

<b>Regulatory Analysis Form</b> (Completed by Promulgating Agency)		<b>INDEPENDENT REGULATORY REVIEW COMMISSION</b>	
(All Comments submitted on this regulation will appear on IRRC's website)		IRRC Number: <b>3202</b>	
(1) Agency Department of Labor and Industry			
(2) Agency Number: 12 Identification Number: 106			
(3) PA Code Cite:  34 Pa. Code, Chapter 231		RECEIVED IRRC 2018 JUN 12 A 10:18	
(4) Short Title: Amendments to 34 Pa. Code Chapter 231 regarding Overtime Pay			
(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: Bryan Smolock, Director, Bureau of Labor Law Compliance, (717) 787-0606, bsmolock@pa.gov Secondary Contact: Jennifer Buchanan Rapach, Director, Policy Office, (717) 787-5294, jerapach@pa.gov			
(6) Type of Rulemaking (check applicable box): <input checked="" type="checkbox"/> Proposed Regulation <input type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation		<input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General	
(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)  The Department of Labor and Industry (Department) proposes amendments to Chapter 231 of 34 Pa. Code to clarify the definitions of Executive, Administrative, and Professional (EAP) salaried workers who are exempt from receiving minimum wage and overtime pay. The proposed regulation updates the salary level at which salaried workers may become exempt to more accurately match the duties they perform. In addition, the proposed regulation allows incentive pay to count toward 10 percent of the salary threshold, and to include a mechanism for the salary threshold to be updated on a triennial basis. Finally, the proposed regulation updates the duties for each EAP exemption to be consistent with Federal regulations interpreting the Fair Labor Standards Act (FLSA), which amended the duties for the EAP in 2004.			
(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.  The Department proposes these rules under the authority contained in sections 5(a)(5) and 9 of the Minimum Wage Act of 1968 (43 P.S. §§ 333.105(a)(5) and 333.109).			
(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.			

In addition to the Minimum Wage Act of 1968, the requirement to pay employees a minimum wage and overtime is found in the FLSA, 29 U.S.C. § 201, *et. seq.* The FLSA also contains the same EAP exemptions from its minimum wage and overtime provisions. 29 U.S.C. § 213(a)(1). The United States Department of Labor (USDOL) has also issued regulations defining these exemptions, 29 C.F.R. §§ 541.100 – 541.304, which creates a dual regulatory scheme.

The proposed amendments are not mandated by any federal or state law, court order, or federal regulation. However, Pennsylvania's current regulations defining "executive," "administrative," and "professional" employees (who are exempt from the Minimum Wage Act's minimum wage and overtime pay requirements) were established to mirror the federal regulations that were in place in 1977 and have not been updated since their original promulgation in 1977.

Prior to 2004, the federal regulations provided a "test" for employers to determine whether an employee's duties would be considered as EAP or non-EAP. The "test" included two components: a "long" test that required an exempt employee to spend no more than 20 percent of his or her time on activities unrelated to EAP duties while meeting a lower salary threshold, and; a "short" test, that was a less stringent duties test to be accompanied by a higher salary threshold. The initial duties test ensured that employers would meet more rigorous requirements to exempt lower-paid workers from receiving minimum wage and overtime pay.

In 2004, USDOL enacted regulations that set a salary threshold at \$23,660 (\$455 weekly) and revised the duties test by establishing one standard test. USDOL determined that one standard duties test was as protective as having separate short and long tests. Since that time, the federal salary threshold has not been adjusted and its real value (purchasing power) has eroded over time. Pennsylvania did not act to update either its salary threshold or duties test requirements as a result of the updated 2004 federal regulations – resulting in Pennsylvania minimum wage regulations that are misaligned with the federal regulations.

Pennsylvania's proposed regulations align with the duties test found in USDOL's regulations by incorporating a streamlined, standard duties test, which eliminates the short and long tests. In addition, the Department proposes to update the salary threshold to align with modern salary levels. It should be noted that a 2016 rule published by the USDOL attempted to increase the salary threshold to \$47,456.. However, in August 2017 a federal district judge in Texas issued an injunction preventing the proposed 2016 federal rule from taking effect on the grounds that the salary threshold level, set at the 40% of salaried workers in the lowest census region, was so high it rendered the duties test for the EAP exemptions irrelevant. USDOL appealed the Court's decision. However, the parties agreed to stay further action on the appeal while USDOL revisits whether to propose a smaller salary threshold increase to the current EAP exemptions.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Regulatory action is needed for multiple reasons:

1) *Aligning with current federal regulations* – The Department aims to more closely align the duties tests for the EAP exemptions in Pennsylvania minimum wage regulations with the duties test found in USDOL's regulations interpreting the EAP exemptions found in the FLSA. More specifically, the

Department proposes to eliminate the short and long test that USDOL eliminated from the FLSA regulations in 2004.

2) *Provide clarity to employers and employees* – Nominal but important revisions were made to the EAP description of duties to provide clarity in understanding what duties were considered EAP or not.

3) *Inclusion of Bonus Pay* The proposed regulations allow up to 10% of the salary threshold to be satisfied through the payment of nondiscretionary bonuses. The Department views this as an important need of the business community.

4) *Update 40-year old salary levels* Pennsylvania's EAP salary thresholds have failed to keep pace with economic growth and the rising nominal salaries of exempt salaried workers; as a result, most EAP workers who would otherwise be eligible are no longer protected, as intended, to receive minimum wage and overtime pay. Since USDOL's EAP salary thresholds have not been updated since 2004, they also have failed to keep pace with economic growth and the rising nominal salaries of exempt salaried workers.

In effect, Pennsylvania's proposed regulation more accurately demarcates the level at which salaried EAP workers should be exempted from minimum wage and overtime based on their duties. Without overtime protections, hours worked over 40 are free to employers, which lowers workers' hourly pay rates substantially, in some cases even to below the minimum wage. To address concerns stemming from updating a 40-year old law, Pennsylvania proposes a phased in approach over a 3-year period.

According to an Economic Policy Institute analysis (see Attachment A, provided herewith) using the proposed salary threshold metric, it is estimated that up to 460,000 salaried employees in Pennsylvania could benefit by January 1, 2022. These workers will be broadly representative of the Pennsylvania workforce, with workers represented by gender, age, race/ethnicity, and industry in proportions that approximate each's group in the overall workforce. Impact of raising the threshold will most likely be in occupations that are "office and administrative support occupations (46.0 percent); transportation and material moving occupations (40.4 percent); farming, fishing, and forestry occupations (40.2 percent), construction and extraction occupations (38.9 percent); and service occupations (38.0 percent).

The change will also result in benefits that are not quantifiable, namely a healthier workforce and more time for families to spend together. Enacting the proposed regulatory change promises considerable economic benefits for the Commonwealth as well as a healthier, happier population.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The proposed regulations mirror the intention of most recent federal attempt to modernize salary thresholds that govern minimum wage overtime exemptions.

The salary threshold formula applied by Pennsylvania (described below) has been adapted to account for salaries in the northeastern United States, of which Pennsylvania is a part, as calculated by the U.S. Department of Labor. For this reason, the nominal salary threshold amount varies slightly from USDOL's attempt to raise the salary threshold from the USDOL regulations. However, it is based upon the necessity for regional applicability to distinguish between EAP and non-EAP workers.

The proposed Pennsylvania salary threshold is \$47,892; differing from USDOL's current 2004 federal threshold by accounting for inflation-adjusted terms through 2017. To account for the fact that Pennsylvania is one of the lower-wage states in the Northeast Census region and to reduce the burden on employers in lower-wage areas within the Commonwealth, the proposed rule uses the 30th percentile of full-time salaried workers in the Northeast. In 2016, this threshold equaled \$921 per week or \$47,892 annually.

In addition, the proposed amendments would align the duties test with the federal regulations 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.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

Comparison with other states: In 2016 New York issued an administrative regulation raising its minimum wage and overtime salary threshold by the end of 2020 to at least \$48,750 per year in all parts of the state. Thus the proposed Pennsylvania threshold is below New York's thresholds. Pennsylvania's other neighbors do not have minimum wage and overtime thresholds above the federal level, although New Jersey may pursue a state increase under its new governor.

Pennsylvania ability to compete: This regulation will have a small impact on Pennsylvania's ability to compete and a potentially net positive impact. First, some employers do not have any salaried employees who earn more than the current federal EAP salary threshold but less than the threshold proposed in these regulations.

Second, employers that do could adjust to the new rule in ways that minimize its impact on costs. Employers will have several choices with respect to these new regulations: to reduce workers' hours to eliminate overtime; to increase workers' salaries to above the new salary threshold; or to pay workers time-and-a-half for any excess hours worked. New job creation will benefit many additional individuals. These include people hired to work some of the hours of overtime previously performed by non-exempt salaried employees. In addition, the 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 will increase consumer demand, creating more jobs.

