

PROPOSED RULEMAKING

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 231]

Minimum Wage

In accordance with sections 5(a)(5) and 9 of The Minimum Wage Act of 1968 (act) (43 P.S. §§ 333.105(a)(5) and 333.109), the Department of Labor and Industry (Department) publishes this proposed rulemaking for the purpose of carrying out the act and safeguarding the minimum wage rates established thereby. The Department publishes this proposed rulemaking for minimum wages under the act to read as set forth in Annex A.

Statutory Authority

This proposed rulemaking is issued under the authority in section 5(a) of the act, which requires the Secretary of the Department (Secretary) to define “bona fide executive,” “administrative” and “professionals,” and section 9 of the act 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 executive, administrative and professional capacities. Section 5(a)(5) of the act specifically authorizes the Secretary to define these exemptions by regulation.

Section 231.82 (relating to executive) currently 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 in paragraphs (1)—(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 in paragraph (1) are compensated at \$250 per week.

Section 231.83 (relating to administrative) currently 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 judge-

ment; 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 of service establishments, performing duties other than those in paragraphs (1)—(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 in paragraph (1) are compensated at \$250 per week.

Section 231.84 (relating to professional) currently 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 in paragraphs (1)—(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 in paragraph (1) are compensated at \$250 per week.

In addition to the act, the requirement to pay employees a minimum wage and overtime is in the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C.A. §§ 201—219). Section 13(a)(1) of the FLSA (29 U.S.C.A. § 213(a)(1)) also contains the same executives, administrative personnel and professionals (EAP) exemptions from its minimum wage and overtime provisions. The United States Department of Labor regulations in 29 CFR Part 541, Subparts B—D (relating to executive employees; administrative employees; and professional employees) define these exemptions, which creates a dual regulatory scheme. The Commonwealth’s current regulations defining the act’s EAP exemptions differ from the United States Department of Labor 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; and 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.

The Commonwealth’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 in the Commonwealth’s current regulations are not reflective of the current salaries of individuals who are EAPs. Moreover, the salary thresholds in the regulations defining the FLSA were last raised in 2004 and are also not reflective of the current salaries of individuals who are EAPs. Thus, amendments are necessary to ensure that individuals who are not EAPs are not improperly exempted from the act. Second, the Commonwealth’s current regulations for 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 in the regulation governing the exemption and is compensated at or above the higher salary threshold in that regulation. Under the long test, an employee is exempt if that employee performs all the duties 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 in the FLSA's regulations defining the EAP exemptions. Making the act's regulations consistent with the FLSA's regulations with regard 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 the act and the FLSA.

Compliance with Executive Order 1996-1

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 postsecondary 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 amend the regulations to the Minimum Wage Advisory Board (Board) at an open meeting and gave 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 this proposed rulemaking.

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 members that it was raising the salary threshold to qualify for EAP exemptions. 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 the large increase in the salary threshold. Department staff considered this feedback and introduced a phase-in approach to raising the salary threshold over a 3-year period.

Purpose

This proposed rulemaking would amend the Department's existing minimum wage regulations in § 231.1 (relating to definitions) and §§ 231.82—231.84.

Summary of Proposed Rulemaking

§ 231.1. Definitions

A definition of "general operation" is proposed to be added to include 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.

A definition of "management" is proposed to be added to include 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.

§ 231.82. Executive

Paragraph (1) is proposed to be amended by replacing "consist of" with "is" to improve readability.

Current paragraph (5) is proposed to be deleted to make the Department's regulations consistent with 29 CFR 541.100 (relating to general rule for executive employees), which interprets the FLSA. Section 541.100 of 29 CFR does not contain different wage requirements for individuals whose primary duties are executive and individuals who spend up to 20% performing nonexecutive duties.

