

TESTIMONY ON 2016 WAGE AND HOUR CHANGES:
The Anticipated Impact of the 2016 Federal FLSA Regulations
Before the Joint Senate Appropriations and Labor & Industry Committees
of the Senate of Pennsylvania

Submitted by:

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Good morning to the Committee Chairs and Members.

Introduction

My name is Kathy Speaker MacNett. I am an attorney and Managing Member of the Harrisburg law firm of SkarlatosZonarch LLC with more 35 years of experience as a management side labor/employment lawyer in the public and private sector. I am also a member of the ABA's Federal Fair Labor Standards Act ("FLSA") Committee, a contributing pro bono author to two Bureau of National Affairs publications on Wage and Hour on FLSA and Pennsylvania, as well as a serving as a co-author of the Chamber's *Model Policies and Procedures for Employers* for a number of years. I've served as a seminar speaker on Wage and Hour matters for the Pennsylvania Chamber on at least four separate occasions. Previous to my private practice, I served as the Research Director to the House Republican Labor Relations Committee in the era of Speakers Lee, Irvis, Butera and Seltzer, and Assistant Counsel to the Pennsylvania Labor Relations Board. It is my pleasure to be here today to assist with your deliberations.

What Themes Should You Keep in Mind?

Let me begin with four basic themes for you to consider throughout today's hearing:

- First, Wage and Hour Law is a different framework than most laws in that state law is not preempted by the Federal FLSA.¹ To the extent that a conflict exists between the federal and any state law, the law more favorable to the employee prevails. Hence, this change in federal regulation will effectively change state law and regulations because the salary thresholds in the new regulations are higher than those mandated by the state. I frequently tell clients they may be "clean," meaning compliant, under federal law, and "dirty" or non-compliant under state law; or vice-versa.
- Second, Wage and Hour law, at the state or federal level, is full of details, which makes compliance difficult. It is not a question of paying folks decently. It is a question of paying employees in accordance with a complicated set of rules and guidelines. Even employers who wish to comply with the Wage and Hour law can get caught in its technicalities. For compliance purposes with either federal or state law, the

¹ 29 U.S.C. § 201-219.

devil truly is in the details. Counting hours of work as the DOL counts hours of work is nearly impossible for most employers.

- Third, Pennsylvania cannot reverse the federal regulation, by legislation, even if it wishes to do so, because the minimum wage law more is always favorable to the employee. Compliance with the federal regulations as of December 1st trumps any party or philosophical affiliation.

- Fourth, employees are not now and never have been exempt just because they receive a salary, with the exception of the fairly recent addition federally of the highly compensated employee earning over \$100,000, increasing to \$134,000 under the new regulations. For most employees, the salary must be the right amount and the employee must generally meet a defined duties test before being treated as exempt from overtime. The combination of (1) salary and (2) duties exempt certain employees from overtime.

What is the History of the Minimum Wage Legislation in Pennsylvania?

Close your eyes, if so inclined, and picture every movie scene you ever watched depicting a factory floor, such as the 1979 film starring Sally Field: *Norma Rae*. There is always a step of steps on the right side of the screen taking actors to and from the Executive Offices. The factory floor employees were hourly, non-exempt, and most, but not all, of the folks in the executive offices were exempt white collar employees. In effect, that was the model for the state and federal minimum wage laws at the federal and state levels in 1937 and 1938, a model difficult to apply to our current service oriented economy.

Pennsylvania's first Minimum Wage Law adopted in 1937, regulating the health and safety of women and male and female minors under the Commonwealth's police powers, predated the adoption of the original FLSA in late June of 1938.² 1937 also saw enactment of a Pennsylvania Women's 44 Hour Law,³ limiting weekly hours of work for women to 44 in a workweek and requiring a meal or rest period, and a General 44 Hour Law,⁴ establishing maximum hours of work and a meal or rest period. Pennsylvania Minimum Wage Law was amended via supplement in 1961⁵ to require a \$1.00 per hour minimum wage for

² Act of May 27, 1937 (P.L. 917, No. 248), 43 P.S. §331a-331q, subsequently repealed.

³ Act of June 4, 1937 (P. L. 1547, No. 322), subsequently repealed.