Third, the new rule will have positive impacts on efficiency at some employers. As the federal overtime threshold has dropped from the 60<sup>th</sup> percentile of salaried employees in 1975 to less than the 10<sup>th</sup> percentile today, some employers have treated even salaried employees that do not pass a duties test as "free" over 40 hours. These employers have faced little economic or legal incentive to operate efficiently so that low-paid salaried employees could complete their work in 40 hours. The new Pennsylvania rule will create the missing incentive, leading some employers to scrutinize their operations more closely for ways to improve efficiency.

Fourth, over two thirds of the persons directly impacted by the new regulation compete in local markets against other Pennsylvania businesses also subject to the new regulation. The proposed regulations could increase worker attractiveness of EAP jobs in Pennsylvania from out-of-state workers; potentially increasing Pennsylvania's labor force and address job vacancies and worker shortages.

In evaluating the impact on competitiveness, it is also important to put this rule in the context of other wage and salary differences between Pennsylvania and surrounding states. For example, the states closest to the most populous parts of Pennsylvania (New Jersey, New York, Maryland, and Delaware) all have enacted state laws that establish wages levels for lower-paid salaried workers (falling in the 40<sup>th</sup> to 60<sup>th</sup> percentile of the overall wage distribution) above Pennsylvania's. New Jersey and Maryland wages are about 20 percent higher than Pennsylvania's in the most relevant wage range; New York about 10 percent higher; and Delaware 2-3 percent higher. (Ohio's wages are 2-3 percent lower than Pennsylvania's in the middle of the overall wage distribution and West Virginia's about 5 percent lower.) When other factors account for salary differences of 10 percent to 20 percent, a proposed rule that would have a tiny impact on costs (in either direction) will not have a significant impact on inter-state competitiveness.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Department closely monitored USDOL's 2016 attempt to increase the salary thresholds for the FLSA's EAP exemptions, including feedback and communications from labor and business representatives during the judicial review of the challenge to USDOL's 2016 regulatory change. Following the December 2017 injunction of the federal rule, the Department identified the timely need to modernize Pennsylvania's minimum wage regulations without further delay. However, in addition, to raising the salary thresholds to Pennsylvania's EAP exemptions, the Department will also align the duties necessary to qualify for Pennsylvania's EAP exemptions with the duties found in the FLSA's EAP exemptions. The duties test for the FLSA's regulations were not part of the Court challenge; the challenge was to USDOL's attempt to increase the salary thresholds for the FLSA's EAP exemptions.

In drafting these amendments, the Department has sought the expertise of outside legal counsel, economists, and policy analysts with extensive experience on the issue of overtime regulations. Among those providing input were Heidi Shierholz, former chief economist at the U.S. Department of Labor from 2014 to 2017, and Patricia Smith, former solicitor of labor at the U.S. Department of Labor from 2010 to 2017.

In addition, the Department solicited input on a draft of its proposal to change the Pennsylvania overtime threshold to the Minimum Wage Advisory Board on Wednesday January 10, 2018. This body, established by Section 6 of the Minimum Wage Act of 1968, 43 P.S. § 333.106, includes three representatives of an established recognized association of labor organizations (including, currently, the PA AFL-CIO), three of an established recognized association of employers (including, currently, the PA Chamber of Business and Industry), and three representatives from the general public.

It is the Department's intent to use the public comment period to solicit further input from the public, including businesses and any other interested parties.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Persons: Item 10 above notes that approximately 367,000 salaried Pennsylvanians would be affected by, and benefit from, the regulation by 2021 (see Attachment A) and about 460,000 by 2022. The demographics of these persons would resemble the overall Pennsylvania working population. These persons and their families will benefit from increased income and/or improved quality of life, as described above.

Businesses including small businesses: (a) According to the US Census, Pennsylvania is home to about 230,000 businesses with employees, 98 percent of them with fewer than 500 employees. (Because the Regulatory Review Act uses criteria for defining "small business" that vary by industry, sometimes using employment size cutoffs above 500 and sometimes using dollar volume of business criteria that are not available for Pennsylvania, the number of small businesses is likely to be at least 225,400, which is 98 percent of 230,000.) Some of these will not be affected by the regulation because they do not have salaried employees who earn more than the current Pennsylvania EAP salary threshold but less than the proposed threshold. As noted in response to item (12), this regulation will have limited impact on businesses that do have salaried employees whose earnings fall within that range: these businesses will likely adapt to the regulation in the least costly way possible and any increase in costs will be at the discretion of the decisions made by the business. Businesses may reorganize in ways that eliminate any cost or increase efficiency, and most businesses affected compete in local markets with other businesses also subject to the regulation. There are indications of willingness to comply, and of acceptance of the legitimacy of the proposed salary threshold, from the business community. For example, following national media attention on minimum wage and overtime rules, Altoona-based Sheetz announced after the that it would raise the pay of all its salaried employees to over \$47,500 in 2017. When announcing this policy, the president and CEO of Sheetz stated: "Since our founding in 1952, the success and satisfaction of our employees at Sheetz has been vital to the accomplishments of the company itself. This announcement represents our constant efforts toward attracting and retaining the best talent and being a great place to work. It is a commitment that reaches beyond compensation, to the offering of excellent benefits and a great balance between work and family."

In addition, businesses will benefit from the simplification of the duties test. Businesses will no longer have to spend time calculating the prior duties caps. Instead, they will be able to quickly identify which employees are exempt and which are not based on a single salary threshold and a straightforward primary duties test.

Other organizations: 108,491 nonprofit organizations are estimated to exist in Pennsylvania. As with other businesses, the impact on nonprofits are mitigated by decisions and adaptations the nonprofit organization chooses to make in the least costly way possible. Some small nonprofits, including some that provide human services, that apply the proposed salary threshold and duties tests may have employees that are now eligible for overtime and will have limited ability to increase their revenues to cover any increase in costs. The phase-in period provides these nonprofits with the ability to adjust operationally and strategically with their funding requests. Many nonprofits affected strongly support from a values perspective the idea that eligible salaried employees should either be paid overtime or not have to work overtime.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Approximately 230,000 businesses with employees (likely including at least 225,400 small businesses) will be required to comply.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

The proposed amendments would reduce worker uncertainty about future overtime demands on the part of newly overtime-protected employees who do not currently work much or any overtime. Resulting in likely reductions or eliminating the need for state-funded social assistance payments to those affected workers who currently receive them. They may increase the number of jobs in Pennsylvania because they give employers an incentive to hire new workers rather than require overtime of current workers who are affected. They may increase the overall size of the state's economy by raising the wages of some affected workers, who would spend most of their extra pay on goods and services produced in Pennsylvania. They may reduce earnings inequality in Pennsylvania. As implicit in the quote from the CEO of Sheetz above, businesses may benefit from reduced employee turnover.

For individuals and for businesses and labor organizations, the reduction in misclassification of employees represents the potential for considerable savings in litigation costs. The proposed amendments have the objective of more clearly distinguishing between employees who are eligible for overtime payment and those who are not. Instead of having to resolve eligibility for overtime one person at a time through litigation regarding whether their specific job duties meet the duties test, a single overtime threshold provides clarity to businesses and workers regarding the designation of EAP duties.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The possible benefits – modernization of outdated overtime laws, streamlining employer and worker understanding of EAP duties, higher pay and better work-family balance for employees, increased efficiency for businesses, reduced uncertainty for employees about future overtime demands, reduced social assistance costs, reduced turnover, and potentially more jobs, a larger Pennsylvania economy, and reduced earnings inequality – arguably outweigh the possible costs and adverse effects, which are very mitigated by business decision making.

The proposed regulation provides a straightforward way to achieve high rates of compliance that salaried employees who fail the salary and duties tests must be paid overtime pay. A main benefit of the proposed regulation is thus the “priceless” one of ensuring compliance with the law: workers who are not bona fide executive, administrative, or professional employees exempt from the state's overtime law will now receive overtime pay. Further, most businesses are accustomed to complying with labor laws and have the systems in place to do so. The erosion of the minimum wage and overtime salary threshold since 1975 (and 2004) has created unnecessary and undesirable ambiguity regarding who is eligible to receive overtime. The proposed regulation thus modernizes the Pennsylvania minimum wage and overtime threshold to match the reality of today's economy. It sharply reduces ambiguity regarding who should receive overtime, making compliance with the law easier for the majority of businesses who want to comply and who prefer that government make it easier to do so.



(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Costs and savings to the regulated community are dependent upon each entity's specific circumstances, including but not limited to their decision-making around human resource allocation, timely compliance with the change in regulation, reduced uncertainty about the duties test, and increased efficiency.

