RULES AND REGULATIONS

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 231]

Minimum Wage

The Department of Labor and Industry (Department) amends Chapter 231 (relating to minimum wage). The amendments are submitted 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), for the purpose of carrying out the act and to safeguard the minimum wage rates established thereby.

Statutory Authority

This final-form rulemaking is issued under the authority provided in section 5(a) of the act, which requires the Secretary of Labor and Industry (Secretary) to define the terms "bona fide executive", "administrative" and "professionals", and section 9 of the act, which requires the Secretary to enforce the act and to

> make and, from time to time, revise regulations, with the assistance of the [Minimum Wage Advisory 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 employes 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 employes; allowances for gratuities; or allowances for such other special conditions or circumstances which may be incidental to a particular employer-employe relationship.

The act provides three exemptions from the minimum wage and overtime provisions of the act for individuals employed in the following capacities: executive, administrative and professional (EAP). Section 5(a)(5) of the act authorizes the Secretary to define and delimit these exemptions by regulation.

Purpose

This final-form rulemaking amends the Department's existing minimum wage regulations in §§ 231.1, 231.71—231.74 and 231.82—231.84.

This final-form rulemaking provides a long overdue update of the definitions of the EAP employees who are exempt from the overtime and minimum wage provisions of the act and modernizes the obsolete salary threshold for those workers. This final-form rulemaking is consistent with the stated purpose of section 1 of the act (43 P.S. § 333.101): to protect employees from unreasonably low wages not fairly commensurate with the value of the services rendered. To the extent permissible and appropriate under Pennsylvania law, it more closely aligns with Federal law, which provides more consistency for employers and lessens the burden of compliance with different Federal and State standards. The amendments to the duties test for the EAP exemptions make the applicable test easier to understand and therefore will increase compliance. This final-form rulemaking will result in less misclassification of workers, thus reducing litigation over an employee's status.

The update to the salary thresholds will protect employees in this Commonwealth from being arbitrarily designated as exempt and required to work excessive overtime hours without additional compensation. The current Federal salary threshold of $23,660 over which an EAP employee does not have to be paid overtime is artificially low due to the passage of 15 years since the salary thresholds were updated and the lack of adjustment for inflation or the current economy. Although the Federal threshold was scheduled to be increased on January 1, 2020, that threshold is based upon the earnings of the lowest-paid salaried employees in the nation and is not reflective of this Commonwealth's economy. This final-form rulemaking uses a methodology that takes into account the economic realities in the Commonwealth, uses more relevant, Pennsylvania-specific data, and also utilizes that same methodology to adjust the salary threshold at regular intervals where the data supports an adjustment. It thus replaces infrequent, dramatic changes caused by sporadic rulemaking with more predictable and modest changes by maintaining the salary level at a fixed percentage of earnings to help ensure that the test continues to reflect actual wage conditions consistent with the duties of exempt employees, providing a gradual threshold adjustment between comprehensive rulemaking.

This final-form rulemaking also gradually phases in the higher salary threshold, first adopting the new Federal threshold and then incrementally adjusting to the Pennsylvania-appropriate threshold. This will allow time for employers to plan and adjust operations to determine how best to implement this final-form rulemaking based on the individual needs of the business. This final-form rulemaking need not have a detrimental impact on employers. As more fully explained herein, employers will have a range of options to choose from in implementing the new duties test and updated thresholds for their EAP employees, enabling employers to make these changes cost neutral for their operation.

Ensuring that workers are fairly compensated and paid a living wage will have an overall positive economic impact for this Commonwealth. In addition, increased competitiveness of employers in this Commonwealth to attract skilled labor, positive economic impact due to increased spending by affected workers and discretionary time returned to employees are all benefits to the Commonwealth.

This final-form rulemaking is in the public interest, is within the Department's statutory authority and is consistent with the legislative intent expressed in the act. It takes into account the concerns of the various stakeholders and will have a positive economic impact on this Commonwealth without overly onerous requirements on businesses and it is all accomplished with a clear, feasible and reasonable regulatory scheme and provisions.