Proposed paragraph (5) adds language to increase the minimum salary amount to \$610 per week on the effective date of adoption of the final-form rulemaking; to \$766 per week 1 year after the effective date of adoption of the final-form rulemaking; to \$921 per week 2 years after the effective date of adoption of the final-form rulemaking; and 3 years after the effective date of adoption of the final-form rulemaking and every 3rd year thereafter at a rate equal to the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. The Department will publish this rate on its web site and in the *Pennsylvania Bulletin*.

Proposed paragraph (6) allows up to 10% of the salary amount to be paid by nondiscretionary bonuses, incentives or commissions. Bonuses, incentives or commissions shall 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 shall make a 1-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 short and long tests in current subsection (6) to qualify for this exemption are proposed to be deleted and replaced with a standard duties test and one salary threshold.

§ 231.83. Administrative

Paragraph (1) is proposed to be amended by replacing "consist of" with "is" to improve readability.

Paragraph (2) is proposed to be amended to clarify that administrative personnel shall regularly exercise judgment and discretion in matters of significance.

Current paragraph (3) is proposed to be deleted to ensure that employees who only assist other executives and administrative personnel, 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 CFR

541.200 (relating to general rule for administrative employees), which does not contain the language in the Department's current regulation. Under the proposed regulation, employers in this Commonwealth will only have one duties test to determine whether an employee is exempt from the minimum wage and overtime under the administrative exemption.

Current paragraph (4) is proposed to be deleted to make the Department's regulations consistent with 29 CFR 541.200, which interprets the FLSA. Section 541.200 of 29 CFR does not contain different wage requirements for individuals whose primary duties are administrative and individuals who spend up to 20% performing nonadministrative duties.

Current paragraph (5) is proposed to be deleted.

Proposed paragraph (3) uses "compensated" to make the language in this exemption consistent with the language in the executive and professional exemptions. In addition, the minimum salary amount is increased to \$610 per week on the effective date of adoption of the final-form rulemaking; to \$766 per week 1 year after the effective date of adoption of the final-form rulemaking; to \$921 per week 2 years after the effective date of adoption of the final-form rulemaking; and 3 years after the effective date of adoption of the final-form rulemaking and every 3rd year thereafter at a rate equal to the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. The Department will publish this rate on its web site and in the *Pennsylvania Bulletin*.

Proposed paragraph (4) allows up to 10% of the salary amount to be paid by nondiscretionary bonuses, incentives or commissions. Bonuses, incentives or commissions shall 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 shall make a 1-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 short and long tests in current subsection (5) to qualify for this exemption are proposed to be deleted and replaced with a standard duties test and one salary threshold.

§ 231.84. Professional

Paragraph (1) is proposed to be amended by replacing "consist of" with "is" to improve readability. In addition, language is proposed to be added to clarify that professionals are individuals who either possess knowledge in a specialized field of science or learning, or perform work that is original or creative in an artistic field.

Current paragraph (4) is proposed to be deleted to make the Department's regulations consistent with 29 CFR 541.300 (relating to general rule for professional employees), which interprets the FLSA. Section 541.300 of 29 CFR does not contain different wage requirements for individuals whose primary duties are professional and individuals who perform up to 20% performing nonprofessional duties.

Current paragraph (5) is proposed to be deleted.

Proposed paragraph (4) adds language to increase the minimum salary or fee amount to \$610 per week on the effective date of adoption of the final-form rulemaking; to \$766 per week 1 year after the effective date of adoption

of the final-form rulemaking; to \$921 per week 2 years after the effective date of adoption of the final-form rulemaking; and 3 years after the effective date of adoption of the final-form rulemaking and every 3rd year thereafter at a rate equal to the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. The Department will publish this rate on its web site and in the *Pennsylvania Bulletin*.

Proposed paragraph (5) allows up to 10% of the salary or fee amount to be paid by nondiscretionary bonuses, incentives or commissions. Bonuses, incentives or commissions shall 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 shall make a 1-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 short and long tests to qualify for this exemption are proposed to be deleted and replaced with a standard duties test and one salary threshold.