Acknowledging this dependence on the circumstances of each entity, since most businesses are accustomed to complying with labor laws and have the systems in place to do so, compliance costs will be small. Using the only known source of direct employer costs with an increased salary threshold and duties test revisions, Pennsylvania referred to the estimated impact of the enjoined USDOL 2016 proposed federal regulations as a source to infer and understand the estimates of "direct employer costs" for Pennsylvania; as a result, Pennsylvania's proposed regulations could impact up to approximately one one-hundredth of one percent (0.01%) of payroll, with "regulatory familiarization" accounting for about 40% of this total and each of "adjustment," and "managerial costs" accounting for about 30%. The same source estimated that increases in earnings would equal about two one hundredths of one percent of payroll (81 Fed. Reg. 32496-32497).

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No costs or savings are anticipated.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No costs or savings are anticipated.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The proposed amendments do not require regulated entities to complete any additional forms or reports. They may require affected employers to incur some additional costs of regulatory familiarization, adjustment, and management. These costs are de minimis. Nearly all employers already have systems and policies in place to comply with existing federal and state overtime rules.

(22a) Are forms required for implementation of the regulation?

No.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the



information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

N/A

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

Savings: As noted above, the proposed rule could lead to savings because it gives Pennsylvania employers an incentive to manage lower-paid salaried employees (between the current and the proposed salaried overtime and duties threshold) more efficiently. There is, however, no way to quantify the size of these savings based on the ability for businesses to comply based on their own decision making.

Costs: The basis for estimating the costs in the table below is explained in (12) above. Also, as noted in (19) above, the estimated impact of the enjoined 2016 U.S. federal rule – which used a 40<sup>th</sup> percentile threshold, concluded: “The estimated increase in payroll costs for business are *well under one-tenth of one-percent of total U.S. payroll costs*... While the rule will have a meaningful effect for workers to see higher pay, work fewer hours, and/or gain clarity about their status as overtime eligible, it is not expected to have a disruptive effect on the broader economy.”

Revenue losses: Since business can mitigate impact of compliance based on their own decision making, the proposed rule is not expected to have a disruptive effect on Pennsylvania’s economy.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>						
<b>Regulated Community</b>	None	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable
<b>Local Government</b>	None	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable
<b>State Government</b>	None	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable
<b>Total Savings</b>	None	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable
<b>COSTS:</b>						
<b>Regulated Community</b>	None	Estimated at <0.1% of payroll	Estimated at <0.1% of payroll	Estimated at <0.1% of payroll	Estimated at <0.1% of payroll	Estimated at <0.1% of payroll
<b>Local Government</b>	None	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
<b>State Government</b>	None	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
<b>Total Costs</b>	None	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable	Not quantifiable
<b>REVENUE LOSSES:</b>						
<b>Regulated Community</b>	None	de minimis	de minimis	de minimis	de minimis	de minimis

<b>Local Government</b>	None	de minimis	de minimis	de minimis	de minimis	de minimis
<b>State Government</b>	None	de minimis	de minimis	de minimis	de minimis	de minimis
<b>Total Revenue Losses</b>	None	de minimis	de minimis	de minimis	de minimis	de minimis

(23a) Provide the past-three year expenditure history for programs affected by the regulation.

The Bureau of Labor Law Compliance (BLLC) has one budget for enforcing 12 different laws, including the Pennsylvania Minimum Wage Act of 1968. The table below thus lists the entire Bureau budget, which has not changed in the past several fiscal years.

<b>Program</b>	<b>FY -14-15</b>	<b>FY -15-16</b>	<b>FY -16-17</b>	<b>Current FY17-18</b>
Bureau of Labor Law Compliance	\$4.8 m	\$4.8 m	\$4.8 m	\$4.8 m

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

(a) Pennsylvania is home to at least 225,400 small businesses. However, 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.

(b) Small businesses will be required to continue to comply with 34 Pa. Code Chapter 231. As stated under #22 above, the proposed amendments do not require regulated entities to complete any additional forms or reports. Employers will have to record the hours of any employees reclassified from exempt to non-exempt. Such recordkeeping would be no different from that already required for non-exempt workers and associated costs would be minimal. Nearly all employers already have systems and policies in place to comply with Pennsylvania's current Minimum Wage regulations.

(c) As noted above, some small businesses may see an increased cost associated with wages. Small businesses may mitigate or eliminate these costs at their own discretion, for example, by limiting employee overtime or reorganizing to improve efficiency. In addition, the reduction in misclassification of employees as ineligible for overtime pay represents the potential for savings in litigation costs. Small businesses may also benefit from less employee turnover.

(d) No alternative method would ensure achievement of the same purpose of the proposed regulation.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

The proposed amendments include the following three special provisions developed to meet the needs of the regulated community:

- 1) Amendments will be phased-in over a three-year period to account for the time it may take businesses to adapt.
- 2) Up to 10 percent of the salary threshold may be satisfied through the payment of nondiscretionary bonuses.
- 3) The regulation will be updated based on the 30<sup>th</sup> percentile wage in the Northeast U.S. region in the first year after full phase-in (i.e., on January 1, 2023) and thereafter on a triennial basis. This will ensure the regulation continues to serve as an effective means for classifying employees and should help reduce potential costs associated with misclassification in the future.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The Department considered retaining the current short and long tests for EAP duties but rejected this option because it would be too burdensome for employers. No other alternative regulatory schemes were considered because the Department considered the proposed amendments as the most appropriate and reasonable method for up-to-date guidance on determining overtime exemptions.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

No other regulatory schemes were considered because the Department considered the proposed amendments as the most appropriate and reasonable method for up-to-date guidance on determining overtime exemptions.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable

data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

The proposed threshold is based on the non-hourly wage data for the Northeast U.S. Census region, which is published quarterly by the U.S. Bureau of Labor Statistics and is publicly available on the Bureau's website.

(29) Include a schedule for review of the regulation including:

- |   |   |
|---|---|
| A. The length of the public comment period:   | 30 days   |
| B. The date or dates on which any public meetings or hearings will be held:                   | None  |
| C. The expected date of delivery of the final-form regulation:                                | 2019  |
| D. The expected effective date of the final-form regulation:                                  | Upon publication of the final form rulemaking in the <i>Pennsylvania Bulletin</i> |
| E. The expected date by which compliance with the final-form regulation will be required:     | Upon publication of the final form rulemaking in the <i>Pennsylvania Bulletin</i> |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | N/A   |

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Department will continue to monitor the impact and effectiveness of the minimum wage regulations.

# ATTACHMENT “A”

# **The new overtime rule will directly benefit 12.5 million working people**

Who they are and where they live

**Report** • By Ross Eisenbrey and Will Kimball • May 17, 2016

**Summary:** These tables give a detailed breakdown of who is included in the estimated 12.5 million salaried workers who will directly benefit from the Department of Labor's new rule raising the salary threshold below which salaried workers are automatically eligible for overtime pay.

These tables give a detailed breakdown of EPI's estimate that 12.5 million salaried workers will directly benefit from the Department of Labor's new rule raising the salary threshold below which salaried workers are automatically eligible for overtime pay. According to our assessment, most of these 12.5 million workers will be newly eligible for overtime protections: they are currently ineligible for overtime pay because they are classified, or wrongly classified, as having job duties that preclude receiving overtime. The rest will have their rights strengthened (they are currently at risk of being classified or misclassified as ineligible for overtime). There is inherent uncertainty in these estimates because no data are available documenting who is currently eligible for or receiving overtime.

In other words, workers making at or above the old threshold could have been excluded from overtime protection if their jobs were determined to be executive, administrative, or professional (EAP) jobs. The new rule raises the threshold from \$455 per week to \$913 per week (in 2015 dollars). There are 12.5 million salaried workers making at least \$455 but less than \$913 per week, and under the Fair Labor Standards Act (FLSA), those workers could have been excluded from automatic overtime protection if they were classified, or incorrectly classified, as EAP employees.

FLSA overtime rules were established to make sure that no one but higher-level workers with control over their time or tasks works overtime without getting paid for it. Unfortunately, rule changes in 2004 regarding the "duties tests" used to determine who does relatively high-level work made it a lot easier to deprive many lower-level workers of overtime protection by tweaking their job descriptions. Employer willingness to push the limits of the law have resulted in widespread noncompliance and misclassification. Raising the threshold will return overtime protection to the employees who need it by preempting these malleable duties tests for the workers under the new threshold.

These tables describe the demographic, geographic, industry, and occupational composition of the workers who will directly benefit from the higher salary threshold. An EPI technical paper, *Estimating the Number of Workers Directly Benefiting from the Proposed Increase in the Overtime Salary Threshold*, provides the detailed computational methodology for estimating the number of workers affected by raising the overtime threshold.