Background

The EAP exemptions (otherwise known as the "white-collar exemptions") signal the General Assembly's intention to exclude bona fide EAP employees from the act's protections. The act does not define these terms. Rather,

the General Assembly specifically gave authority to the Department to define each of these exemptions through regulation.

In addition to the act, the requirement to pay employees a minimum wage and overtime is found in the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C.A. §§ 201—219). Section 13(a)(1) of the FLSA (29 U.S.C.A. § 213(a)(1)) also contains similar EAP exemptions from its minimum wage and overtime requirements. The United States Department of Labor (USDOL) also issued regulations defining these exemptions at 29 CFR 541.100—541.304.

Under both the Federal and Commonwealth regulations, there is a three-prong test that an employee must meet to be exempt from minimum wage and overtime requirements. First, the employee cannot be paid on an hourly basis; second, the employee must receive a salary at a threshold set by regulation; and third, the employee must perform specific duties set by regulations.

However, there are two significant differences between Commonwealth regulations implementing the act and USDOL's regulations implementing the FLSA, which creates a dual regulatory scheme. First, the salary thresholds for the act's EAP exemptions are much lower than the salary thresholds for the FLSA's EAP exemptions. Second, 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 lower salary threshold has essentially rendered the act inconsequential to protect employees from misclassification, because it is exceeded by the Federal threshold for virtually all employees. The FLSA applies to all employers with gross sales of at least $500,000 or who engage in interstate commerce. The term "interstate commerce" has been defined very broadly and, in fact, includes nearly every employer in this Commonwealth. In addition, the current Commonwealth regulations contain an outdated duties test and salary threshold to determine whether an EAP employee is exempt from payment of overtime for hours worked in excess of 40 per week. The current duties test for executive employees are set forth in § 231.82 (relating to executive); for administrative employees in § 231.83 (relating to administrative); and for professional employees in § 231.84 (relating to professional). The current salary thresholds range from $155 per week to $250 per week, well below the hourly minimum wage.

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 found in the Commonwealth's current regulations are not reflective of the current salaries of individuals who are EAP or professionals. The salary thresholds established in the recently superseded USDOL regulations defining the FLSA were established in 2004 and were also not reflective of the current salaries of employees serving in executive, administrative or professional capacities. Only recently, on September 27, 2019, the USDOL issued a final rule raising the FLSA's salary thresholds for exempt EAP employees to $684 per week effective January 1, 2020. See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 FR 51230 (September 27, 2019).

However, the data USDOL used to support the Federal salary threshold was based upon workers in the lowest-wage region of the country (that is, the South). Those wages are not reflective of wages paid to workers in this Commonwealth. Thus, a regulatory change is necessary to ensure that individuals who are not EAP or professionals are not improperly exempted from minimum wages and overtime under the act.

Second, the Commonwealth's regulations for the EAP exemptions contain two separate tests for employees to be exempt: the short test and the long test. Under the short test, an employee is exempt if that employee performs one specific duty listed in the regulation governing the exemption and is compensated at or above the higher salary threshold listed in that regulation. Under the long test, an employee is exempt if that employee performs all the duties found in the regulation governing the exemption and is compensated at or above the lower salary threshold listed in that regulation. This differs from the FLSA's regulations defining the EAP exemptions, which contain one standard duties test and one salary threshold for each exemption.

Third, the duties to qualify for each exemption have become outdated and need to be clarified to prevent the improper classification of employees and to be more consistent the duties for the EAP exemptions found in the FLSA's regulations defining the EAP exemptions.

The Department agrees with many commentators that 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 both the act and the FLSA. As such, the Department has made an effort to harmonize its regulations with the Federal regulations to the extent permissible and appropriate under the act.

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

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

On January 10, 2018, the Department solicited input on a draft of the proposed rulemaking from the Minimum Wage Advisory Board (Board). The Department presented its intention to revise the regulations to the Board at an open meeting and gave the Board members the ability to comment. The Board is appointed by the Secretary under section 6 of the act (43 P.S. § 333.106) to assist the Secretary to carry out the duties prescribed by the act. The Board consists of three representatives of an established, recognized association of employers (including the PA Chamber of Business and Industry (PA Chamber)) and three representatives from the general public.