Affected Persons

This proposed rulemaking would affect all employers in this Commonwealth covered by the act and all individuals who are employed by these entities.

Fiscal Impact

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

Reporting, Recordkeeping and Paperwork Requirements

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

Sunset Date

A sunset date is not appropriate for this proposed rulemaking because the Department believes it is not appropriate to sunset regulations that exempt individuals from the act and because the proposed rulemaking contains an automatic increase to the salary threshold. However, the Department will continue to monitor the impact and effectiveness of the regulations.

Effective Date

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

Contact Person

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Bryan Smolock, Director, Bureau of Labor Law Compliance, Department of Labor and Industry, 651 Boas Street, Room 1301, Harrisburg, PA 17121, (717) 787-0606, 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 June 12, 2018, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Committee on Labor and Industry and the House Committee on Labor and Industry. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the Department, the General Assembly and the Governor.

W. GERARD OLEKSIK,
Secretary

Fiscal Note: 12-106. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 231. MINIMUM WAGE

GENERAL PROVISIONS

§ 231.1. Definitions.

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(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—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—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.

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SPECIAL DEFINITIONS

§ 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) 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.]

(5) Who is compensated for his services on a salary basis at a rate of not less than:

(i) \$610 per week exclusive of board, lodging or other facilities, effective _____ (*Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.*)

(ii) \$766 per week exclusive of board, lodging or other facilities, effective _____ (*Editor's Note: The blank refers to 365 days after the effective date of adoption of this proposed rulemaking.*)

(iii) \$921 per week exclusive of board, lodging or other facilities, effective _____ (*Editor's Note:*

The blank refers to 730 days after the effective date of adoption of this proposed rulemaking.

(iv) Effective _____ (*Editor's Note: The blank refers to 1,095 days after the effective date of adoption of this proposed rulemaking.*), and January 1 of each 3rd year thereafter, the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure on its web site and in the *Pennsylvania Bulletin*.

(6) Up to 10% of the salary amount required under paragraph (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 under this section, the employer may make 1 final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. A 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) Who is paid for his services a salary 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.]

(3) Who is compensated for his services on a salary basis at a rate of not less than:

(i) \$610 per week exclusive of board, lodging or other facilities, effective _____ (*Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.*).

(ii) \$766 per week exclusive of board, lodging or other facilities, effective _____ (*Editor's Note: The blank refers to 365 days after the effective date of adoption of this proposed rulemaking.*).

(iii) \$921 per week exclusive of board, lodging or other facilities, effective _____ (*Editor's Note: The blank refers to 730 days after the effective date of adoption of this proposed rulemaking.*).

(iv) Effective _____ (*Editor's Note: The blank refers to 1,095 days after the effective date of adoption of this proposed rulemaking.*), and January 1 of each 3rd year thereafter, the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure on its web site and in the *Pennsylvania Bulletin*.

(4) Up to 10% of the salary amount required under paragraph (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 1 final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. A 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 [**knowledge**] either of the following:

(i) **Knowledge** of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study [**or the**].

(ii) **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) 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.]

(4) Who is compensated for his services on a salary or fee basis at a rate of not less than:

(i) \$610 per week exclusive of board, lodging or other facilities, effective _____ (Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.).

(ii) \$766 per week exclusive of board, lodging or other facilities, effective _____ (Editor's Note: The blank refers to 365 days after the effective date of adoption of this proposed rulemaking.).

(iii) \$921 per week exclusive of board, lodging or other facilities, effective _____ (Editor's Note: The blank refers to 730 days after the effective date of adoption of this proposed rulemaking.).

(iv) Effective _____ (Editor's Note: The blank refers to 1,095 days after the effective date of adoption of this proposed rulemaking.), and January 1 of each 3rd year thereafter, the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast Census region in the second quarter of the prior year as published by the United States Department of Labor, Bureau of Labor Statistics, exclusive of board, lodging or other facilities. The Department will publish this figure on its web site and in the *Pennsylvania Bulletin*.

