Testimony before the Pennsylvania House of Representatives

Labor and Industry Committee

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On the

Proposed Changes to the Pennsylvania Minimum Wage Regulations

Regarding White Collar Employees

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Good morning, Mr. Chairman and Committee Members:

Thank you for the opportunity to testify about the proposed changes to the Pennsylvania Minimum Wage regulations regarding white collar employees ("PENNSYLVANIA PROPOSAL")[1] this morning. I am a Managing Member of the Harrisburg law firm, SkarlatosZonarich LLC, which offers a wide-range of civil law services. I testify as a long-term labor/employment attorney of the management persuasion, who started her professional career as the Research Director for this Committee during much of the 1970's. My Master's Degree in Government Administration is from the University of Pennsylvania; my Master's Degree in Industrial Relations is from St. Francis of Loretto; and my J.D. is from Dickinson School of Law.[2] The views I express today are mine, and not that of any particular client or organization.

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[1] 48 Pa. B. 3731 (June 23, 2018) Publication of the Proposed Rulemaking, https://www.pabulletin.com/secure/data/vol48/48-25/961.html; 48 Pa. B. 4258, Pa. B. Doc. No. 18-1113 Extension of the departmental public comment Period until August 22, 2018, https://www.pabulletin.com/secure/data/vol48/48-29/1113.html.

[2] Additionally, I have participated in the American Bar Association' Federal Fair Labor Standards Committee for over a decade, and also authored the Pennsylvania chapter of the Bureau of National Affairs' *Wage and Hour Laws A State by State Survey, and* co-authored a *Model Policies and Forms for Pennsylvania Employers*, part of the HR Compliance Library copyrighted by the American Chamber of Commerce Resources, LLC for numerous years, and speak on this topic before members of non-profit organizations, including the Pennsylvania Chamber of Business and Industry. I do lobby as Legislative Counsel for the Pennsylvania Propane Gas Association, but am not engaged to lobby on this PENNSYLVANIA PROPOSAL.

THE BACKGROUND

The origin of the Pennsylvania Minimum Wage Act ("PMWA")[3] is as a "little[4] Fair Labor Standards Act. The federal Fair Labor Standards Act[5] ("FLSA") is the short-hand for the federal law, adopted in 1938, to address minimum wage and overtime pay requirements in a day when our economy was largely based in industry and manufacturing. When the PMWA was adopted thirty years later, it covered only employers/employees who were NOT covered by the FLSA. Differences between the two laws mattered little because different employers and different groups of employees were covered under each of the laws. In 1988, the General Assembly expanded the coverage of the PMWA to apply both to the small Pennsylvania employers historically covered by the "little FLSA" and those Pennsylvania employers already subject to FLSA coverage. After 1988, some employers had to comply with both laws.

The FLSA and the PMWA, although closely aligned at a basic level to address minimum wage and overtime, are far from identical.[6] The FLSA states that the law more favorable to the

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[3] 43 P.S. § 333.101 *et seq.*

[4] "Little" refers to state laws modeled upon federal laws, but differing in coverage. Other examples in Pennsylvania include the Pennsylvania Labor Relations Act, modeled upon the National Labor Relations Act, and the Pennsylvania Equal Pay Act, modeled on the federal Equal Pay Law.

[5] 29 U.S.C. § 201 *et seq.*

[6] The actual hourly minimum wage rate remains the same under both laws. For federal purposes, the minimum wage is $7.25 per hour currently. The PMWA already includes a provision, which automatically increases the actual minimum wage rate for employees when the FLSA changes the minimum rate. Section 333.104 (a)(1).[6] (Minimum Wages), 43 P.S. § 333.104(a)(1). This provision eliminates the Non-Compliance Trap for the minimum wage rate itself.

employee applies if there is a conflict.[7] Often that provision can function as a kind of "reverse preemption" provision in which the state law supplants federal. After the 1988 amendment to the PMWA, employers could be compliant or "clean" under one law, while non-compliant or "dirty" under the other in spite of their best intentions. The problem is that many employers are not familiar enough with the differences between the FLSA and PMWA to spot issues before violating one law even though they are trying to comply with both. This is what I refer to as the Non-Compliance Trap, *i.e.* inadvertent violation of either the FLSA or PMWA due to lack of detailed knowledge of the sizable nuances between the federal and state laws in spite of the intent to comply with both laws.[8]

PROPOSED PENNSYLVANIA REGULATION

The PENNSYLVANIA PROPOSAL increases the salary threshold for most white collar employees[9] from $455 per week or $23,660 per year (the current FLSA amount) to $921 per week or $47,892 per year over the three years following adoption of the PENNSYLVANIA PROPOSAL,[10] and adds an escalator clause effective every third year thereafter to continue to

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[7] 29 U.S. C. § 218.