In its presentation, the Department informed the Board that it was clarifying the duties tests in the regulations including replacing the short and long tests with a standard duties test. In addition, the Department notified the members that it was raising the salary threshold to qualify for the executive, administrative and professional exemptions. The Board members were provided the opportunity to comment on the Department's intention to update the regulations. Some Board members expressed approval of the intention to update the regulations, and

some members expressed concerns about such a large increase in the salary threshold. Department staff considered this feedback, and introduced a phase-in approach to raising the salary threshold over a 3-year period.

The proposed rulemaking was published at 48 Pa.B. 3731 (June 23, 2018) with a 30-day public comment period. The Department extended the public comment period for an additional 30 days, with a notice published at 48 Pa.B. 4258 (July 21, 2018). The public comment period closed on August 22, 2018.

During the public comment period, the Department received 917 unique comments from 898 commenters, including comments from the legislature. In total, the Department received 1,101 comments, some of which were submitted more than once by the same commentator. The Department also received comments from the Independent Regulatory Review Commission (IRRC).

In response to comments related to the Department's outreach efforts, the Department hosted ten roundtable meetings throughout this Commonwealth to consult with the regulated community and obtain feedback on the proposed rulemaking. The Department, together with the Pennsylvania Chamber of Commerce and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), held five sessions with businesses in this Commonwealth and local chambers of commerce, and five sessions with local labor organizations between May 20, 2019, and June 6, 2019. The agendas for these roundtable meetings provided that the goals were to educate stakeholders on the exemptions and the Department's application, and to engage stakeholders and elicit feedback. The Department specifically asked the stakeholders to discuss the impacts of the proposed rulemaking and provide recommendations for changes.

On May 20, 2019, the Department held a roundtable in Harrisburg, PA including the following participants: Keystone Research Center, Service Employees International Union (SEIU), Communications Workers of America, SEIU Healthcare and AFL-CIO.

On May 21, 2019, the Department held a roundtable in Harrisburg, PA, including the following participants: Harrisburg Regional Chamber of Commerce, the Pennsylvania Chamber of Commerce, Pennsylvania Association of Community Bankers, Army Heritage Foundation, Ned Smith Nature Center, HACC, Perfectly Pennsylvania, RETTEW, Capital Blue Cross, Greater Reading Chamber Alliance, York County Economic Alliance, Hampton Inn, Insurance Agents and Brokers, Hershey Entertainment and Resorts, Dickinson College and Pennsylvania Consortium for Liberal Arts.

On May 22, 2019, the Department held a roundtable in Erie, PA for local businesses, including the following participants: Country Fair Stores, Family House, Inc., Community Health Net, Knox McLaughlin, Erie Federal Credit Union, Community Resources for Independence, Achievement Center, North Country Brewing Company and Mercyhurst.

On May 22, 2019, the Department held another roundtable in Erie, PA for local labor organizations, including the following participants: AFL-CIO Northwest, IBEW 56, UE Local 506 (Wabtech) and UE Local 618 (Wabtech).

On May 28, 2019, the Department held a roundtable in Malvern, PA, including the following participants: Abel Brothers Towing & Automotive, Inc., East Goshen Township, Aqua, Miller's Insurance Agency, Inc., CCCBI, Endo International, Chester County Economic Development Council, Sojourn Philly, Desmond Hotel & Conference Center, Community Action Partnership, Cozen O'Connor, Exton Regional Chamber of Commerce, Post & Schell, Chester County Economic Development Council, Wawa, Inc., Gawthrop Greenwood, PC, Germantown Cricket Club, National Bank of Ethopia and West Chester University.

On May 29, 2019, the Department held a roundtable in Plymouth Meeting, PA including the following participants: Philadelphia AFL-CIO, Pathways PA, Community Legal Services, Outten & Golden, Stephan Zouras, R., Winebrake and Santillo, Berger Montague and UFCW.

On June 2, 2019, the Department held a roundtable in Pittsburgh, PA, including the following participants: USW and Mon Valley Unemployed Committee.