As the tables show, raising the overtime salary threshold will directly benefit a broad range of working people, including:

- 6.4 million women, or 50.9 percent of all directly benefiting workers
- 4.2 million parents and 7.3 million children (under age 18)
- 1.5 million blacks (who make up 8.9 percent of the salaried workforce but 12.0 percent of directly benefiting workers), and 2.0 million Hispanics (who make up 11.8 percent of the salaried workforce but 16.0 percent of directly benefiting workers)
- 3.6 million workers age 25 to 34 (who make up 22.9 percent of the salaried workforce but 28.7 percent of directly benefiting workers)



- 4.5 million millennials, defined as workers age 16 to 34 (who make up 28.2 percent of the salaried workforce but 36.3 percent of directly benefiting workers)
- 3.2 million workers with a high school degree but not more education (who make up 15.5 percent of the salaried workforce but 25.3 percent of directly benefiting workers)

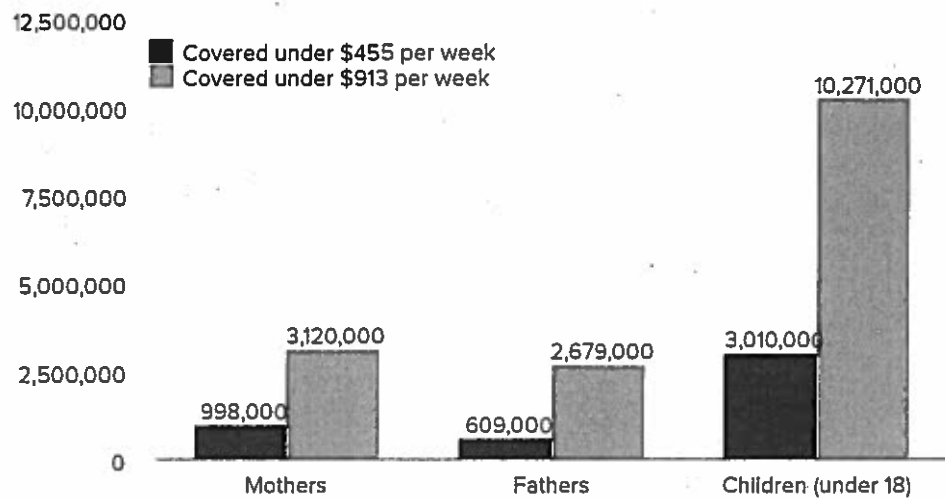
Raising the threshold will affect workers in all states, with the biggest effects—in terms of states with the greatest share of salaried workers in that state who will directly benefit from raising the threshold—in West Virginia (30.7 percent), Arkansas (30.6 percent), South Carolina (30.3 percent), Florida (29.3 percent), Tennessee (29.2 percent), Idaho (29.1 percent), Georgia (28.2 percent), South Dakota (28.2 percent), Delaware (27.7 percent), and North Dakota (27.5 percent).

Of the major industries, the new threshold will have the biggest impacts—in terms of the greatest share of salaried workers in the industry who will directly benefit from the increase in the overtime threshold—in agriculture, forestry, fishing, and hunting (39.7 percent); leisure and hospitality (37.3 percent); other services (33.2 percent); construction (32.6 percent); and public administration (32.5 percent).

Occupations with the greatest share of salaried workers in the occupation who will directly benefit will be office and administrative support occupations (46.0 percent); transportation and material moving occupations (40.4 percent); farming, fishing, and forestry occupations (40.2 percent); construction and extraction occupations (38.9 percent); and service occupations (38.0 percent).

Figure A

## Number of fathers, mothers, and their children covered under old and new overtime salary thresholds, 2015



**Note:** The sample reflects salaried (nonhourly) workers who are subject to the Fair Labor Standards Act (FLSA). This excludes certain groups of workers such as the self-employed, most federal workers, religious workers, many agricultural workers, and many transportation workers.

**Source:** EPI analysis of the U.S. Department of Labor's proposed (July 6, 2015) and final (May 18, 2016) rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

**Economic Policy Institute**

Table 1

**Salaried workers\* directly benefiting from the increase in the overtime salary threshold to \$913/week, by demographic, 2015**

Group	Total salaried workers*	Directly benefiting salaried workers**	Share of group's salaried workers that are directly benefiting	Group's share of directly benefiting workers	Group's share of total salaried workforce
	(A)	(B)	(C)=(B/A)	(D)=(B <sub>x</sub> /B <sub>t</sub> )	(E)=(A <sub>x</sub> /A <sub>t</sub> )
<b>All (t)</b>	53,717,000	12,502,000	23.3%	100.0%	100.0%
<b>Gender</b>					
Male	28,495,000	6,133,000	21.5%	49.1%	53.0%
Female	25,223,000	6,369,000	25.3%	50.9%	47.0%
<b>Race/ethnicity***</b>					
White	37,656,000	8,038,000	21.3%	64.3%	70.1%
Black	4,799,000	1,504,000	31.3%	12.0%	8.9%
Hispanic	6,359,000	2,006,000	31.5%	16.0%	11.8%
Asian	4,100,000	771,000	18.8%	6.2%	7.6%
Other	4,904,000	182,000	22.7%	1.5%	1.5%
<b>Age group</b>					
16-34	15,130,000	4,535,000	30.0%	36.3%	28.2%
16-24	2,849,000	941,000	33.0%	7.5%	5.3%
25-34	12,280,000	3,594,000	29.3%	28.7%	22.9%
35-44	13,145,000	2,769,000	21.1%	22.1%	24.5%
45-54	13,221,000	2,739,000	20.7%	21.9%	24.6%
55-64	9,461,000	1,990,000	21.0%	15.9%	17.6%
65+	2,760,000	469,000	17.0%	3.8%	5.1%
<b>Educational attainment</b>					
Less than high school	1,853,000	693,000	37.4%	5.5%	3.4%
High school	8,312,000	3,158,000	38.0%	25.3%	15.5%
Some college	11,418,000	3,836,000	33.6%	30.7%	21.3%
College degree	19,007,000	3,658,000	19.2%	29.3%	35.4%
Advanced degree	13,128,000	1,157,000	8.8%	9.3%	24.4%

Table 1  
(cont.)

\* The sample reflects salaried (nonhourly) workers who are subject to the Fair Labor Standards Act (FLSA). This excludes certain groups of workers such as the self-employed, most federal workers, religious workers, many agricultural workers, and many transportation workers.

\*\* Directly benefiting salaried workers are those who will newly be guaranteed overtime protection by virtue of their salary alone under the higher overtime threshold, i.e., they make at least \$455 a week (the old threshold) but less than \$913 a week (the new threshold in 2015 dollars). This includes workers who are newly eligible (they were excluded from automatic overtime protection because they were classified, in some cases incorrectly, as executive, administrative, and professional or "EAP" employees); and workers whose rights are strengthened (they were at risk of being classified as EAP employees).

\*\*\* Race/ethnicity categories are mutually exclusive (i.e., white non-Hispanic, black non-Hispanic, and Hispanic any race).

Note: Subtotals may not add up to totals due to rounding.

Source: EPI analysis of the U.S. Department of Labor's proposed (July 6, 2015) and final (May 18, 2016) rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

Economic Policy Institute

Table 2

### Number of mothers, fathers, and children newly covered by updated overtime salary threshold, by demographic, 2015

	Covered under \$455	Covered under \$913	Newly covered under \$913
<i>Mothers</i>	998,000	3,120,000	2,122,000
<i>Fathers</i>	609,000	2,679,000	2,070,000
<i>Children (under 18)</i>	3,010,000	10,271,000	7,261,000

Note: The sample reflects salaried (nonhourly) workers who are subject to the Fair Labor Standards Act (FLSA). This excludes certain groups of workers such as the self-employed, most federal workers, religious workers, many agricultural workers, and many transportation workers.