(5) Up to 10% of the salary or fee amount required under paragraph (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 1 final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. A 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.

[Pa.B. Doc. No. 18-961. Filed for public inspection June 22, 2018, 9:00 a.m.]

STATE BOARD OF MASSAGE THERAPY

[49 PA. CODE CH. 20]

Fees

The State Board of Massage Therapy (Board) proposes to amend § 20.3 (relating to fees) to read as set forth in Annex A.

Effective Date

This proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*. The increased application fees will be implemented immediately; the increased biennial renewal fees will be implemented with the January 31, 2019, biennial renewal.

Statutory Authority

Section 11(a) of the Massage Therapy Law (act) (63 P.S. § 627.11(a)) requires the Board to increase fees by regulation to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties imposed under the act are not sufficient to meet expenditures over a 2-year period. Likewise, section 11(b) of the act requires the Board to increase fees by regulation so that adequate revenues raised will meet the enforcement efforts required under the act.

Background and Need for Amendments

Under section 11(a) and (b) of the act, the Board is required by law to support its operations from the revenue it generates from fees, fines and civil penalties. In addition, the act provides that the Board shall increase fees if the revenue raised by fees, fines and civil penalties is not sufficient to meet expenditures over a 2-year period. The Board raises the majority of its revenue through biennial renewal fees. A small percentage of its revenue comes from application fees, fines and civil penalties.

Under section 49 of the act (63 P.S. § 627.49), initial operating funds were transferred from the Professional Licensure Augmentation Account (PLAA) to the Board to be repaid to the PLAA within 3 years of the beginning of the issuance of licenses. The current fee schedule in § 20.3 was established with the Board's initial rulemaking in 2011 based upon an estimate of the costs of administering the functions of the Board at that time. See 41 Pa.B. 16 (January 1, 2011). However, since the Board began issuing licenses in 2011, it has not produced enough revenue to cover its current operating expenses or repay the moneys advanced from the PLAA. In fact, the deficit balance in the Board's account as of the beginning of Fiscal Year (FY) 2017-2018 was \$1,058,603.88.

At the June 3, 2014, Board meeting, representatives from the Department of State's Bureau of Finance and Operations (BFO) presented a summary of the Board's revenue and expenses for FY 2008-2009 through FY 2013-2014 and the projected revenue and expenses through FY 2025-2026, and discussed various options for the Board's consideration to balance its budget and to repay the PLAA. The BFO returned on October 17, 2014, with updated projections that it discussed with the Board. During FY 2008-2009 and FY 2009-2010, the Board incurred expenses of \$89,628.97, with no revenue coming in. In FY 2010-2011, the Board began issuing licenses and received \$203,105 in revenue. However, expenditures for that same time period totaled \$211,749.61, adding to the

deficit. Thus, at the beginning of FY 2011-2012, the Board's deficit balance was \$98,273.58. In FY 2011-2012, the Board received revenue of \$293,876.80, while expenditures were \$413,876.64, adding another \$119,999.84 to the deficit—totaling \$218,273.42. FY 2012-2013 was the Board's first renewal year, that is, the first time the Board would collect the \$75 biennial renewal fee from each of its 7,313 licensees (at that time). In that year, the Board received \$607,889.13 in total revenues which covered its expenditures for the year of \$596,442.21, but only reduced the deficit balance to \$206,826.50. The next year, FY 2013-2014, was a nonrenewal year with revenues of only \$129,884.26. Expenditures during FY 2013-2014 were consistent with the year before at \$601,282.08, resulting in a total deficit balance of \$678,224.32 at the beginning of FY 2014-2015.