On June 5, 2019, the Department held another roundtable in Pittsburgh, PA, including the following participants: Allie Kiski Chamber of Commerce, Sodini & Company, African American Chamber of Commerce of Western Pennsylvania, Keep It Simple Training, Eat'N Park, SMC Business Controls, North Side/North Shore Chamber of Commerce, Priory Hospitality, HR-FamilyLinks, Duquesne, Robert Morris, Community Care Connect, MHY Family Services, Community Human Services, Standard Bank, Littler Mendelsohn and Family House.

On June 6, 2019, the Department held a roundtable in Scranton, PA for local businesses, including the following participants: Greater Scranton Chamber, Ufberg Law, Advocacy Alliance, Fidelity Bank, Commonwealth Health/Moses Taylor Hospital, Girl Scouts in the Heart of PA, Allied Services, SLHDA, UFCW Federal Credit Union, Institute for HR & Services, Needle Law, Greater Scranton Chamber and Ben Franklin Technology Partners. Also, on June 6, 2019, the Department held another roundtable for local labor organization in Scranton, Pennsylvania including the following participants: AFSCME and Labor Law Compliance.

In these roundtable sessions, businesses in this Commonwealth and local chambers of commerce commented that the proposed rulemaking's departure from the Federal rule creates confusion, especially for employers in multiple states, and that it is challenging for employers to know whether they are in compliance with Federal and State law. Businesses in this Commonwealth expressed concern about the proposed rulemaking's use of data from the Northeast census region to develop the exempt salary thresholds, arguing that Pennsylvania is the lowest wage-earning state within that region. Employers suggested that the proposed rulemaking required employers to terminate positions, cease funding health insurance and move salaried positions to hourly positions. Employers also suggested that employees will lose the flexibility in their schedules to meet "crunch times" when overtime is needed and to offset times when work is less plentiful.

Businesses in this Commonwealth commented that the increase from year 1 to year 3 is a big increase and recommended raising the wage at a slower rate. Lastly, the local chambers of commerce expressed a concern about the Commonwealth's ability to compete in the other states with lower salary thresholds. They recommend that the Department adopt a rulemaking that adopts the Federal rules and adds the exceptions.

Nonprofit organizations commented that they are not able to absorb this increase in costs or to budget for overtime. They noted that events and programs are often scheduled in the evening and that employees at nonprofit organizations do not have standard working hours. Nonprofit organizations also expressed concerns about in-

creasing costs and not knowing whether there will be an increase in government contracts that help fund their operations. They recommended that employees be exempt from overtime if they average 40 hours over a 2-week pay period.

The local labor organizations commented that the proposed rulemaking would properly compensate workers and is an integral part of raising the minimum wage. They also commented that the existing law places managerial expectations on employees at small businesses that are not actually managers. The local labor organizations recommended more public outreach on this rulemaking, noting that many employees are not aware that they are entitled to overtime and that the law contains exemptions for overtime.

The local labor organizations supported the proposed rulemaking and commented that social workers, case managers and secretaries may now be eligible for overtime and that these changes are an integral part of raising the minimum wage. They also commented that the incremental increases made this proposed rulemaking easier for the employer. These local labor organizations believed it was appropriate to use data from the Northeast census region which includes Pennsylvania. They also recommend a pay schedule for other than salaried workers, and asked the Department to consider that an employee may be employed by two employers under the same umbrella organization and, for that reason, not collect overtime.

The Department considered the comments from the local businesses, local chambers of commerce and the local labor organizations in the development of this final-form rulemaking. In particular, the Department considered how nonprofit organizations will be affected, especially those reimbursed at a formula rate by State and Federal government. As a result of these comments, the Department is considering outlining best practices for employers to allow employers to consider options to implement this final-form rulemaking. In addition, the Department will engage in outreach activities and establish educational sessions to ensure that stakeholders are informed of the EAP exemptions' new duties tests and salary threshold and the differences between State and Federal requirements. Once this final-form rulemaking is approved, the Department will hold educational sessions for all stakeholders in Harrisburg, Scranton, Pittsburgh, Altoona, Philadelphia and Erie. The Department will work with the Regional Chambers and associations to distribute fact sheets and offer assistance. The Department will ensure that those organizations have the Bureau's toll-free number and the e-mail address of a resource account created specifically for this issue so that questions will be answered timely and consistently.