Source: EPI analysis of the U.S. Department of Labor's proposed (July 6, 2015) and final (May 18, 2016) rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

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Table 3

### Salaried workers directly benefiting from the increase in the overtime salary threshold, by state, 2015

State	Total salaried workers*	Directly benefiting salaried workers**	Share of state's salaried workers that are directly benefiting	State's share of directly benefiting workers	State's share of total salaried workforce
	(A)	(B)	(C)=(B/A)	(D)=(Bx/B1)	(E)=(Ax/A1)
<i>United States(1)</i>	53,717,000	12,502,000	23.3%	100.0%	100.0%
<i>Alabama</i>	632,000	167,000	26.4%	1.3%	1.2%
<i>Alaska</i>	90,000	16,000	17.6%	0.1%	0.2%
<i>Arizona</i>	999,000	258,000	25.8%	2.1%	1.9%
<i>Arkansas</i>	425,000	130,000	30.6%	1.0%	0.8%
<i>California</i>	6,005,000	1,076,000	17.9%	8.6%	11.2%
<i>Colorado</i>	1,033,000	248,000	24.0%	2.0%	1.9%
<i>Connecticut</i>	700,000	113,000	16.2%	0.9%	1.3%
<i>Delaware</i>	176,000	49,000	27.7%	0.4%	0.3%
<i>District of Columbia</i>	170,000	29,000	16.8%	0.2%	0.3%
<i>Florida</i>	3,645,000	1,068,000	29.3%	8.5%	6.8%
<i>Georgia</i>	1,748,000	493,000	28.2%	3.9%	3.3%
<i>Hawaii</i>	214,000	57,000	26.4%	0.5%	0.4%
<i>Idaho</i>	219,000	64,000	29.1%	0.5%	0.4%
<i>Illinois</i>	2,359,000	539,000	22.8%	4.3%	4.4%
<i>Indiana</i>	999,000	248,000	24.9%	2.0%	1.9%
<i>Iowa</i>	493,000	124,000	25.2%	1.0%	0.9%
<i>Kansas</i>	449,000	98,000	21.7%	0.8%	0.8%
<i>Kentucky</i>	591,000	149,000	25.1%	1.2%	1.1%
<i>Louisiana</i>	710,000	174,000	24.5%	1.4%	1.3%
<i>Maine</i>	191,000	46,000	24.2%	0.4%	0.4%
<i>Maryland</i>	1,156,000	233,000	20.2%	1.9%	2.2%
<i>Massachusetts</i>	1,454,000	262,000	18.0%	2.1%	2.7%
<i>Michigan</i>	1,366,000	275,000	20.1%	2.2%	2.5%
<i>Minnesota</i>	961,000	158,000	16.4%	1.3%	1.8%
<i>Mississippi</i>	349,000	88,000	25.3%	0.7%	0.6%
<i>Missouri</i>	979,000	257,000	26.3%	2.1%	1.8%

Table 3  
(cont.)

State	Total salaried workers*	Directly benefiting salaried workers**	Share of state's salaried workers that are directly benefiting	State's share of directly benefiting workers	State's share of total salaried workforce
	(A)	(B)	(C)=(B/A)	(D)=(Bx/B1)	(E)=(Ax/A1)
<i>Montana</i>	126,000	33,000	26.4%	0.3%	0.2%
<i>Nebraska</i>	314,000	81,000	25.8%	0.6%	0.6%
<i>Nevada</i>	428,000	115,000	26.9%	0.9%	0.8%
<i>New Hampshire</i>	253,000	54,000	21.5%	0.4%	0.5%
<i>New Jersey</i>	2,050,000	410,000	20.0%	3.3%	3.8%
<i>New Mexico</i>	242,000	61,000	25.3%	0.5%	0.5%
<i>New York</i>	4,157,000	982,000	23.6%	7.9%	7.7%
<i>North Carolina</i>	1,653,000	425,000	25.7%	3.4%	3.1%
<i>North Dakota</i>	122,000	34,000	27.5%	0.3%	0.2%
<i>Ohio</i>	1,677,000	351,000	20.9%	2.8%	3.1%
<i>Oklahoma</i>	587,000	154,000	26.2%	1.2%	1.1%
<i>Oregon</i>	568,000	124,000	21.9%	1.0%	1.1%
<i>Pennsylvania</i>	2,035,000	459,000	22.6%	3.7%	3.8%
<i>Rhode Island</i>	169,000	37,000	21.8%	0.3%	0.3%
<i>South Carolina</i>	724,000	219,000	30.3%	1.8%	1.3%
<i>South Dakota</i>	115,000	32,000	28.2%	0.3%	0.2%
<i>Tennessee</i>	993,000	290,000	29.2%	2.3%	1.8%
<i>Texas</i>	4,906,000	1,244,000	25.4%	9.9%	9.1%
<i>Utah</i>	493,000	119,000	24.1%	1.0%	0.9%
<i>Vermont</i>	109,000	25,000	22.9%	0.2%	0.2%
<i>Virginia</i>	1,578,000	333,000	21.1%	2.7%	2.9%
<i>Washington</i>	1,146,000	232,000	20.2%	1.9%	2.1%
<i>West Virginia</i>	215,000	66,000	30.7%	0.5%	0.4%
<i>Wisconsin</i>	866,000	187,000	21.6%	1.5%	1.6%
<i>Wyoming</i>	80,000	20,000	24.6%	0.2%	0.1%

\* The sample reflects salaried (nonhourly) workers who are subject to the Fair Labor Standards Act (FLSA). This excludes certain groups of workers such as the self-employed, most federal workers, religious workers, many agricultural workers, and many transportation workers.

\*\* Directly benefiting salaried workers are those who will newly be guaranteed overtime protection by virtue of their salary alone under the higher overtime threshold, i.e., they make at least \$455 a week (the old threshold) but less than \$913 a week (the new threshold in 2015 dollars). This includes workers who are newly eligible (they were excluded from automatic overtime protection because they were classified, in some cases incorrectly, as executive, adminis-

Table 3  
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trative, and professional or "EAP" employees); and workers whose rights are strengthened (they were at risk of being classified as EAP employees).

**Note:** Subtotals may not add up to total due to rounding.

**Source:** EPI analysis of the U.S. Department of Labor's proposed (July 6, 2015) and final (May 18, 2016) rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

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Table 4

### Salaried workers directly benefiting from the increase in the overtime salary threshold, by major industry, 2015

	Total salaried workers*	Directly benefiting salaried workers**	Share of industry's salaried workers that are directly benefiting	Industry's share of directly benefiting workers	Industry's share of total salaried workforce
	(A)	(B)	(C)=(B/A)	(D)=(B <sub>x</sub> /B <sub>1</sub> )	(E)=(A <sub>x</sub> /A <sub>1</sub> )
<b>All (†)</b>	53,717,000	12,502,000	23.3%	100.0%	100.0%
<b>Agriculture, forestry, fishing, and hunting</b>	333,000	132,000	39.7%	1.1%	0.6%
<b>Mining</b>	390,000	62,000	15.9%	0.5%	0.7%
<b>Construction</b>	2,395,000	780,000	32.6%	6.2%	4.5%
<b>Manufacturing</b>	5,419,000	1,141,000	21.1%	9.1%	10.1%
<b>Wholesale and retail trade</b>	5,435,000	1,698,000	31.2%	13.6%	10.1%
<b>Transportation and utilities</b>	1,999,000	557,000	27.8%	4.5%	3.7%
<b>Information</b>	1,489,000	319,000	21.4%	2.5%	2.8%
<b>Financial activities</b>	5,315,000	1,238,000	23.3%	9.9%	9.9%
<b>Professional and business services</b>	7,543,000	1,567,000	20.8%	12.5%	14.0%
<b>Educational and health services</b>	16,311,000	2,568,000	15.7%	20.5%	30.4%
<b>Leisure and hospitality</b>	2,572,000	959,000	37.3%	7.7%	4.8%
<b>Other services</b>	2,061,000	684,000	33.2%	5.5%	3.8%
<b>Public administration</b>	2,456,000	798,000	32.5%	6.4%	4.6%

\* The sample reflects salaried (nonhourly) workers who are subject to the Fair Labor Standards Act (FLSA). This excludes certain groups of workers such as the self-employed, most federal workers, religious workers, many agricultural workers, and many transportation workers.

\*\* Directly benefiting salaried workers are those who will newly be guaranteed overtime protection by virtue of their salary alone under the higher overtime threshold, i.e., they make at least \$455 a week (the old threshold) but less than \$913 a week (the new threshold in 2015 dollars). This includes workers who are newly eligible (they were excluded from automatic overtime protection because they were classified, in some cases incorrectly, as executive, administrative, and professional or "EAP" employees); and workers whose rights are strengthened (they were at risk of being classified as EAP employees).

Note: Subtotals may not add up to total due to rounding.

Source: EPI analysis of the U.S. Department of Labor's proposed (July 6, 2015) and final (May 18, 2016) rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

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Table 5

### Salaried workers directly benefiting from the increase in the overtime salary threshold, by major occupation, 2015

	Total salaried workers*	Directly benefiting salaried workers**	Share of industry's salaried workers that are directly benefiting	Industry's share of directly benefiting workers	Industry's share of total salaried workforce
	(A)	(B)	(C)=(B/A)	(D)=(Bx/B1)	(E)=(Ax/A1)
<i>All (1)</i>	53,717,000	12,502,000	23.3%	100.0%	100.0%
<i>Management, business, and financial occupations</i>	14,167,000	2,549,000	18.0%	20.4%	26.4%
<i>Professional and related occupations</i>	19,690,000	2,353,000	12.0%	18.8%	36.7%
<i>Services occupations</i>	4,199,000	1,595,000	38.0%	12.8%	7.8%
<i>Sales and related occupations</i>	5,281,000	1,627,000	30.8%	13.0%	9.8%
<i>Office and administrative support occupations</i>	4,987,000	2,294,000	46.0%	18.3%	9.3%
<i>Farming, fishing, and forestry occupations</i>	243,000	98,000	40.2%	0.8%	0.5%
<i>Construction and extraction occupations</i>	1,426,000	554,000	38.9%	4.4%	2.7%
<i>Installation, maintenance, and repair occupations</i>	1,073,000	403,000	37.6%	3.2%	2.0%
<i>Production occupations</i>	1,315,000	489,000	37.1%	3.9%	2.4%
<i>Transportation and material moving occupations</i>	1,337,000	540,000	40.4%	4.3%	2.5%

\* The sample reflects salaried (nonhourly) workers who are subject to the Fair Labor Standards Act (FLSA). This excludes certain groups of workers such as the self-employed, most federal workers, religious workers, many agricultural workers, and many transportation workers.