[8] Since the PMWA and related regulations occupy less than 30 pages of print, whereas the FLSA's statute, regulations and guidance amount to some 730 pages, there are a myriad of differences. Recently lawsuits and enforcement actions have resulted from those differences between the FLSA and the PMWA. My sympathy rests with employers, who are unaware of such differences or nuances between the laws, not employers who flaunt either the FLSA or PMWA.

[9] The newly proposed regulations deal with three of the "white collar" exemptions, specifically those applying to executive, administrative and professional employees. These are sometimes referred to as the Part 541 exemptions under the FLSA, because the "white collar" exemptions appear at 29 CFR Part 541. See https://www.dol.gov/whd/overtime/applicable_laws.htm and https://www.dol.gov/whd/overtime_pay.htm for a summary of the current federal regulations.

[10] The Pennsylvania Regulation thresholds follow: $610 per week exclusive of board, lodging or other facilities, effective upon the adoption of the PENNSYLVANIA PROPOSAL; $766 per

increase the threshold. The escalator has not yet been calculated. [11] A Pennsylvania increase above the federal mandate strikes me as another argument that Pennsylvania is not business-friendly. Even if the actual amounts of the salary thresholds were acceptable, the PENNSYLVANIA PROPOSAL, will also exacerbate the differences between the FLSA and PMWA. The Pennsylvania thresholds, even if enacted, simply will not be as well-known as the current lower federal counterparts, and the escalator clause will assure that the two laws are likely to have differing thresholds for years to come.

Admittedly, the United States Department of Labor ("DOL") tried to increase the salary threshold dramatically. The Final Regulation would have increased the salary threshold for most "white collar" employees from the current $455 weekly or $23,660 annually to $913 weekly[12] or $47,476 effective December 1, 2016. An escalator clause also would have applied automatically each third year thereafter. Many employers adopted the increased thresholds in advance of its effective date.

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week exclusive of board, lodging or other facilities, effective 365 days later; $921 per week exclusive of board, lodging or other facilities, effective 730 days after the effective date of adoption of the proposed rulemaking.

[11] Starting roughly four year after the effective date of the PENNSYLVANIA PROPOSAL and every January 1 of each third year thereafter, an automatic escalator would apply, increasing the salary threshold to the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure on its web site and in the Pennsylvania Bulletin.

[12] The highest of the proposed increase under the PENNSYLVANIA PROPOSAL is actually $8 higher than the threshold in the federal regulation.

Federal litigation stayed the implementation of the final federal regulation.[13] It is still anticipated that the federal threshold for "white collar" employees will increase through issuance of federal regulations, but it is also expected that the thresholds will be lower than originally proposed by the DOL, and perhaps lower than those contained in the PENNSYLVANIA PROPOSAL.

The PENNSYLVANIA PROPOSAL adopts almost the same dollar salary threshold abandoned in the original federal Notice of Proposed Rule Making, but varies the effective dates. The $913 salary threshold under the federal was to be immediate whereas the PENNSYLVANIA PROPOSAL phases in the required $921 amount during the three-year period following the date of final adoption of the PENNSYLVANIA PROPOSAL.

If the PENNSYLVANIA PROPOSAL is adopted prior to any federal change, Pennsylvania will require a higher salary threshold than either the current federal threshold or the anticipated new federal thresholds. DOL announced on August 27, 2018 that it is holding "Listening Sessions" on a revised federal proposal in a number of major U.S. cities[14] during September to consider the appropriate salary level, the best methodology to update that salary level and the benefits and costs to employers and employees, which may accompany such a salary level.

Under the PENNSYLVANIA PROPOSAL, Pennsylvania's salary threshold will also continue to increase every three years without the benefit of any type of additional consideration

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[13] For a comparison of the comparison of the Notice of Proposed Rule Making and the Final Rule see https://www.dol.gov/whd/overtime/final2016/faq.htm

[14] Cities in which the "Listening Sessions" will be held include Atlanta, Seattle, Kansas City, MO, Denver, and Providence.

by the General Assembly or DLI.[15] Even if it is believed that some increase in the salary threshold is warranted, it is likely that the Pennsylvania amount or timing will continue to differ from the federal threshold for years to come, adding to the confusion and unintentional non-compliance among businesses, which are more aware of the FLSA than the PMWA.