Summary of Comments and Responses on the Proposed Rulemaking

The proposed rulemaking was published at 48 Pa.B. 3731. Public comments on the proposed rulemaking were accepted through August 23, 2018. The Department received comments from 898 commentators during the public comment period and IRRC. The comments were considered and are addressed in the comment and response document that accompanies this final-form rulemaking. A summary of major comments and responses is set forth as follows. The remaining comments are addressed in the comment and response document attached to this final-form rulemaking.

IRRC Comments

1. *Efforts to reach consensus*

IRRC commented that the proposed rulemaking had not achieved consensus and that the Department should engage in dialogue with individuals and representatives of those programs and employment sectors that were part of the initial Governor's Middle-Class Task Force meeting. In response, the Department engaged in an extensive public outreach campaign.

The Middle-Class Task Force held six sessions between September 29, 2017, and November 20, 2017 and engaged 74 participants who served as representatives of regional chambers, businesses, educational institutions, nonprofit groups, labor organizations and the general public. In response to IRRC's direction to engage in stakeholder outreach and engage in dialogue with representatives of the Governor's Middle-Class Task Force meetings, the Department held ten stakeholder roundtable sessions across the State between May 20, 2019, and June 6, 2019, as detailed previously. Five regional chambers hosted the business stakeholder roundtables and five labor organizations hosted the labor stakeholder roundtables. The Department invited and met with participants spanning each sector at the roundtable meetings to provide education on the current application of the EAP exemptions, explain the Department's proposed rulemaking, and listen to attendees' feedback on how the proposed rulemaking would impact their lives, businesses or organizations. The business roundtables were attended by members of the business community, educational institutions, nonprofit groups and lawyers who represent employers. The labor roundtables were attended by labor organizations, members of the general public, and attorneys who represent employees.

The purpose of the roundtables and the extensive review of comments that the Department undertook was intended to find areas of agreement between vastly opposed interests. Although it is not possible to achieve total consensus, the Department has carefully evaluated the concerns of all affected groups.

There is no dispute that the current Pennsylvania salary threshold is obsolete and needs to be updated. Although it will be superseded by a new Federal threshold to become effective on January 1, 2020, the Federal threshold of $23,660 has been in place since 2004 and was likewise obsolete. The long-term failure to adjust the salary threshold dilutes the purpose of the regulation; namely, that the duties test and salary threshold differentiate between exempt individuals performing actual, EAP duties, while lower paid white-collar workers are extended overtime protections. Such a failure demands an appropriate increase in the salary threshold.

The Department also heeded the commentators who urged the Department to await publication of the Federal rule and to more closely align with the Federal standards. As discussed at length herein, the Department has taken substantial steps to more closely align with the Federal standards, to the extent consistent with its statutory authority. As described herein, there are some Federal exemptions that the act simply does not empower the Department to adopt.

The Department has also revised its methodology, as is discussed in detail herein, based on comments regarding the use of salary and wage data information for the Northeast region of the country. Instead, it has developed its salary threshold figures for this final-form rulemaking strictly from Pennsylvania data, so that it accurately reflects economic realities in the Commonwealth.

2. *Legislative comments*

In its comment, IRRC specifically identified two legislative concerns: whether the legislative process should be used instead of the regulatory process; and whether the Department should wait for the Federal government to issue its overtime rule. IRRC also encouraged the Department to work with the standing committees and State lawmakers to address their issues as this final-form rulemaking was developed.

The Department received the following legislative comments that also suggested use of the legislative process over the regulatory process: The Honorable Senators Lisa Baker, Kim Ward, The Honorable Representative Robert Kauffman, and members of the House Labor and Industry Committee (The Honorable Representatives Ryan Mackenzie, Jesse Topper, Jim Cox, Cris Dush, Sheryl Delozier, Mark Gillen, Seth Grove, Dawn Keefer, Fred Keller, Kate Klunk, David Maloney, John McGinnis, Steven Mentzer, Eric Nelson and Jack Rader). The Department also received comments expressing a similar concern from Michael Lawson and from Gail Landis, on behalf of the Greater Reading Chamber of Commerce.