⁴ Act of July 2, 1937 (P.L. 2766, No. 567).

⁵ Act of Sept. 15, 1961 (P.L. 1313, No. 582), 43 P.S. §331.1-333.12, subsequently repealed.

all covered employees and to exempt “white collar” employees. The law was amended again in 1968 to include our current structure.⁶ Both the Women and Minors Act and the Minimum Wage Act of 1961 were repealed in 1978.⁷

Pennsylvania law became a “Little FLSA” or little federal law from 1968 until 1988, because Pennsylvania law covered only those business **not** covered by the FLSA by specific exclusion in Pennsylvania law.⁸ The bottom line: *For two decades, a Pennsylvania employer was covered by state or federal law, but not both.* Post 1988,⁹ Pennsylvania Minimum Wage Law applies to many of the same employers, who are also subject to federal law. In 1988, the General Assembly changed the definitions of “employee” to remove the exclusion for employees covered by federal law, resulting in dual coverage under state and federal law, and the possibility of being “clean” under one law and “dirty” under the other. In 1988, the Pennsylvania law was also amended for its actual minimum wage rate to increase along with any federal increase. Exemptions were another story. Pennsylvania was among the majority of states who adopted “white collar” exemptions.¹⁰ Sometime later exemptions were amended into the Pennsylvania to conform to federal law, as in the 8/80 rule¹¹ or amendment for air carriers and sometimes not.¹²

How Do the New Federal Regulations Contrast with Pennsylvania Law?

The federal FLSA “white collar” regulations were previously updated in 2004. At that time, many misclassifications of persons classified as exempt instead of hourly were discovered. The same discovery of misclassifications may occur this December, meaning that a number of employees who had been treated as non-exempt will be moved to the exempt category. The new federal regulations become effective on

⁶ Act of Jan.17, 1968 (P.L. 11, No. 5), 43 P.S. § 333.101-335.115.

⁷ Act of October 4, 1978 (P.L. 202, No. 53), 43 P.S. § 331a to 331q and 331.1 to 333.12.

⁸ “Employee” includes any individual employed by an employer but shall not include an individual to the extent that he is subject to the Federal Fair Labor Standards Act of June 25, 1938... or subject to any other federal minimum wage....” Minimum Wage Act of 1968, Section 2, Definition of employee.

⁹ Act of December 18, 1988 (P. L. 1232, No. 150), 43 P.S. §333.103.

¹⁰ States without “White Collar” exemptions are Alabama, Arizona, Georgia, Idaho, Louisiana, Nebraska, South Carolina, South Dakota, Tennessee, Utah and Virginia.

¹¹ Act of July 5, 2012 (P.L. 987 No. 109), 43 P.S. § 333.105(b)(8).

¹² Examples, not exhaustive, are the HCE and computer exemptions.

December 1, 2016 unless blocked by some federal action before that time. The regulations make a number of changes:

First, the revised regulation changes the required salary thresholds or salary levels for “white collar” professional, executive and administrative exemptions. Currently, the overtime exemption applies to persons meeting the requirements of the duties test, if they also earn more than \$23,660 annually. Under the new regulations, the salary threshold will be raised from \$23,660 to \$47,476 annually for most white collar employees. That figure may include non-discretionary bonuses and commissions of up to 10% of that amount. This is more than a doubling of the amount and now means that to be exempt, an employee must be paid the equivalent of \$913 weekly.

Pennsylvania is among the majority of states which have some version of the “White Collar” Exemptions.¹³ However, Pennsylvania’s current salary threshold, set by the *Pennsylvania Code* is significantly lower than the previous \$26,600 used by the FLSA. It currently stands at \$155/\$250 (plus duties and direction of two employees).¹⁴

Second, the revised federal regulations sets the salary threshold for “white collar” education employees at the entrance salary determined by the educational establishment by which employed, not at the \$47,476 level. I suspect that level is less than the \$47,000 figure for some schools at the elementary and secondary levels, but I suspect it is more at colleges and universities in general.

Third, the revised regulations set a different salary level for the motion picture industry. These employees are exempt if compensated, as of December 1, 2016, at a base rate of at least \$1,397 per week (exclusive of board, lodging, or other facilities).

