

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

August 22, 2018

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

By electronic transmission: bsmolock@pa.gov

Re: Comments on Proposed Changes to 34 Pa. Code, Chapter 231 Regarding Overtime Pay, *Pennsylvania Bulletin* June 23, 2018, p. 3731.

Dear Director Smolock:

The U.S. Chamber of Commerce (“the Chamber”) submits these comments in response to the Department of Labor and Industry’s (“DLI”) proposal to revise 34 Pa. Code, Chapter 231 regarding overtime pay, as published in the *Pennsylvania Bulletin* on June 23, 2018. The proposal would update Pennsylvania’s regulations determining which employees are exempt from being paid overtime under the executive, administrative, and professional classifications. It would adjust the salary threshold above which employees may be exempt if they satisfy the duties associated with the specific classification, and it would also align those duty descriptions with those adopted by the U.S. Department of Labor (DOL) during its 2004 rulemaking.

Pennsylvania’s proposal is almost identical to a 2016 overtime rule promulgated by DOL that was subsequently invalidated by a U.S. District Court. The Chamber believes the Pennsylvania proposal contains the same flaws that doomed the 2016 regulation and urges DLI to withdraw it. Withdrawal is particularly warranted since DOL is in the midst of drafting a new overtime rule that is likely to address many of the arguments DLI cites in its proposal. The Chamber supports, however, Pennsylvania’s efforts to synchronize its duties tests with those in the federal regulations so that employers working in Pennsylvania and other states have one set of duties to use in determining the exempt status of their employees.

The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. An important function of the Chamber is to represent the interests of its members in federal employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. The Chamber represents many state and local chambers of commerce and other associations who, in turn, represent many additional businesses. Among the Chamber's members are employers within the Commonwealth of Pennsylvania, as well as the Pennsylvania Chamber of Business and Industry and several local chambers of commerce.

DISCUSSION

The Pennsylvania proposed regulation, by admission, "mirrors"¹ the 2016 DOL regulation by ultimately setting a new salary threshold to determine overtime eligibility at \$47,892/annual (\$921/week).² The U.S. District Court for the Eastern District of Texas later invalidated this regulation on the basis that the \$47,456 annual salary (\$913 per week) was so high as to render the duties tests for exemption irrelevant. The court's ruling left the 2004 annual salary threshold of \$23,660 (\$455/week) in place nationally, including in Pennsylvania.

The court reasoned that the duties tests were the more appropriate representation of Congressional intent for exemption, and that the salary test was to serve merely as a proxy, or shorthand, for the duties test. The court ruled that the salary test was increased so much as to supplant the duties test; the new salary test would render non-exempt employees who should be exempt due to the duties they perform, thereby making the regulation contrary to Congressional intent and rendering it invalid. Unfortunately, Pennsylvania is repeating the same mistakes by using the invalidated federal regulation as the template for this proposal.

Pennsylvania's Proposal is Driven by the Failed Federal Overtime Rulemaking and Repeats the Same Errors

One reason the Pennsylvania proposal so closely mirrors the Obama regulation is that DLI relied on the architects of the federal proposal in developing its threshold, including the Obama administration's DOL Chief Economist, Heidi Shierholz, and Solicitor of Labor Patricia Smith. In addition, DLI relied on an economic analysis from the Economic Policy Institute that was central to the federal rulemaking.³

¹ Regulatory Analysis Form (hereinafter, RAF) Question 11, page 3.

² The Pennsylvania proposal would go into effect in three phases: \$610/week, \$31,720/year effective upon the date the final regulation is published in the *Pennsylvania Bulletin*; \$766/week, \$39,832/year one year after the final regulation is published in the *Pennsylvania Bulletin*; and \$921/week, \$47,892/year two years after the final regulation is published in the *Pennsylvania Bulletin*.

³ RAF Question 10, page 3, and Question 14, page 5.