Therefore, the Board determined that it is necessary to raise fees to meet or exceed projected expenditures in compliance with section 11(a) and (b) of the act. The Board assigned the matter to its Regulations Committee, which then presented the proposed fee structure to the Board. A draft of the proposal was presented to the Board at its meeting on February 10, 2015, at which time the Board voted to solicit input from interested parties and stakeholders in accordance with Executive Order 1996-1 for the Board's consideration at its next meeting. At its meeting on April 7, 2015, the Board considered the comments submitted by the Pennsylvania Chapter of the American Massage Therapy Association (AMTA PA) regarding the proposed increase to the biennial renewal fee and those submitted by the Executive Director of the Pittsburgh School of Massage Therapy regarding the proposed fees for continuing education course approval. In addition, at the April 7, 2015, meeting the Board invited public comment and permitted members of the audience to address the Board regarding the proposal. At that time, Kim Kane-Santos, President of AMTA PA, reviewed the comment she submitted on behalf of AMTA PA. At the conclusion of the presentation, the Board voted to proceed to promulgate a proposed rulemaking.

At that time, it was anticipated that the increased fees would be effective in time to be imposed for the biennial renewal period beginning January 31, 2017. However, due to circumstances beyond the Board's control, the Board was unable to promulgate the rulemaking in time to impose the fees in 2017. In the meantime, the accumulated deficit has continued to grow. In FY 2014-2015, the Board received \$679,772.08 in total revenues which covered its expenditures for the year of \$664,644.20, resulting in a total deficit balance of \$663,096.44, at the beginning of FY 2015-2016. In FY 2015-2016, a nonrenewal year, the Board's revenues were \$196,667.41 and the expenditures were \$635,539.01, which resulted in an accumulated deficit of \$1,101,968.04. In FY 2016-2017, a renewal year, the Board's revenues were at \$701,356.77 and the expenditures were \$657,992.61, which resulted in a slightly lower accumulated deficit of \$1,058,603.88 at the beginning of FY 2017-2018. At its meeting on February 23, 2017, the BFO returned to the Board to make its annual budget presentation and suggested the Board consider increasing the fees further in light of the mounting deficits. The Board considered the BFO's proposal at its meeting on June 13, 2017, and ultimately determined that it would proceed with this proposed rulemaking as drafted, although it would take longer to recoup the accumulated deficit.

There are currently 8,754 actively licensed massage therapists who pay a biennial renewal fee of \$75. Therefore, under the existing fee structure, the Board will

produce approximately \$656,550 in renewal revenues covering the biennial renewal period which falls in FY 2017-18 and FY 2018-19. Based on an estimated 2,000 application fees at \$65 each, the Board is estimated to receive \$130,000 in application fees during the biennial period. It is estimated that the Board will receive an additional \$25,000 in other nonrenewal revenue, for a total of \$811,550 in projected biennial revenue for FY 2017-18 and FY 2018-19. However, projected expenditures for the same period are estimated at \$1,269,732.39, resulting in a biennial operating deficit of \$458,182.39 which when added to the existing deficit will result in a projected deficit of approximately \$1,516,786.27 by the end of FY 2018-2019. Without a substantial increase in the biennial renewal fee, the BFO projects continuing deficits for the foreseeable future. In addition, the BFO anticipates that there will be an increase in costs to the Board in the implementation of the act of September 24, 2014 (P.L. 2476, No. 136) (Act 136) which permits the practice of massage therapy in cosmetology and esthetician salons and directs the Board and the State Board of Cosmetology to jointly promulgate regulations to carry out Act 136. It is anticipated that some of the costs associated with inspection of cosmetology and esthetician salons that include massage therapy services will be allocated to the Board.

Therefore, this proposed rulemaking would amend § 20.3 to increase: the application fee for initial licensure from \$65 to \$100; the application fee for approval of a continuing education program from \$65 to \$100; and the biennial renewal fee from \$75 to \$200. The increased application fees will be effective immediately upon publication of the final-form rulemaking. The increased biennial renewal fee will go into effect for the January 31, 2019, biennial renewal. The new fee structure is projected to produce biennial revenues of approximately \$2 million, which will allow the Board to avoid adding to the mounting deficits, repay the PLAA and meet its subsequent estimated expenditures for a number of years to come.