Fourth, the revised regulations require an automatic update of these salary levels for “White Collar” employees in January 2020, and every three years thereafter through the federal Department of Labor (“DOL”) without the need for another change in law or regulation.

¹³ BNA, *Wage and Hour, State by State Survey*, Second Edition, 2011 and 2015 updates, passim.

¹⁴ 34 Pa. Code § 231.82(6).

Fifth, the revised regulations update the federal Highly Compensated Employee (“HCE”) Exemption level from \$100,000 to \$134,004 annually. Remember that Pennsylvania has no such equivalent exemption for highly paid salaried employees, who are not otherwise exempt as white collar “executive, administrative and professional” employees.

Finally, the revised federal regulations carve out computer employees and allows the salaried or fee basis computer exemption to be applied if a computer employee earns \$47,476, or is paid \$27.63 hourly. Pennsylvania has no similar exemption.

What Don’t the New Federal Regulations Mandate?

The new federal regulations do not change either the federal or the state minimum wage rate of \$7.25 per hour for non-exempt employees, which is sometimes called non-exempt or hourly employees because this can only be accomplished by a change in law, not a change in regulation.¹⁵ The new federal regulations do not force any employer to treat employees as salaried employees or to pay any employer the \$47,000 figure. Hourly employees can still be paid less than \$47,476 annually. Hourly employees simply must be paid overtime for all hours worked over 40 in any given workweek at time and one half their hourly rate of pay. However, employers who wish to use the overtime exemptions must qualify under both the salaried threshold amount and duties test in order to be exempt as Executive, Administrative and Professional Employees.

What Industries are the New Federal Regulations Expected to Impact Hard?

Please remember that we are very early in consideration and application of these new regulations. Commentators currently expect the following industries to be hard hit:

- Nonprofits
- Retail
- Hospitality
- Construction
- Education

¹⁵ However, the Obama Administration has issued an Executive Order increasing the minimum wage to \$15 per hour for federal contractors and federal employees and the Wolf Administration has increased the minimum wage for Executive branch employees and state contractors to \$10.15 hourly¹⁵. Only 450 state employees were impacted by Governor Wolf’s Executive Order. The number of employees of impacted vendors is still unknown.

- Athletics including some non-faculty university coaches, some assistant and part-time coaches, and licensed/certified athletic trainers (who function as physician extenders).

Of course, as the federal regulations are implemented, other impacted industries as well as the “unintended consequences” are expected to emerge.

What is the Impact of this Change in Federal Regulations?

First, I predict that a number of employees will be converted from salaried to hourly in order to avoid payment of the \$47,476. Some employees are already concerned about the impact of a variable hourly amount compared to a stable salaried amount. Second, some legal commentators opine that the change in salary level will restrict telecommuting of employees. Third, other commentators expect an increase in record keeping time and energy. Failure to maintain adequate records can be a separate wage and hour violation. Hourly employment requires significantly more tracking of hours *worked* than does salaried employment. Finally, costs will increase and services will decrease. The United States Department of Labor expects 185,000 Pennsylvania employees to be impacted by the new federal regulations.¹⁶

As of December 1, 2016, the wage base for most exempt employees will be increased by virtue of the new federal regulation from \$23,660 (or other amounts less than \$47,476) to \$47,476. The alternative for employers will be to treat the employee as an hourly employee and pay overtime. Since employers can calculate the hourly figure in a number of legitimate ways, it is unclear how many of the current salaried employees who are converted to hourly will receive significant increases. That leads to a case- by -case analysis. We are sure, however:

1. The Regulations Will Cost Real Money or Decrease Services

The US Chamber published the estimated impact on a number of organizations, including non-profits at the proposed \$50,000 [proposed and subsequently reduced] salary level.¹⁷ Additionally,

¹⁶ <https://blog.dol.gov/2016/05/18/who-benefits-from-the-new-overtime-rule/>

¹⁷<https://www.uschamber.com/above-the-fold/proposed-overtime-regulation-threatens-nonprofits-and-state-local-governments>. That website reports: proposed \$50,000 [proposed and subsequently reduced] salary level. Additionally, the Salvation Army expects a 50% impact nationally; the YMCA expects layoffs and Operation Smile expects service cuts; one of my favorites, Smile Train, could be similarly impacted. It estimates the cost of a surgery is well less than \$300 each; Lutheran Services expects a 9.1 percent unfunded increase in its budget nationally; and, the Pennsylvania Association of Township Supervisors expected an increase in taxes or reduction in services due to what it has labeled as a new unfunded mandate.