The PENNSYLVANIA PROPOSAL does several things in addition to increasing the salary threshold and adding an escalator. It adds some helpful definitions[16] for employers to better understand the application of the "white collar" exemptions, but it fails to distinguish thresholds for strapped educational institutions that the FLSA had included.[17]

Very troubling in the PENNSYLVANIA PROPOSAL are the numerous bracketed deletions of language currently included in the regulations for "white collar" exemptions. These changes that may appear esoteric on the surface may eliminate some exemptions currently recognized under both the PWMA and the FLSA. Time does not allow for a full discussion, but selected examples include the executive exemptions "sole charge" exemption and deletion of the percentages applicable to the performance of executive duties. Again, these deletions create

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[15] We note that maximum benefits for Unemployment Compensation benefits remained frozen for several years because of concerns about impact on the UC Fund at a time when wage increases were minimal.

[16] Including a definition of "General Operations" and "Management," which track the stayed federal language.

[17] Educational employees, who are "white collar" exempt under both federal and state law may be treated differently because the PENNSYLVANIA PROPOSAL language does not recognize that the stayed FLSA regulation implemented a different threshold for teaching professionals to accommodate cash-strapped educational institutions.

unnecessary and probably unintended differences with the FLSA,[18] and depart from case law established under the PMWA while that language controlled.

The PENNSYLVANIA PROPOSAL does nothing to address the issue of remaining "white collar" exemptions, which appear in the FLSA and not in the PMWA. For example, two other types of "white collar" employees addressed in the FLSA are not addressed in the PENNSYLVANIA PROPOSAL. These are highly compensated employees and computer employees. Highly-compensated employees earning over $100,000[19] are generally overtime exempt under the FLSA because of a "relaxed duties test," whereas even a very highly compensated employee under the PMWA, who does not fit within a specific exemption, such as the "white collar executive, administrative or professional exemption, must be paid overtime at 1.5 times his/her regular rate of pay.[20] Additionally, there is no computer exemption in the PMWA, which parallels the FLSA's exemption and allows payment of either an hourly rate or a salary for computer professional, even though computer jobs generally pay well and would appear to be on a par with the rationale of the "white collar" exemptions. The PENNSYLVANIA

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[18] Senator Lisa Baker has recognized the silence or the inadvertent differences between the PMWA and the FLSA and has introduced SB 587, PN 662, *The Statutory Construction of the Pennsylvania Wage and Hour Laws*, to solve the issue. The Senator's bill recognizes that in some cases, such as the *Prohibition of Excessive Overtime in Health Care Act*, the Pennsylvania General Assembly has considered and decided to implement a policy different from the FLSA. With the adoption of that specific statute, Pennsylvania employers must respect that law. However, her bill seeks to avoid the unintended differences, which have arisen between the two different sets of standards, federal and state, by virtue of differences in the quantity of regulations caused generally by inattention rather than by legislative, departmental or judicial decision.

[19] The stayed federal regulation would have increased that to $134,004, the 90th percentile of full-time salaried workers.

[20] That employee's regular hourly rate, assuming a 40- hour workweek, would be $48.08, far higher than the mandated minimum wage rate of $7.25. That employee's overtime rate would be $72.12 (1.5 times his/her regular rate).

PROPOSAL simply does not address these "white collar" areas, while suggesting that its intent is to more closely align with the FLSA. [21]

THE RECENT FLUCTUATING WORK WEEK CASE

One recent example of the Non-Compliance Trap is the *Chevalier v. General Nutrition,* a fluctuating work week ("FWW") case issued by the Pennsylvania Superior Court in December of 2017. The case is in its briefing stage before the Pennsylvania Supreme Court. No oral argument date has yet to be set. The plaintiffs in *General Nutrition*, claimed that it was inappropriate to pay employees in accordance with the FWW method expressly specifically sanctioned under the FLSA by court interpretation in instances in which the employee is paid on a salaried basis but his/her hours of work vary from workweek to workweek.[22] The issues in the case involved both the proper calculation of the "regular rate" of pay and the proper amount of overtime to be paid.

