

Testimony

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I appreciate the opportunity to provide the following written testimony on issues related to the Fair Labor Standard Act (29 U.S.C. Chapter 8) (FLSA) and the Pennsylvania Minimum Wage Act (35 P.S. §333.101) (PMWA). I currently serve as General Counsel and Vice President for Legal Affairs at Mercyhurst University in Erie, PA. Mercyhurst is a small Catholic private liberal arts Mercy institution with over 3,500 students. We offer certificates, associate, bachelor, and master's level degrees. We are home to twenty-two Division 2 varsity teams, and two Division 1 teams. Some of our marquee academic programs include Intelligence Studies and Forensic Science, both housed in our Tom Ridge College for Intelligence Studies and Applied Sciences.

In the testimony that follows, I have attempted to 1) Provide a brief introduction to the issue of overtime regulations; 2) Discuss the PMWA and its divergence in key areas from the FLSA; 3) Describe how the more stringent Pennsylvania rules will negatively impact higher education institutions, students, workers, townships/municipalities, and businesses in Pennsylvania; 4) Provide some concrete regulatory solutions that could alleviate the burden of these regulations and their negative impact.

1) The recently announced change in the FLSA overtime threshold which takes the exemption salary level from \$23,660 to \$47,476 will create significant challenges for our institution and the other 150+ higher education institutions across Pennsylvania. Employers must follow both state and federal rules related to overtime pay. There are significant points of divergence between the federal and Pennsylvania rules on exemption status. The United States Department of Labor provided some helpful technical guidance documents for higher education institutions, highlighting a recognition at the federal level of the unique work environment at colleges and universities. While this guidance was helpful as it relates to compliance with the federal rules, it does nothing to address the challenges created by the current state of Pennsylvania law.

2) Some key areas where Pennsylvania law does not track with the federal law include a) the scope and application of the Professional Exemption; b) existence of a Computer Employees Exemption; and c) allowance of fluctuating work-week pay.

a) Scope and application of the Professional Exemption

The FLSA clearly establishes a Professional Exemption category that explicitly includes post-secondary teachers. There is no salary requirement for teachers under the FLSA. In other words they do not have to make \$47,476 to be exempt. They are exempt by virtue of their *bona fide* teaching position. Teaching must be their primary duty under the FLSA. That is not the case in Pennsylvania. In Pennsylvania, a minimum salary of \$250/week must be met and the exemption is limited by the narrow language found in the Professional Exemption statutory language. Furthermore, a teacher in Pennsylvania must spend no more than 20% of their time on non-teaching duties.

The higher education technical guidance that accompanied the new US DOL regulations states explicitly that non-faculty higher education employees such as coaches and certain academic administrators could also

become exempt under the “Teacher - Professional Exemption”. Coaches can be exempt with no concern for meeting the threshold if teaching their sport is their “primary” function. This is a much lower standard than the 80% requirement in Pennsylvania. The effect of this Professional Exemption discrepancy is that the Federal rules provide institutions with some ability to retain an exemption status for coaches, academic counselors, and certain other academic support personnel who work closely with students, but the Pennsylvania rules make it impossible to take advantage of that much needed flexibility.

b) Existence of a Computer Employees Exemption

The FLSA specifically recognizes an exemption category for Computer Employees. Pennsylvania does not recognize this as an exemption category.