The Pennsylvania proposal uses an almost identical methodology for setting the salary threshold: pegging it to the 30th percentile of full time salary earners in the northeastern United States, while DOL used the 40th percentile of full time salary earners in the southeastern United States (including the high-income areas of the District of Columbia, Virginia and Maryland). Although the DLI claims they chose the 30th percentile “to account for the fact that Pennsylvania is one of the lower-wage states in the Northeastern Census region and to reduce the burden on employers in lower-wage areas of the Commonwealth.”⁴ However, the final salary threshold will still be higher than that in the 2016 regulation. DLI gives no explanation as to why they did not use Pennsylvania specific income levels in setting this threshold, especially after acknowledging that the Commonwealth is “one of the lower-wage states in the Northeastern Census region.”

The DOL’s methodology included some of the highest income earning areas of the country within the Southeastern Census region and generated an elevated threshold. Likewise, Pennsylvania’s use of the Northeastern Census region also includes some of the highest income earning areas of the country and yields an even higher threshold at a lower percentile. This approach does not merely update the salary threshold but actually expands the proportion of employees eligible for overtime in the same way the invalidated 2016 federal regulation would have. The proposed Pennsylvania threshold would no longer be just a proxy or shorthand for the duties test but would be the dominant determinant of an employee’s exempt status.

The Pennsylvania proposal repeats another error of the invalidated regulation in its automatic increase provision. The Pennsylvania proposal calls for resetting the salary threshold every three years. For Pennsylvania this would be based on the 30th percentile for full time non-hourly workers in the Northeastern Census region. The automatic escalator provision of the federal regulation was one of the most troubling parts of that rule, and its inclusion in the Pennsylvania proposal raises identical concerns.

First, the threshold will eventually be so high that whatever duties an employee performs will be completely meaningless in determining their exempt status; the proportion of employees performing exempt duties that do not meet the salary threshold will increase as the salary threshold increases. Under the automatic escalator provision, the salary threshold will increase rapidly as the proportion of employees being paid a salary after each increase will diminish, thus accelerating the rise of the 30th percentile of full time salaried employees. The federal court reasoned that if the first salary threshold supplanted the duties tests then anything that made that higher would, by definition, be too high.

Second, repeatedly raising the salary threshold will also mean that employers will have to constantly reevaluate the classification of certain employees and will likely have to reclassify as non-exempt more and more employees currently performing exempt duties. As many comments

⁴ RAF Question 11, page 4.

during the federal rulemaking demonstrated, employees often view this reclassification as a demotion and wonder whether they are being punished. The more the salary threshold affects highly educated, professional career track employees, the more this will be the case.

Finally, an automatic escalator clause will guarantee that a higher salary threshold will take effect during an economic downturn, precisely when it would be least appropriate.

Pennsylvania's Cost, Impact, and Benefit Assessments are Flawed

Since the Pennsylvania proposal explicitly relies on the federal rulemaking's assessment of costs and benefits,⁵ the Chamber submits its analysis of that rulemaking as an attachment to these comments. This analysis demonstrated that the U.S. Department of Labor failed to adequately or accurately assess the total costs of that proposed regulation. Thus any reliance by DLI on the flawed federal assessment is unwarranted and undermines the legitimacy of the Commonwealth's proposal.

Not only does DLI rely on the flawed federal assessment of costs and impacts, but its own projection of benefits lacks credibility. Included in the projected benefits is an economic stimulus effect that would result in: "new job creation," "increase in pay of directly impacted salaried workers, and the pay of those hired to perform some of the hours of overtime previously performed by non-exempt salaried employees," all of which will "increase consumer demand, creating more jobs," and "a larger Pennsylvania economy."⁶ These assertions are wildly speculative and unsupported by any data, study, or quantitative analysis.

In addition, the DLI's assessment of the impact of the proposal on small businesses is severely lacking and dismissive. The DLI estimates that there at least 225,400 small businesses subject to the proposed regulation in Pennsylvania but asserts that "many of these will be unaffected by the proposed amendments because they have no salaried employees who earn more than the current Pennsylvania EAP salary threshold but less than the proposed threshold."⁷ No data is provided to support this statement, nor does DLI even attempt to suggest how many of 225,400 small businesses will not have any employees in that salary range. Additionally, DLI has not attempted to assess the impact on the remaining small businesses who would have employees in that salary range. DLI blithely claims that "some small businesses may see an increased cost associated with wages" and assert that reducing misclassification of employees "represents the potential for savings in litigation costs" and that "small businesses may also benefit from less employee turnover."⁸ DLI does not support any of these claims with data, studies, or quantitative analysis.