Under a recent Pennsylvania Superior Court's interpretation, the employees would have to be paid more under the PMWA than they would be paid under the well-established FLSA interpretation.[23] The Pennsylvania Superior Court departed from the federal precedent noting

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[21] Another interesting difference rests in enforcement. Under the FLSA's Payroll Audit Independent Determination or "PAID" Program, which is effective until October,[21] non-compliant employers may pay employees back wages and overtime without the fear of litigation and related attorney's fees, liquidated or double damages, and payment of interest. https://www.dol.gov/whd/paid/. Pennsylvania has no parallel program for employers to correct deficiencies if they inadvertently fall into the Non-Compliance Trap.

[22] Under both the FLSA and the PMWA, an hourly employee could be paid on a salaried basis even if s/he was not exempt from overtime, so long as the appropriate overtime amount was paid for hours worked over 40 in a work week.

[23] In *General Nutrition*, the Pennsylvania Superior Court allowed the salary to be divided by the total actual number of hours worked the employee actually worked, but still required payment of 1.5 times the regular rate for overtime hours in excess of 40 in a workweek. We offer an example unrelated to the facts of the case to try to assist in understanding the calculation. Under

differences between the language in the regulations under the PMWA and the FLSA mandated a different amount of overtime payment. However, the PMWA was adopted after the FLSA's FWW interpretation was established. The Superior Court viewed the silence of the Pennsylvania General Assembly and DLI on specifically adopting the FWW method was as rejection of that federal method of payment. That may or may not have been the intent of the General Assembly or DLI. The Superior Court reasoned that the legislative and regulatory silence equaled disapproval of the FWW methodology under the PMWA. The Pennsylvania Supreme Court will now consider the case, and decide if the current Superior Court opinion will be affirmed, reversed or modified.[24]

RECOMMENDATIONS

Given the difficulty of dealing with the Non-Compliance Trap already, and the exacerbation of that problem if the PENNSYLVANIA PROPOSAL is adopted, I recommend you:

- Avoid the additional confusion that will follow adoption of the thresholds in the PENNSYLVANIA PROPOSAL before the issuance of the anticipated federal

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FLSA, an employee working 60 hours that workweek would have a regular hourly rate of $10, and would receive salary of $600 and an additional payment of $100 to include the 20 hours of overtime hours worked, for a total of $700, whereas the employee under the PMWA with the same $10 regular rate would receive $15 per hour for the 20 hours of overtime or $600 plus $300, for a total of $900. Under the FWW analysis working more hours actually lowers the regular hourly rate, and working less hours actually increases the regular hourly rate. Since the law more favorable to the employee must be applied, even multistate employers with employees in Pennsylvania must pay the higher rate to their employees, under this interpretation of the FWW. For an employee making $10 an hour, the difference in overtime would be a payment of $5 an hour for overtime hours under the FLSA's FWW methodology v. an overtime payment of $15 per hour under the PMWA's.

[24] But see: Vance v. Amazon, 852 F.3d 601 (6th Cir. 2017) (The state adopted an "analogous law" including the interpretations of that law in effect at the time the law was adopted by the state).

regulations on the salary thresholds. If the federal government acts to increase the salary thresholds, no Pennsylvania action will be necessary for Pennsylvania's workers to enjoy a higher salary threshold;

- Strike the bracketed deletions in the PENNSYLVANIA PROPOSAL in the white collar exemptions to assure that these changes do not further exacerbate the Non-Compliance Trap;
- Decide the underlying issue causing the Non-Compliance Trap: Does silence on the part of the Pennsylvania General Assembly and the Pennsylvania DLI equal rejection of a FLSA concept? If not, that should be stated clearly in the PMWA or related legislation, so that the Non-Compliance Trap will be eliminated or reduced, and compliance with the PMWA and the FLSA increased.

CONCLUSION

Wage and hour laws are often more about paying employees in the correct manner than about jobs that pay well. Employees should understand what they will be paid up front, and employers should understand their obligations with guessing. Compliance should not be confusing. My personal goal is clarity for employers and employees alike. Pennsylvania has the legal right to adopt or to differ from the FLSA, but the differences, if desired, should be clearly stated. Pennsylvania employers should not inadvertently fall into the Non-Compliance Trap under the PMWA if they are compliant with the FLSA. Adoption of the PENNSYLVANIA PROPOSAL will only exacerbate the Non-Compliance Trap for Pennsylvania employers despite their intent and efforts to comply with the law. The PENNSYLVANIA PROPOSAL would increase the actual dollar value of the salary thresholds, but would also add more unnecessary variations between the PMWA and the FLSA in the language of the white collar exemptions.