c) Allowance of fluctuating work-week pay

Fluctuating work week pay is permissible in almost every state in the country except Pennsylvania. A very small number of states do not permit this method of calculating overtime pay. Based on case law, it would appear that it is impermissible in Pennsylvania (*Chevalier v. General Nutrition Centers (GNC)* (2014 Pa. Dist. & Cnty. Dec. LEXIS 145) to use fluctuating work week pay. The fluctuating workweek model allows an employer to calculate the employee’s regular rate of pay based on the hours worked in that week, and calculate overtime based on that week’s determined hourly rate. By way of an example, assume employee, Coach Bob and his employer, ABC University (ABC) reach a mutual and clear understanding that Bob will be paid \$1,000 week as a fixed weekly salary and that this amount is compensation for all of the hours he works regardless of how many he will actually work. If Bob works 40 hours during Week 1, his regular rate of pay that week is \$25/hour. If Bob works 60 hours in Week 2, his regular rate of pay that week is \$16.66. Bob would be entitled to 20 hours of overtime for the hours he worked in excess of 40 at a rate equal to half of his weekly pay for that week, or \$8.33. Bob would be entitled to his \$1,000 fixed weekly pay + 20 hours @ \$8.33 = \$1,166.66. The amount owed for the 60 hour week in the absence of fluctuating work week pay would be \$1,750. Allowing Pennsylvania higher education institutions to use the fluctuating work week could significantly help ameliorate the negative impact of the new FLSA rules.

3) Colleges and universities have been particularly vocal about the proposed and now enacted FLSA changes in large part because of the extraordinarily negative impact they will have on our students, their families, our workers, our local communities, and businesses. The negative impacts will also be felt financially at the state level. The US DOL responded to the angst of higher education representatives by providing some critical technical guidance on some key personnel areas at colleges and universities. Unfortunately, these federal efforts to address some of the most problematic areas will not help colleges and universities in Pennsylvania. There are numerous and vast negative consequences for being forced to place most coaches, academic counselors, and certain other academic support personnel on non-exempt status.

a) Reduction in Student Services and Programs

According to the Department of Education 2014 IPEDS report, there are over 690,000 non-profit, higher education students in Pennsylvania. These students will be negatively impacted because we will be forced to reduce the services we currently offer. These services extend beyond running athletic drills, watching film, or tutoring a student with a difficult assignment. They include crisis response and supervisory/support tasks. Our campuses, while no longer officially or legally under the mantle of *in loco parentis*, still do operate very much on that model. We are running small communities or households. The students study,

eat, play, and live with us 365 days a year, 24 hours a day, 7 days a week. We have a moral and ethical obligation to be available to our students to assist with classes, athletics, injuries, and crises. The stark reality is that we may soon be finding ourselves telling our employees, “You can’t help that student because you can’t work any more hours this week because there is no money left in the budget for overtime pay.” This negatively impacts the state because state-funded programs will be forced to pick up the slack. If we cannot employ adequate Resident Life, counseling, or Police and Safety staff, the burden of this work will go to local rape crisis centers, local police departments, and other state-funded support services and entities. State-funded entities will have to assist us much more than they do now.

There is also a distinct possibility that institutions will be forced to make cuts to certain programs, including athletic teams, tutoring, and other student support services. We simply do not have the ability to pay the overtime that would occur in certain areas, and we also cannot afford to hire more people. This harms students and also harms the state. Pennsylvania risks becoming a state known for the low quality of student services and programs at our colleges and universities. The issue of reduced services and programs will be unique to Pennsylvania because other states will be able to keep many more people “exempt” and therefore offer more robust services and programs to students. This reduction in the reputation of colleges in Pennsylvania harms our business and the communities who rely on the presence and health of the institution in their district. The impact of this will be felt across entire communities in the state, where it is not uncommon for the biggest employer and local economic engine to be a higher education institution.