\*\* Directly benefiting salaried workers are those who will newly be guaranteed overtime protection by virtue of their salary alone under the higher overtime threshold, i.e., they make at least \$455 a week (the old threshold) but less than \$913 a week (the new threshold in 2015 dollars). This includes workers who are newly eligible (they were excluded from automatic overtime protection because they were classified, in some cases incorrectly, as executive, administrative, and professional or "EAP" employees); and workers whose rights are strengthened (they were at risk of being classified as EAP employees).

Note: Subtotals may not add up to total due to rounding.

Table 5  
(cont.)

Source: EPI analysis of the U.S. Department of Labor's proposed (July 6, 2015) and final (May 18, 2016) rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015


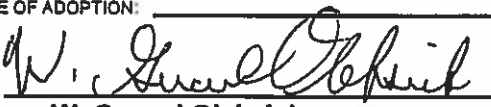
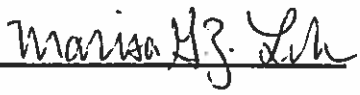
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<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY: <u></u> (DEPUTY ATTORNEY GENERAL)</p> <p><u>6/1/18</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><b>DEPARTMENT OF LABOR AND INDUSTRY</b> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>12-106</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u></u> <b>W. Gerard Oleksiak</b> TITLE: <u>Secretary</u> (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u></u></p> <p><u>MAY 07 2018</u> DATE OF APPROVAL</p> <p>Deputy General Counsel (Chief Counsel, Independent Agency) (Strike Inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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**NOTICE OF PROPOSED RULEMAKING**

**TITLE 34. LABOR AND INDUSTRY**

**PART XII. BUREAU OF LABOR LAW COMPLIANCE**

**CHAPTER 231. MINIMUM WAGE**

## PROPOSED RULEMAKING

### Title 34 Labor and Industry Regulations for Minimum Wage 34 Pa. Code, Part XII, Chapter 231

In accordance with Sections 5(a)(5) and 9 of the Minimum Wage Act of 1968 (43 P.S. §§ 333.105(a)(5) and 333.109), Act of January 17, 1968, P.L. 11, No. 5, the Department of Labor and Industry (Department) is submitting proposed rulemaking for the purpose of carrying out the Minimum Wage Act and to safeguard the minimum wage rates established thereby.

The Department proposes the following regulations for minimum wages under the Minimum Wage Act of 1968 (Act) (43 P.S. §§ 333.101-333.115) as set forth in Annex A.

#### *Statutory Authority*

This proposed rulemaking is issued under the authority provided in both Section 5(a) of the Act (43 P.S. § 333.105(a)(5)), which requires the Secretary to define the terms bona fide executive, administrative and professionals and Section 9 of the Act (43 P.S. § 333.109) which provides: "The secretary shall enforce this act. The secretary shall make and, from time to time, revise regulations, with the assistance of the board, when requested by the secretary, which shall be deemed appropriate to carry out the purposes of this act and to safeguard the minimum wage rates thereby established. Such regulations may include, but are not limited to, regulations defining and governing bona fide executive, administrative, or professional employees and outside salespersons, learners and apprentices, their number, proportion, length of learning period, and other working conditions; handicapped workers; part-time pay; overtime standards; bonuses; allowances for board, lodging, apparel, or other facilities or services customarily furnished by employers to employees; allowances for gratuities; or allowances for such other special conditions or circumstances which may be incidental to a particular employer-employee relationship."

#### *Background*

The Act provides three exemptions from the minimum wage and overtime provisions of the Act for individuals employed in the following capacities: executive, administrative and professional. Section 5(a)(5) of the Act, 43 P.S. § 333.105(a)(5), specifically authorizes the Secretary to define these exemptions by regulation.

The existing regulation defines "executive" as individuals who: 1) manage and supervise at least two people; 2) have the power to, at least, recommend decisions that would affect the employment status of individuals; 3) customarily exercise discretionary powers; 4) spend no more than 20%, or 40% in the case of retail or service establishments, performing duties other than those found in clauses 1 through 3; and 5) are compensated at a salary of at least \$155 per week except that individuals whose primary duties consist of performing the duties found in clause 1 are compensated at \$250 per week. 34 Pa. Code § 231.82.

The existing regulation defines "administrative" as individuals who: 1) have a primary duty consisting of office or nonmanual work directly related to management policies or the general operation of the employer or customers of the employer; 2) customarily and regularly exercise independent judgement; 3) regularly and directly assist another employee employed in executive or administrative capacities or perform, under general supervision, work along specialized lines or execute special assignments and tasks; 4) spend no more than 20%, or 40% in the case of retail or service establishments, performing duties other than those found in clauses 1 through 3; and 5) are paid at a salary of at least \$155 per week except that individuals whose primary duties consist of performing the duties found in clause 1 are compensated at \$250 per week. 34 Pa. Code § 231.83.

The existing regulation defines "professional" as individuals who: 1) have a primary duty consisting of the performance of work requiring specialized knowledge or work that is original or creative in an artistic field; 2) perform work requiring the consistent exercise of discretion; 3) perform work that is intellectual and varied; 4) spend no more than 20% of the work week performing duties other than those found in clauses 1 through 3; and 5) are compensated at a salary or fee basis of at least \$170 per week except that individuals whose primary duties consist of performing the duties found in clause 1 are compensated at \$250 per week. 34 Pa. Code § 231.84.

In addition to the Act, the requirement to pay employees a minimum wage and overtime is found in the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201, *et. seq.* The FLSA also contains the same EAP exemptions from its minimum wage and overtime provisions. 29 U.S.C. § 213(a)(1). The United States Department of Labor (USDOL) has also issued regulations defining these exemptions, 29 C.F.R. §§ 541.100 – 541.304, which creates a dual regulatory scheme. Pennsylvania's current regulations defining the Act's EAP exemptions differ from USDOL's regulations defining the FLSA's EAP exemptions in two significant aspects: 1) the salary thresholds for the Act's EAP exemptions are lower than the salary thresholds for the FLSA's EAP exemptions; 2) the duties test to qualify for the Act's EAP exemptions is different than the duties test to qualify for the FLSA's EAP exemptions.

Pennsylvania's regulations have not been updated since 1977, which results in three issues. First, many individuals are being improperly classified as exempt because the salary thresholds found in Pennsylvania's current regulations are not reflective of the current salaries of individuals who are executives, administrative personnel or professionals. Moreover, the salary thresholds found in the regulations defining the FLSA were last raised in 2004 and are also not reflective of the current salaries of individuals who are executives, administrative personnel or professionals. Thus, a regulatory change is necessary to ensure that individuals who are not executive, administrative personnel or professionals are not improperly exempted from the Act. Second, Pennsylvania's current regulations for the EAP exemptions contain two separate tests for employees to be exempt: the "short test" and the "long test". Under the short test, an employee is exempt if that employee performs one specific duty listed in the regulation governing the exemption and is compensated at or above the higher salary threshold listed in that regulation. Under the "long test", an employee is exempt if that employee performs all the duties found in the regulation governing the exemption and is compensated at or above the lower salary threshold listed in that regulation. This differs from the FLSA's regulations defining the EAP exemptions, which contain one standard duties test and one salary threshold for each exemption. Finally, the



duties to qualify for each exemption need to be clarified to prevent the improper classification of employees and to be more consistent the duties for the EAP exemptions found in the FLSA's regulations defining the EAP exemptions. Making the Act's regulations consistent with the FLSA's regulations with regards to duties would make compliance easier for employers who would no longer have to make separate evaluations of an employee's duties to determine whether they are exempt under both the Act and the FLSA.

#### *Compliance with Executive Order 1996-1, Regulatory Review and Promulgation*

The Governor's Middle Class Task Force held six meetings between September 29, 2017 and November 20, 2017. These meetings included workers and students, along with representatives of businesses, labor unions, workforce development programs, institutions of higher education and other post-secondary training. On several occasions, workers expressed concern about the inability to join the ranks of the middle class or maintain their middle-class status because of low or stagnant wages.