- The University of Kansas, testifying at a recent federal hearing (House Education and the Workforce Committee), predicted an annual cost of almost \$3 million to bring its 354 exempt employees up to the necessary salary level.
- Easter Seals at the same federal hearing predicted reduction of services in areas such as child development centers, physical rehabilitation programs and job training for the disabled and military/veterans programs.

Remember that an employer has options. No employer need pay an employee more than the employee is currently making. Only the method of payment changes from salaried to hourly for the employee if they are exempt and make below the \$47,000 figure.

- **Option 1 – Pay Hourly Plus Overtime.** The employer may simply “back into” the hourly and overtime rate or raise hourly rates. If the calculation is successful, the employee receives no or minimal additional compensation.
- **Option 2- Increase Compensation to \$47,476.** Employers, if able financially, may increase the salary threshold this year and every three years thereafter. Using DOL’s statistic of 185,000 Pennsylvania employees, an increase of salaries to maintain their exempt status, may have an initial staggering impact of \$4,255,500,000.¹⁸
- **Option 3- Reclassify.** Reclassify the employee to hourly because s/he does not meet the duties test.¹⁹

¹⁸ For ease, the 185,000 was multiplied by \$23,000 per individual in the first example. The \$10,000 figure was randomly selected because some of the employees in the DOL number may be closer to the \$47,476 figure than others.

¹⁹ Even if it is assumed that each of these employees will only receive an average of \$10,000 in increased compensation, the result is \$1,850,000,000. The salary level figures will increase again in 2020 and every three years thereafter as the federal regulation automatically increases the required salaried base. You can see how some employers will simply opt to limit overtime or to pay overtime, rather than increase salaries significantly in 2016 and again in 2020 to stay current with the salary level.

A thoughtful article using DOL's own statistics estimates the compliance cost nationally is at approximately \$2.9 billion over 10 years with annual costs in the range of \$304.3 million and over 2.5 million hours of additional paperwork burden.²⁰

2. Non-Profits are Particularly Vulnerable

The U.S. Department of Labor is offering advice to non-profits on the federal law, which boils down to a discussion of coverage under federal law based on activities for business purpose, such as gift shops or veterinary services.²¹ Note the non-profits already referenced citing anticipated increased costs or cuts in services. These non-profits view themselves as under federal jurisdiction because of: (1) specified types of covered agencies (hospitals, schools, government agencies, businesses involving medical or nursing care) in interstate commerce; or (2) individuals separately covered because of their interstate activities. The federal publications do not mention state law compliance. In my estimation, the problem is that a non-profit covered only by state law (think social service providers for sexual assault, domestic violence, hotlines, disaster relief, or trade associations without much business activity) also has to comply with state law, even if those entities are not involved in interstate commerce. Hence, the federal "help" may lull non-profits into believing that the regulations will have little impact, without giving considerations to the ramifications of state law.²² Litigation in the non-profit sector is accordingly forecasted.

3. Athletics Will Be Impacted in Pennsylvania and Elsewhere

Another interesting area impacted is school athletics, particularly for high schools and colleges and universities in NCAA Division II and III, with regard to both coaches and athletic trainers. Educational

²⁰ <https://www.americanactionforum.org/research/final-overtime-rule-minimal-benefits-major-costs/>.

²¹ <https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf>.