One of the most poignant examples of the negative impact on programs is the baseball example that my institution’s head coach provided to me. Our team plays in the PSAC conference. This conference is home to Millersville University, Shippensburg University, as well as many other state system schools. PSAC often plays double header, double elimination games over the course of a weekend. Teams travel on Thursday or Friday and they may end up playing two games or four games, depending on their play. They may get rained out, or have other weather-related issues/delays. The game may go into extra innings. A player may get injured. Heading out on Friday, the five person coaching staff may end up working three 15 hour days for a total of 225 worked hours or they may work one 10 hour day for a total of 50 worked hours. There is simply no way of knowing what to expect when so much is dependent on so many unknowable factors. This type of uncertainty in what the week’s payroll will be could push some vulnerable institutions into negative cash flow situations where they cannot make institutional pay roll because of the unanticipated overtime. The only solution here would be for the team to pack it in and forfeit the next round of play. Certainly this would be a nightmare situation for our coaches and student-athletes and their families who came to watch them play, not to mention a complete barrier to effective recruiting. This nightmare will soon be our reality if we are unable to get some clarity on whether or not Pennsylvania will follow the US DOL’s lead and update the professional exemption to clearly include coaches whose primary duty is teaching their sport. It is worth noting that the vast majority of assistant coaches in the state system schools earn under \$47,476. Without some relief here, the state will be facing extraordinary overtime costs associated with athletics, beginning December 1, 2016. With the Fiscal Year already begun for most colleges and budgets already set, without some movement here by the state, there should be an expectation that many state institutions will come in millions of dollars over-budget. There is simply not enough time to train coaches and implement policies and rules to address this huge change.

b) Increases in Tuition

The main source of revenue for many higher education institutions in Pennsylvania is tuition. When our costs go up, we have to increase tuition, we have no other levers to pull. When we increase tuition, student

debt increases, family disposable income goes down which harms businesses and the tax base, and fewer students pursue higher education. Unfortunately, this impact may be felt more so here in Pennsylvania than in other states whose laws track more closely with the FLSA. Institutions in other states can keep coaches, and other key academic administrators exempt and be relieved of the financial burden of paying overtime to a significant part of their workforce. In Pennsylvania, under the current law, we have to pay out that overtime. The effect of this is that Pennsylvania may quickly become one of the most expensive states in which to earn a college degree.

c) Wage Uncertainty

According to the Department of Education 2014 IPEDS report, non-profit higher education institutions in Pennsylvania employ over 138,000 people. Many of our workers will likely suffer some hardships under the new regulations. The primary example of the type of worker this will most negatively impact is an assistant coach who earns under \$47,476. In order to keep this assistant coach employed, we will have to “wage-smooth” her to be at an hourly rate that will amount to her current annual salary. We would look at her current salary, estimate how many total hours of overtime she will work in the entire year and then “wage-smooth” her to get to a regular hourly rate that will maintain her current salary. If she is currently a \$40,000/year salaried exempt employee, she will soon become an hourly non-exempt employee. Her current hourly rate would be \$20.51 (\$40,000/1950 hours). If we determined that she works on average 50 hours/week throughout the year, and paid her \$20.51 for the 1950 hours of regular time she worked and \$30.76 for the 520 hours of overtime she worked, her new salary would be approximately \$55,000/year (1950 @ \$20.51 + 520 @ \$30.76). This \$15,000 raise across the institution for each person who is newly non-exempt is simply not possible for many institutions. Private institutions don’t have the margins to do this, nor do the state system schools because of state budgetary constraints. Because it will be impossible to give all the newly non-exempt employees this type of raise, institutions are forced to reduce hourly rates through “wage-smoothing”. In order to “wage-smooth” this exemplary employee and keep her at her current \$40,000 salary, we have to take her down to \$15/hour (1950@\$15 + 520 @ \$22.5 = \$40,950). She will make nearly the same exact salary and work the same number of hours that year. The big downside for her is that she will now have weeks where her pay is very low and weeks where it is very high. During a week where she works 30 hours, her pay check will be \$450 less withholdings for health insurance, taxes, etc. During weeks when she works 60 hours, her pay check will be \$1,050 less withholdings. These low weeks will all occur together and the high weeks will all occur together because low weeks will occur during out of season and high weeks will all occur while in season. So we in essence have to pay her a very low wage for months at a time and then a higher wage for months at a time. This is a not a good outcome for her. It will jeopardize her ability to pay all of her monthly bills with a weekly rate this low. The other downside for her is that she feels she has gotten a demotion. She also now has to keep track of every hour she works and has lost all flexibility. She also now will be tightly controlled by the administration, and disciplined (including termination) for working overtime without permission. And perhaps the worst consequence for her is that she can no longer dedicate herself to her student-athletes. If a player is injured during a game, she may be told she can’t go to the hospital to visit that student-athlete because it would be “working” and there is no money in the budget for that. She may also be told that she has to pack up the team in the middle of a tournament because her staff have all already worked as much overtime as is permitted/possible for that week.