The Department presented its intention to revise the regulations to the Minimum Wage Advisory Board (Board) at an open meeting and gave the Board members the ability to comment. The Board includes representatives of labor organizations, employer associations and the general public. These groups represent the entities that would be affected by the change in the regulations.

In its presentation, the Department informed the Board that it was clarifying the duties tests in the regulations including replacing the short and long tests with a standard duties test. In addition, the Department notified the members that it was raising the salary threshold to qualify for the executive, administrative and professional exemptions. The Board members were provided the opportunity to comment on the Department's intention to update the regulations. Some Board members expressed approval of the intention to update the regulations, and some members expressed concerns about such a large increase in the salary threshold. Department staff considered this feedback, and introduced a phase-in approach to raising the salary threshold over a three-year period.

#### *Purpose*

This proposed regulation amends the Department's existing minimum wage regulations in Title 34 at Sections 231.1 (relating to Definitions), 231.82 (relating to Executive), 231.83 (relating to Administrative) and 231.84 (relating to Professional).

#### *Summary of Proposed Rulemaking*

##### **34 Pa. Code § 231.1. Definitions.**

This section adds a definition for "general operation" to include, but not be limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory

compliance; and similar activities. This will assist the Department, employers, and employees to properly determine whether employees are exempt under the administrative exemption.

The section also adds a definition for "management" to include, but not be limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting employees' rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used to perform work; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees and the property; planning and controlling the budget, and monitoring or implementing legal compliance measures; and similar activities. This will assist the Department, employers, and employees to properly determine whether employees are exempt under the executive exemption.

#### **34 Pa. Code § 231.82. Executive.**

Subsection 1 replaces the phrase "consist of" with "is" to improve the readability of the section.

Subsection 5 is eliminated to make the Department's regulations consistent with 29 C.F.R. § 541.100, which interprets the FLSA. The federal regulation does not contain different wage requirements for individuals whose primary duties are executive and individuals who spend up to 20% performing non-executive duties.

Subsection 6 is renumbered as subsection 5 and adds language to increase the minimum salary amount to \$610 per week effective the date of publication of the final form regulation; to \$766 per week effective one year after the date of publication of the final form regulation; to \$921 per week effective two years after the date of publication of the final form regulation; and, effective three years after the date of publication of the final form regulation and every third year thereafter, at a rate equal to the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. The Department will publish this rate in the *Pennsylvania Bulletin* and on its website.

A new subsection 6 allows up to 10% of the salary amount to be paid by non-discretionary bonuses, incentives or commissions. Bonuses, incentives or commissions must be paid on at least a quarterly basis. If by the last quarter, the salary and bonuses, incentives or commissions do not equal at least 13 times the weekly salary threshold, then the employer must make a one-time payment equal to the amount of the underpayment by the end of the next pay period of the next quarter. This one-time payment only counts towards the payment requirements of the previous quarter. Finally, the proposed regulation eliminates the short and long tests found in current subsection (6) to qualify for this exemption and replace it with a standard duties test and one salary threshold.

### **34 Pa. Code § 231.83. Administrative.**

Subsection 1 replaces the phrase “consist of” with “is” to improve the readability of the section.

Subsection 2 adds language to clarify that administrative personnel must regularly exercise judgment and discretion in matters of significance.

Subsection 3 is eliminated to ensure that employees who only assist other executives and administrative personnel or who only perform work requiring specialized training, experience or knowledge or who only perform specialized tasks or assignments are no longer classified as exempt. This was done to make the language of this regulation consistent with 29 C.F.R. § 542.100, which does not contain the language found in the Department’s current regulation. Under the proposed regulation, Pennsylvania employers will only have one duties test to determine whether an employee is exempt from the minimum wage and overtime pursuant to the Administrative exemption.

Subsection 4 is eliminated to make the Department’s regulations consistent with 29 C.F.R. § 542.100, which interprets the FLSA. The federal regulation does not contain different wage requirements for individuals whose primary duties are administrative and individuals who spend up to 20% performing non-administrative duties.

Subsection 5 is renumbered as subsection 3 and replaces the word “paid” with “compensated” to make the language in this exemption consistent with the language in the executive and professional exemptions. In addition, the proposed regulation adds language to increase the minimum salary amount to \$610 per week effective the date of publication of the final form regulation; to \$766 per week effective one year after the date of publication of the final form regulation; to \$921 per week effective two years after the date of publication of the final form regulation; and effective three years after the date of publication of the final form regulation and every third year thereafter, at a rate equal to the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. The Department will publish this rate in the *Pennsylvania Bulletin* and on its website.

New subsection 4 allows up to 10% of the salary amount to be paid by non-discretionary bonuses, incentives or commissions. Bonuses, incentives or commissions must be paid on at least a quarterly basis. If by the last quarter, the salary and bonuses, incentives or commissions do not equal at least 13 times the weekly salary threshold, then the employer must make a one-time payment equal to the amount of the underpayment by the end of the next pay period of the next quarter. This one-time payment only counts towards the payment requirements of the previous quarter. Finally, the proposed regulation eliminates the short and long tests found in current subsection (5) to qualify for this exemption and replace it with a standard duties test and one salary threshold.

### **34 Pa. Code § 231.84. Professional.**

Subsection 1 replaces the phrase “consist of” with “is” to improve the readability of the section. In addition, language is added to clarify that professionals are individuals who either possess knowledge in a specialized field of science or learning, or work that is original or creative in an artistic field.

Subsection 4 is eliminated to make the Department’s regulations consistent with 29 C.F.R. § 541.300, which interprets the FLSA. The federal regulation does not contain different wage requirements for individuals whose primary duties are professional and individuals who perform up to 20% performing non-professional duties.

Subsection 5 is renumbered as subsection 4 and adds language to increase the minimum salary or fee amount to \$610 per week effective the date of publication of the final form regulation; to \$766 per week effective one year after the date of publication of the final form regulation; to \$921 per week effective two years after the date of publication of the final form regulation; and effective three years after the date of publication of the final form regulation and every third year thereafter, at a rate equal to the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. The Department will publish this rate in the *Pennsylvania Bulletin* and on its website.

New subsection 5 allows up to 10% of the salary or fee amount to be paid by non-discretionary bonuses, incentives or commissions. Bonuses, incentives or commissions must be paid on at least a quarterly basis. If by the last quarter, the salary and bonuses, incentives or commissions do not equal at least 13 times the weekly salary threshold, then the employer must make a one-time payment equal to the amount of the underpayment by the end of the next pay period of the next quarter. This one-time payment only counts towards the payment requirements of the previous quarter. Finally, the proposed regulation eliminates the short and long tests to qualify for this exemption and replace it with a standard duties test and one salary threshold.

#### *Affected Persons*

This regulation will affect all Pennsylvania employers covered by the Act and all individuals who are employed by these entities.

#### *Fiscal Impact*

The Department does not anticipate that this regulation change will create a significant impact on its enforcement budget.

#### *Reporting, Recordkeeping and Paperwork Requirements*

This regulation will not require the creation of new forms and reporting requirements.

### *Sunset Date*

A sunset date is not appropriate for this regulation because the Department believes it is not appropriate to sunset a regulation that exempts individuals from the Act and because the regulation contains an automatic increase to the salary threshold. However, the Department will continue to monitor the impact and effectiveness of the regulation.

### *Effective Date*

This proposed regulation will take effect upon publication of the final-form regulation in the *Pennsylvania Bulletin*.

### *Contact Person*

Interested persons are invited to submitted written comments, suggestions or objections regarding the proposed regulation to Bryan Smolock, Director, Bureau of Labor Law Compliance, Department of Labor & Industry, 651 Boas Street, Room 1301, Harrisburg, Pennsylvania, 17121, (717) 787-0606, or by electronic mail to bsmolock@pa.gov within 30 days of publication in the *Pennsylvania Bulletin*.

### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on 6/12/18, 2018, the Department submitted a copy of this proposed rulemaking to the Chairpersons of the Senate Committee on Labor and Industry and the House Committee on Labor and Industry and to the Independent Regulatory Review Commission (IRRC). In addition to submitting the proposed rulemaking, the Department has provided the Committees and IRRC with a copy of a detailed Regulatory Analysis Form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking to the Department within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the proposed regulations, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

W. Gerard Oleksiak  
*Secretary*

Annex A

Title 34. Labor and Industry  
Part XII. Bureau of Labor Law Compliance  
Chapter 231. Minimum Wage

§ 231.1. Definitions.

\* \* \* \* \*

(b) In addition to the provisions of subsection (a), the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

\* \* \* \* \*

*Domestic services* – Work in or about a private dwelling for an employer in his capacity as a householder, as distinguished from work in or about a private dwelling for such employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation.