²² See Pennsylvania Department of Labor and Industry website at http://www.portal.state.pa.us/portal/server.pt/community/labor_law_compliance/10515/overtime_rules_in_pennsylvania/553571 stating: Also, the Federal rules increase the minimum threshold's required salary to \$455 per week, or \$23,660 annually. An executive, administrative, or professional employee must make this amount, at least, or overtime is required. Pennsylvania still maintains its test to determine whether the exemption applies to employees making a weekly salary over \$155.00. However, an employer would violate Federal rules if the employer did not pay overtime to an employee making below \$455 per week or \$23,600 annually.

establishments, including institutions of higher education, are treated differently than many others under the new federal regulations, with the salary level tied to entry level teachers or professors.²³

A big issue arises with non-faculty coaches and assistants. The expired CBA for non-faculty coaches in the Commonwealth's State System of Higher Education²⁴ lists the minimum salary level for non-faculty coaches at \$40,000, and full-time assistant coaches at \$35,000.²⁵ Part-time coaches earn even less than that. Collective bargaining negotiations are reportedly underway at this time with this bargaining unit. A fiscal note on that group of non-faculty coaches alone would be interesting once the number of non-faculty coaches in the various categories under the entrance salary for teachers in the educational establishment by which employed is determined. DOL has issued guidance for institutions of higher education, which may contain some helpful information.²⁶

Athletic trainers (functioning as physician extenders) have been classified as professional employees since the adoption of the 2004 federal regulatory changes. They present another challenge. Many ATC/LTCs are on contract with high schools, colleges and universities. That means that the employer will be tied to the higher salary levels as of December 1, 2016.²⁷

²³ According to DOL's national statistics only coaches from the 75% percentile on up earned \$48,590 in 2015. The median salary was \$31,000. Obviously, this may be below the required salary level in schools or colleges depending upon the entry level of teachers or professors.²³ Elementary and Secondary Schools had an annual mean salary of \$34,800 while Colleges Universities and Professional Schools showed an annual mean of \$55,210. Pennsylvania may have as many as 29,900 coaches/scouts.

²⁴ The State System includes:

Bloomsburg University of Pennsylvania, California University of Pennsylvania, Cheyney University of Pennsylvania, Clarion University of Pennsylvania, East Stroudsburg University of Pennsylvania, Edinboro University of Pennsylvania, Indiana University of Pennsylvania, Kutztown University of Pennsylvania, Lock Haven University of Pennsylvania, Mansfield University of Pennsylvania, Millersville University of Pennsylvania, Shippensburg University of Pennsylvania, Slippery Rock University of Pennsylvania, and West Chester University of Pennsylvania, and their respective branch campuses.

²⁵http://www.apscuf.org/members/contract/index.php?option=com_content&view=category&id=13&Itemid=206.

²⁶ <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>.

²⁷ So, an athletic trainer working for a salary of \$35,000 now annually would be making a regular rate in the area of \$16.82 per hour for the first 40 hours and \$25 hourly for time worked over 40 hours in a workweek. It is not unusual for ATC/LTCs to work in excess of 60 hours a week during a season and cover multiple sports seasons. Careful calculation by the employer will determine for those employees whether a salary increase or a change to hourly status is better.

4. Discovery of Misapplication of Exemptions is Likely

When DOL announced its regulatory changes in 2004, it was determined that numerous persons were inappropriately included in “White Collar” exemptions, who should have been treated as hourly because they failed the duties test. Some of these “misclassified employees” were thrilled by the possibility of overtime payment. Some employees were very concerned and morale suffered because they believed that “status” had been removed from their positions. Appropriate application of the exemptions will probably lead to additional overtime payments this time around as well.

5. Implementing an Hourly Status Involves Lots of Other Employer and Employee Changes

If employers choose to treat employees on an hourly basis, they are assuming an increased burden in recordkeeping and minutiae for themselves and their employees. Wage and hour law is no longer a question of paying people well. It is a question, in my estimation, of paying persons properly with the factory mold that no longer suits our current service based society, more complicated business models or Ipad/Iphone technology. An employee who previously was “trusted” by the employer not to keep detailed time records, now has to do so. Properly counting “hours worked” for wage and hour purposes is not S/he dislikes entering the “picky” little things related to meal and break periods and out of area travel and on call time, and then the employer continues to face the possibility of collective or class action. S/he dislikes punching a time card or the equivalent through a smart phone. Changes in hours may mean eligibility for partial or full Unemployment Compensation benefits in certain week, and such changes may bleed over into impact on health benefits.