The Department also received comments supporting the Department's use of the regulatory process to increase salary thresholds and revise definitions from the following legislators: The Honorable Representative John Galloway, The Honorable Senator Christine Tartaglione and members of the House Labor and Industry Committee (The Honorable Representatives John Galloway, Leanne Krueger, Morgan Cephas, Daniel Deasy, Maria Donatucci, Jeanne McNeill, Dan Miller, Gerald Mullery, Ed Neilson, Adam Ravenstahl, and Pam Snyder).

Under section 5(a)(5) of the act, the Secretary is authorized to define and delimit employment in a bona fide "executive, administrative or professional capacity." While the Department acknowledges the legislature's ability to address such issues through the legislative process, as the law exists at this time, the Department's use of the regulatory process to increase salary thresholds, revise definitions and update the duties tests for EPA employees is squarely within the Department's statutory authority.

In response to IRRC's concern and numerous other comments asking the Department to wait for the publication of the final USDOL rulemaking, the Department postponed publication of its final-form rulemaking package until the USDOL rulemaking was published. The USDOL promulgated its final rule on September 27, 2019, at 84 FR 51230, establishing a new salary threshold for employees performing in EAP capacities effective on January 1, 2020. In USDOL's final rulemaking, USDOL updated its current salary threshold to qualify for the EAP exemptions from $455 per week to $684 per week for all employees except for employees who are not employed by the Federal government and who work in the Northern Mariana Islands, Guam, Puerto Rico, the United States Virgin Islands or American Samoa. The USDOL's final rule also updated the salary threshold for employees who are highly compensated employees, work in educational establishments and computer employees. In its final rule, the USDOL clarified that a weekly salary rate may be translated into an equivalent amount for periods longer than a week, and amended its rule to allow ten percent of the salary amount to be satisfied by the payment of nondiscretionary bonuses, incentives and commissions paid annually or more frequently instead of quarterly or more frequently.

The Department has more closely aligned this final-form rulemaking with the Federal regulations, including the new Federal rule effective on January 1, 2020. A detailed explanation of the Federal rule and the Department's efforts to align with that rule appears herein, in response IRRC's fifth comment.

The Department engaged with the legislature after the proposed regulatory package was submitted to IRRC. First, in July 2018, the Department met with staff of the Department's legislative oversight committees, which are Labor and Industry Committees of the House of Representatives and the Senate. The meeting offered an overview of and an opportunity to answer questions about the Department's proposed regulations to modernize overtime regulations. Of particular note, majority committee staff from both the House and Senate expressed concerns about the new salary threshold and questioned why exemptions and technical language were not being updated to align more with Federal regulations.

In September 2018, the House Labor and Industry Committee held a public hearing regarding the Department's proposed regulations. The Secretary of Labor and Industry and the Deputy Secretary for Safety and Labor Management Relations, who oversee the program area that administers and enforces Pennsylvania's labor laws, participated in this public hearing by offering oral and written testimony and answering questions asked by committee members. The public hearing offered a valuable opportunity to hear from a range of stakeholder groups. A significant takeaway from this public hearing was that many employers and individuals indicated a fundamental misunderstanding of eligibility and applicability of current overtime exemptions for workers. For example, some employers believe any salaried employee is automatically exempt from overtime.

Lastly, the Department received the written comments referenced previously from legislators and standing committees during the regulatory review process, which have been taken into consideration and are addressed herein.

3. *The Regulation is in the public interest*

IRRC commented that the Department should provide more detailed information for each section of this final-form regulation in the preamble and should explain why the amendments are required. The Department has done so herein on pages 38—44 of the preamble, under "Summary of Amendments."

In enacting the act, the General Assembly established the public policy direction underpinning the Department's exercise of its authority under the act:

> Employes are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employes employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employes, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of the economy. **The**

evils of unreasonable and unfair wages as they affect some employes employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employes employed therein and of the public interest of the community at large.