⁵ RAF Question 19, page 8, Question 23, page 9.

⁶ RAF Question 12, page 4, and Questions 17, 18, page 7.

⁷ RAF Question 24 (a), page 10.

⁸ RAF Question 24 (c), page 10.

The supporting analysis also dismisses the effects on non-profit employers. DLI estimates there are 108,491 non-profit employers in Pennsylvania and believes the phased-in approach will provide sufficiently gradual increases that they will be able to adjust their operations to absorb the increased burden despite “having limited ability to increase their revenues to cover any increase in costs.”⁹ This view is consistent with that of the Obama administration that for-profit enterprises would sacrifice profit margin and non-profit enterprises would sacrifice some of their mission.

Because the Pennsylvania proposal so closely mimics the federal regulation, comments from Pennsylvania non-profits made during the federal rulemaking are relevant to this rulemaking. Accordingly, the Chamber is attaching the testimony of Elizabeth Hays of MHY Family Services in Mars, PA, delivered at a hearing of the Education and Workforce Committee of the U.S. House of Representatives. The statement describes in detail the threat to MHY’s operations represented by the federal proposal. The Pennsylvania proposal would present a similar threat.

For state and local government agencies, the DLI’s analysis is even thinner. All that DLI notes for state and local government agencies, is that, “No costs or savings are anticipated.” While these employers are not part of the Chamber’s membership, impacts on these agencies lead to tax increases and other fiscal consequences, ultimately impacting affecting U.S. Chamber members as well as Pennsylvania residents. During the federal rulemaking, state and local government agencies expressed their concerns about the serious negative impacts that regulation would have caused. The regulation was simultaneously challenged in court by a coalition of state attorneys general. The Chamber is attaching comments that the Pennsylvania State Association of Township Supervisors submitted on the federal proposal, describing the significant negative fiscal consequences. The similarity with the federal rulemaking makes these comments from the small township supervisors in Pennsylvania relevant to this rulemaking.

Question 24 (d) of the Regulatory Analysis Form asks for “a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.” The DLI stated, “No alternative method would ensure achievement of the same purpose of the proposed regulation.”¹⁰ However, that answer is inaccurate. Pennsylvania has several options for updating the regulations governing overtime exemption status:

1) Wait for the DOL to complete the rulemaking currently underway to update the salary threshold. If that threshold is not appropriate to delineate properly exempt from non-exempt employees in the Commonwealth, a Pennsylvania-specific threshold could always be implemented, as other states have done. However, Pennsylvania should first pursue the

⁹ RAF Question 15, page 6.

¹⁰ RAF Question 24 (d), pages 10-11.

possibility of a national threshold so that Pennsylvania employers operating in other states will not face a “patchwork” effect leading to increased administrative and compliance burdens.

2) Update Pennsylvania’s threshold using a methodology that actually reflects Pennsylvania’s employers and results in a more modest increase that works in concert with the duties test rather than supplanting it.

3) Focus only on aligning Pennsylvania’s duties tests with the federal duties tests and suspend any salary threshold changes until the federal rulemaking is complete and the Commonwealth conducts a review to determine whether a Pennsylvania-specific threshold is appropriate.

CONCLUSION

Pennsylvania’s proposed revision to the salary threshold for determining overtime exemption status would result in a salary threshold higher than the DOL issued in late 2016 and that a federal district judge subsequently invalidated. The DLI proposal is explicitly based on the federal regulation, and therefore built on the same flawed data, economic analysis and assumptions, and misguided understanding of the role of the salary threshold. It also includes the same problematic automatic escalator provision as the final federal regulation. DOL is currently undertaking a rulemaking to adjust the federal salary threshold. Accordingly, Pennsylvania should withdraw this proposal pending the outcome of the federal rulemaking. Alternatively, Pennsylvania should pursue only those provisions of this rulemaking that seek to align the duties test with those found in the federal regulations.

Sincerely,



Marc Freedman
Vice President, Workplace Policy
U.S. Chamber of Commerce