**General operation** – To include, but not be limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

*Handicapped worker* – An individual whose earning capacity for the work to be performed is impaired by physical or mental deficiency or injury.

\* \* \* \* \*

*Lodging* – A housing facility available for the personal use of the employee at all hours.

**Management** – To include, but not be limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting employees' rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used to perform work; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees

**and the property; planning and controlling the budget, and monitoring or implementing legal compliance measures; and similar activities.**

*Nonprofit organization* – A corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

\* \* \* \* \*

**§ 231.82. Executive.**

Employment in a bona fide executive capacity means work by an individual:

(1) Whose primary duty [consists of] is the management of the enterprise in which he is employed or of a customarily recognized department or subdivision.

(2) Who customarily and regularly directs the work of two or more other employees.

(3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

(4) Who customarily and regularly exercises discretionary powers.

[(5) Who does not devote more than 20%, or, in the case of an employee of a retail or service establishment, who does not devote as much as 40% of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (1) - (4), provided that this paragraph may not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment or who owns at least 20% interest in the enterprise in which he is employed.]

[(6)] (5) Who is compensated for his services on a salary basis at a rate of not less than: [\$155 per week, exclusive of board, lodging or other facilities, provided that an employee who is compensated on a salary basis at a rate of not less than \$250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein shall be deemed to meet all the requirements of this section.]

**(a) \$610 per week exclusive of board, lodging or other facilities, effective**  
**(Editor's Note: The blank refers to the date of publication of the final**  
**form rulemaking in the *Pennsylvania Bulletin*).**



(b) \$766 per week exclusive of board, lodging or other facilities, effective \_\_\_\_\_ (Editor's Note: The blank refers to one year after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(c) \$921 per week exclusive of board, lodging or other facilities, effective \_\_\_\_\_ (Editor's Note: The blank refers to two years after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(d) effective \_\_\_\_\_ (Editor's Note: The blank refers to three years after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*), and January 1 of each third year thereafter, the 30<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure in the *Pennsylvania Bulletin* and on its website.

(6) Up to ten percent of the salary amount required by subsection (5) may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid quarterly or more frequently. If by the last pay period of the quarter the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received does not equal 13 times the weekly salary amount required by this section, the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. Any such final payment made after the end of the 13-week period may count only toward the prior quarter's salary amount and not toward the salary amount in the quarter it was paid.

#### **§ 231.83. Administrative.**

Employment in a bona fide administrative capacity means work by an individual:

(1) Whose primary duty [consists of] is the performance of office or nonmanual work directly related to management policies or general operation of his employer or the customers of the employer.

(2) Who customarily and regularly exercises discretion and independent judgment with respect to matters of significance.

[(3) Who regularly and directly assists an employer or an employee employed in a bona fide executive or administrative capacity, who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or who executes under only general supervision special assignments and tasks.

(4) Who does not devote more than 20% of time worked in a workweek, or, in the case of an employee of a retail or service establishment, who does not devote more than 40% of time worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (1) - (3).]

[(5)] (3) Who is [paid] compensated for his services on a salary basis at a rate of not less than: [\$155 per week, exclusive of board, lodging, or other facilities, provided that an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week, exclusive of board, lodging or other facilities and whose primary duty consists of the performance of work described in paragraph (1), which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.]

(a) \$610 per week exclusive of board, lodging or other facilities, effective \_\_\_\_\_ (Editor's Note: The blank refers to the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(b) \$766 per week exclusive of board, lodging or other facilities, effective \_\_\_\_\_ (Editor's Note: The blank refers to one year after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(c) \$921 per week exclusive of board, lodging or other facilities, effective \_\_\_\_\_ (Editor's Note: The blank refers to two years after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(d) effective \_\_\_\_\_ (Editor's Note: The blank refers to three years after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*), and January 1 of each third year thereafter, the 30<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure in the *Pennsylvania Bulletin* and on its website.

(4) Up to ten percent of the salary amount required by subsection (3) may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid quarterly or more frequently. If by the last pay period of the quarter the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received does not equal 13 times the weekly salary amount required by this section, the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. Any such final payment made after the end of the 13-week period may count only toward the prior quarter's salary amount and not toward the salary amount in the quarter it was paid.

**§ 231.84. Professional.**

Employment in a bona fide professional capacity means work by an individual:

(1) Whose primary duty [consists of] is the performance of work requiring either:

- (i) [knowledge] Knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study; or
- (ii) [the] The performance of work that is original and creative in character in a recognized field of artistic endeavor.

(2) Whose work requires the consistent exercise of discretion and judgment in its performance.

(3) Whose work is predominately intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work, and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

[(4) Who does not devote more than 20% of time worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) - (3).]

[(5)] (4) Who is compensated for his services on a salary or fee basis at a rate of not less than: [\$170 per week, exclusive of board, lodging or other facilities, provided that an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (1), which includes work requiring the consistent exercise of discretion and judgment, or the performance of work requiring invention, imagination or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.]

(a) \$610 per week exclusive of board, lodging or other facilities, effective  
(Editor's Note: The blank refers to the date of publication of the final  
form rulemaking in the *Pennsylvania Bulletin*).

(b) \$766 per week exclusive of board, lodging or other facilities, effective  
(Editor's Note: The blank refers to one year after the date of  
publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(c) \$921 per week exclusive of board, lodging or other facilities, effective  
(Editor's Note: The blank refers to two years after the date of  
publication of the final form rulemaking in the *Pennsylvania Bulletin*).

(d) effective \_\_\_\_\_ (Editor's Note: The blank refers to three years after the date of publication of the final form rulemaking in the *Pennsylvania Bulletin*), and January 1 of each third year thereafter, the 30<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure in the *Pennsylvania Bulletin* and on its website.

(5) Up to ten percent of the salary or fee amount required by subsection (4) may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid quarterly or more frequently. If by the last pay period of the quarter the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received does not equal 13 times the weekly salary amount required by this section, the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. Any such final payment made after the end of the 13-week period may count only toward the prior quarter's salary amount and not toward the salary amount in the quarter it was paid.

June 12, 2018

The Honorable George D. Bedwick  
Chairman, Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

Re: Notice of Proposed Rulemaking  
Title 34 Labor and Industry  
Regulations for Minimum Wage  
34 Pa. Code, Part XII, Chapter 231

Dear Chairman Bedwick:

Enclosed is a proposed rulemaking package consisting of a Face Sheet, Preamble, Annex A and Regulatory Analysis Form.

The Department of Labor & Industry (Department), Bureau of Labor Law Compliance is submitting this rulemaking for Chapter 231 of 34 Pa. Code to update the executive, administrative and professional exemptions from the minimum wage and overtime requirements of the Minimum Wage Act of 1968.

Written comments, recommendations or objections should be directed to Bryan M. Smolock, Director, Bureau of Labor Law Compliance, 651 Boas Street, Room 1301, Harrisburg, PA 17121, telephone no. (717) 787-0606, email address: [bsmolock@pa.gov](mailto:bsmolock@pa.gov).

The Department's staff will provide your staff with any assistance required to facilitate your review of this proposal.

Sincerely,



W. Gerard Oleksiak

cc w/encl: Robert V. O'Brien, Executive Deputy Secretary  
Jennifer L. Berrier, Deputy Secretary Safety & Labor-Management Relations  
Marsha A. Sajer, Chief Counsel  
Joanne Manganello, Director of Legislative Affairs  
Jennifer Buchanan Rapach, Policy Director  
Kelly K. Smith, Executive Deputy Chief Counsel  
Robert C. Schramm, Deputy Chief Counsel, Safety & Labor-Management Relations  
Bryan M. Smolock, Director, Bureau of Labor Law Compliance

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT

I.D. NUMBER: 12-106  
SUBJECT: Minimum Wage  
AGENCY: DEPARTMENT OF LABOR & INDUSTRY

TYPE OF REGULATION

X Proposed Regulation  
Final Regulation  
Final Regulation with Notice of Proposed Rulemaking Omitted  
120-day Emergency Certification of the Attorney General  
120-day Emergency Certification of the Governor  
Delivery of Tolled Regulation  
a. With Revisions b. Without Revisions

RECEIVED  
IRRC  
2018 JUN 12 A 10:48

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		HOUSE COMMITTEE ON LABOR & INDUSTRY
6-13-18	Clara Maynard	MAJORITY CHAIR Ron W. Kauffman
6-12-18	Harry M. Sa	MINORITY CHAIR John T. Galloway
		SENATE COMMITTEE ON LABOR & INDUSTRY
6/12/18	Edgeline Scler	MAJORITY CHAIR Kim L. Ward
6/12/18	Diomey	MINORITY CHAIR Christine Tartaglione
4/12/18	K. Cooper	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
6/12/18	Beth Pappas	LEGISLATIVE REFERENCE BUREAU (for Proposed only)

June 6, 2018