The other impact here that is of note is that these wage-smoothed rates are so low that they will make Pennsylvania a very unattractive place to come work. A valuable assistant coach will have the choice to either go to a neighboring state and make \$40,000 a year as a salaried exempt employee (under the FLSA and state law), or come take a job in Pennsylvania doing the exact same thing earning \$15.00/hour. There is

little doubt which would be more attractive to a young professional. Becoming an unattractive place to live and work is bad for our communities, the businesses in them, and the tax base.

It is worth noting that the desire to keep coaches exempt is not solely driven by a concern re the certainty of significant overtime work/pay, but is in large part a reflection of the desire to respect and maintain the valuable work that our teams, coaches, and student-athletes do. Their work truly is unique. They train intensely for a period of time, compete intensely for a period of time, and then rest for a period of time. The time spent between a coach and his or her athletes is a mix of work, play, and quasi-familial bonding. They don't go to the hospital to visit an injured player, or stay an extra hour in the gym to work on free throws because they are "working". It is often about much more than that – mentoring, caretaking, bonding, and friendship. We are being forced to find a way to take those components out of coaching and many other academic support functions. Teachers in Pennsylvania can still be those things to students, but coaches and academic counselors cannot under the current uncertainty in Pennsylvania law.

d) Increased litigation

The current state of divergence between federal and state law, on coaches in particular, makes institutions very vulnerable to wage claims under the PMWA. These claims are costly for institutions and any state-wide increase in litigation is costly for the state court system. Colleges and universities have increasingly been the target of FLSA and state wage claims in part because of the uncertainty that exists and the lucrative nature of the claims due in part to their fee-shifting component.

4) There are four specific steps that could be taken at the state level to assist its colleges and universities. These include a) update the professional exemption category to align with FLSA; b) create a computer employees exemption category to mirror FLSA; c) allow fluctuating work-week pay at colleges and universities; d) exempt non-profits or colleges and universities from the PMWA, or exempt certain student support/student function employees from PMWA.

- a) The US DOL published comprehensive technical guidance documents for certain higher education employees that can be found at <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>. A move to align Pennsylvania law with these would be immensely helpful. Without this specific change of broadening the Professional Exemption category, the state as well as all private colleges in Pennsylvania should begin finding ways to prepare for the certain and intense negative consequences that will result as early as Spring 2017. Very few institutions have the "margins" to absorb the millions of dollars in overtime that **will** occur in the Spring.
- b) Any movement towards more aligned exemption categories would be welcome, including the creation of a computer employee exemption like the one found in the FLSA.
- c) Fluctuation work-week pay is not a panacea, although it would provide some financial relief.
- d) Completely exempting non-profits or colleges and universities, or certain employees within them who work with students is the most sensible solution to many of us in higher education, primarily because of the nature of our jobs. We are not working for financial profit. We are happy and lucky to break even each year. The "profit" we work towards is student growth, maturity, success, and learning. The mission in higher education is about what we create in people and for society, not money. Our ability to achieve these non-financial outcomes are called into question when we are forced to behave like a for-profit company.

My institution, like many others across the country, is struggling to deal with the intense competitive, demographic, and regulatory pressures facing higher education today. This is evidenced by the fact that we were forced to employ a reduction in forces program this past year, which affected over fifty (50) employees. Any relief that the legislature could provide to assist its institutions to continue the important and necessary work we do would be welcome.

In closing, I thank you for your service to the Commonwealth and your willingness to hear from the constituents in the state who will be so seriously impacted by this drastic change to the overtime rules. I am happy to provide any additional information should it be deemed helpful.

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