Description of Proposed Amendments

This proposed rulemaking would amend § 20.3 to increase: the application fee for initial licensure from \$65 to \$100; the fee for approval of a continuing education program from \$65 to \$100; and the biennial renewal fee from \$75 to \$200.

The Board also proposes to delete § 20.3(d) pertaining to certain examination fees because on October 3, 2014, the Federation of State Massage Therapy Boards (FSMTB) and the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB) reached an agreement that the NCBTMB will no longer provide examinations for licensure purposes and will focus exclusively on delivering certification programs. The licensure examinations previously administered by the NCBTMB included the National Examination for State Licensure, the National Certification Examination for Therapeutic Massage and the National Certification Examination for Therapeutic Massage and Bodywork. Effective November 1, 2014, the NCBTMB ceased accepting new licensure exam applications. Effective February 1, 2015, the NCBTMB stopped offering licensure exams. Effective February 1, 2015, and thereafter, the FSMTB administers the Massage and Bodywork Licensure Exam that is provided for in § 20.3(c).

Fiscal Impact

This proposed rulemaking will increase the biennial renewal fees, the initial application fees and the fee for

approval of continuing education programs. There are currently approximately 8,754 licensees that will be required to pay \$125 more every 2 years to renew their licenses when they expire on January 31, 2019, and thereafter. There are currently approximately 1,000 initial applicants annually who will have to pay \$35 more to obtain an initial license. The sponsors of continuing education programs will have to pay \$35 more for the approval of their continuing education programs. This proposed rulemaking should not have other fiscal impact on the private sector, the general public or political subdivisions of this Commonwealth.

Paperwork Requirements

The proposed rulemaking will require the Board to alter some of its forms to reflect the new fees. This proposed rulemaking will not create additional paperwork for the regulated community or for the private sector.

Sunset Date

The act requires the Board to monitor its revenue and costs on a fiscal year and biennial basis. Therefore, a sunset date has not been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on June 13, 2018, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee (HPLC) and the

Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the Board, the General Assembly and the Governor.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Jacqueline A. Wolfgang, Assistant Counsel, Department of State, P.O. Box 69523, Harrisburg, PA 17106-9523, RA-STRegulatoryCounsel@pa.gov within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference Regulation No. 16A-724 (fees) on comments.

BECKY D. LESIK, LMT,
Chairperson

Fiscal Note: 16A-724. No fiscal impact; the fee increases described in this proposed rulemaking are necessary to meet the costs assumed by the Board; (8) recommends adoption.

Annex A

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS
PART I. DEPARTMENT OF STATE
Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS
CHAPTER 20. STATE BOARD OF MASSAGE THERAPY
GENERAL PROVISIONS**

§ 20.3. Fees.

(a) The following fees are charged for services provided by the Board:

Application for initial licensure	[\$65] \$100
Application for temporary practice permit	\$65
Verification of licensure or letter of good standing	\$15
Certification of licensure history	\$25
Reactivation of license	\$65
Restoration after suspension or revocation	\$65
Approval of continuing education program	[\$65] \$100

(b) The following fees are charged to sustain the operations of the Board:

Biennial renewal of license	[\$75] \$200
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(c) In addition to the application fee prescribed in subsection (a), which is payable directly to the Board, a candidate for the MBLEx shall be responsible for any fees charged by the FSMTB for taking the examination.

[(d) In addition to the application fee prescribed in subsection (a), which is payable directly to the Board, a candidate for the NESL, the NCETM or the NCETMB shall be responsible for any fees charged by the NCBTMB for taking the examinations.]

[Pa.B. Doc. No. 18-962. Filed for public inspection June 22, 2018, 9:00 a.m.]