6. Employees May or May Not Like a Switch to Hourly Status

For employees used to uniform weekly, biweekly or biweekly payment of salary, hourly employee introduces a need for vigorously budgeting, because paychecks will vary. For some such as athletic trainers, for example, compensation during the summer months may decrease dramatically. Other employees may simply welcome the overtime payments, and overtime payments will probably lead to reduction in hours in

some position because overtime becomes expensive. However, some employers may choose to hire more employees, rather than continue to pay large overtime amounts to certain individuals.

Are Any Changes Possible at the State Level?

Definitely. As state legislators, you simply lack the authority to override the federal regulations. However, you are not powerless. A listing of some constructive, but non-exclusive, changes to Pennsylvania law/regulations which you can consider:

- Evaluating whether or not the state law plays a necessary role in this day and age when most entities are subject to federal law on the basis of dollar volume or interstate commerce connection.
- Adding a computer professional exemption and a HCE exemption to the Pennsylvania law. Adopting all federal exemptions so that employers are not placed in a “gotcha” situation when following the federal regulations without attention to the state law and regulations.
- Reevaluating the non-profit language. Do we want to require small non-profits in Pennsylvania to pay overtime to many employees when equivalent organizations in other states would only pay if there were an interstate commerce nexus or connection?
- Adding a provision to the Pennsylvania Minimum Wage Law alerting employers that compliance with the FLSA is mandatory even if the state has a different standard, if the law is maintained.
- Conforming the state regulations to the federal regulations/interpretations. Increasingly courts are looking to the paucity of state regulation as an indicator that the state does not wish to utilize federal interpretations, and this should effectively reverse that line of cases. Federal regulations and interpretations take up some 670 pages, while state regulations cover a scant 15 pages. Obviously, they differ in content and extent.
- Recommending that Congress begin the lengthy process of consider changes to update the law from its outmoded factory model to apply to our modern service society, complicated business models and related technology.
- Restoring the pre-1988 language, which exempts employees already covered by the federal FLSA.

What will Wise Individual Employers Do? Assess Their Compensation Schedules and the Related Duties of their Employees

There is no substitute for a prompt review of compensation schedules and duties of employees currently considered exempt to determine what the impact of the federal regulatory change will be on individual employers.

CONCLUSION

I can still picture, Harry Boyer, the former President of the AFL-CIO, testifying before the House Labor Relations Committee decades ago, and saying that employers pictured the original federal minimum wage of \$.25 per hour as the start of grass growing in the streets. Obviously, grass did not grow in the streets, but this factory floor model wage law has little to do with our current service economy and today's technology, making compliance a nightmare. Neither law, however, meets the requirements of the "fissured workplace" or "gig economy" that are becoming the norm. Effective use of the time between now and December 1 is not to panic, but to calculate the anticipated impacts and decide whether it is fiscally sensible to change employees from salaried to hourly, simply raise their salaries, or reclassify the employee.

Appendix 1

Selected Differences Between Federal FLSA and Pennsylvania Minimum Wage Law

There are a number of differences between federal and state law. We will detail some, but our list is not all inclusive, Pennsylvania LACKS:

A Highly Compensated Employee Exemption;

Computer exemption based on level of salary or hourly wage rate;

The same tip credit as federal law (federal tip credit is \$2.13 in cash from the employer while Pennsylvania's is more pro-employee mandating \$2.83 in cash to be paid to the employee);

The same language of the Outside sales exemption;

Hundreds of pages of regulatory guidance and interpretive materials;

The possibility of collective actions to cover multi-employee lawsuits where the employees are similarly situated. The federal using an opt in procedure, instead of the class actions in Pennsylvania, which employee an opt out procedure; and

The same level of enforcement.

Coverage of public employers. Pennsylvania law does not cover public employers whereas most governments, educational institutions and public agencies are covered by the FLSA.

A business owner exemption under the "White Collar" executive exemption.

A "pass" for the salary level for doctors, teachers and lawyers.

An exemption for non-profits not involved in interstate commerce.

A fluctuating workweek under Court interpretation.

Additionally, Pennsylvania goes further than federal law in at least one major regard. Pennsylvania regulates mandatory overtime in custodial health care institutions through the *Prohibition of Excessive Overtime in Health Care Act* of 2008,²⁸ a more stringent requirement than federal law.

²⁸ Act 102 of October 9, 2008 (P.L. 1376, No.102), 43.P. S. § 932.1-932.6