43 P.S. § 333.101 (emphasis added). The legislature has determined that the protection of workers from unreasonably low wages is in the public interest.

This final-form rulemaking is in the public interest because the Commonwealth's current regulation is obsolete and no longer is relevant to provide guidance to employers to properly classify employees as exempt and to protect employees from employers who improperly misclassify them as exempt. The regulation is obsolete for two reasons. First, the duties test in the current regulations is out of date and no longer aligns with the USDOL duties test as it once did. The two different duties tests prescribed by Federal and State law make it difficult for employers to accurately determine which employees are exempt from receiving overtime. Second, the salary threshold in the Department's current regulation has failed to keep pace with current wages and thus applies to very few of the salaried employees it was intended to protect. The Department's final-form rulemaking is intended to update these regulations for easier comprehension and compliance by this Commonwealth's business community, and to provide protections to certain white-collar employees consistent with the express intent of the act.

The duties and salary threshold tests in the act have not been updated since 1977. At that time, the duties and salary threshold aligned with the USDOL rules. Since 1977, the USDOL has updated the Federal regulations twice, in 2004 and in 2019, and have significantly changed both the duties and salary threshold tests for the FLSA's salary exemptions. Although the Federal salary threshold will be updated on January 1, 2020, that threshold was calculated based on salary data for the Southern region of the United States—a region with the lowest wages Nationally. The Department will initially align with the Federal threshold and take a graduated approach to achieving a threshold that is representative of the Commonwealth's economy.

Updating Pennsylvania's duties test and the salary threshold is essential to meet the intent of the overtime exemption regulation. As the Department discovered during its stakeholder outreach, both employers and employees often misunderstand this regulation. There is confusion around Pennsylvania's antiquated use of both a short and long test for EAP exemptions. Further, most individuals understand only the salary threshold portion of the regulation, and mistakenly assume that if they make over $23,660 (USDOL's current threshold until the updated USDOL regulation takes effect on January 1, 2020), they are ineligible for overtime. However, under both the Department's regulation and USDOL's regulation, the individual must make over the salary threshold and meet the duties test. The increase in the salary threshold will better align the average salaries paid for employees who perform EAP duties with those duties; aligning Pennsylvania's duties test with the Federal duties test will assist employers with compliance.

Even opponents of the proposed rulemaking acknowledge that the existing regulation is outdated and the salary thresholds are obsolete. The methodology used by the Department to arrive at a fair and realistic salary threshold and the alignment of the duties test with the Federal regulation is in the public interest.

4. *Economic or fiscal impacts of the regulation; protection of the public health, safety and welfare*

IRRC commented that the Department should explain the reasonableness of the proposed salary thresholds in light of the fact that the National average for salary increases has been about 3% and that, even with the 3-year phase in, the Department's proposed salary increase is significant. IRRC summarized a number of the public comments, which are addressed more fully in the attached comment and response document that accompanies this final-form rulemaking. IRRC's comment expressed concern with the cost of compliance for nonprofit and educational institutions, as well as local governments. It asked the Department to consult with the regulated community to "gain a thorough understanding of the fiscal impacts of this proposal."

As set forth in detail herein, the Department consulted at length with the regulated community in an effort to understand concerns and to appreciate the impact of the regulation on both businesses and employees. As a result of that outreach, the Department has revised its methodology to take into account concerns with the geographic reach of the data set selected. As previously outlined, the revised salary threshold in the final-form rulemaking is based on Pennsylvania Occupation Employment Statistics data. This data better reflects economic realities in Pennsylvania and has, in fact, resulted in a salary threshold that is more than $2,000 lower than the salary level the Department proposed last year.

Business response to the salary threshold will vary depending on the characteristics of the business's operations, current staffing structure and current scheduling practices. Each affected employer must consider the regulation, including both the duties test and the salary threshold, and consider if they will adjust operations to make the regulation cost neutral, or if they wish to maintain several options for operations, including requiring employees to work beyond 40 hours per week, and therefore respond to the regulation in a way that may increase payroll costs. To adjust for this final-form rulemaking, employers may pursue one or a combination of options: pay nonexempt employees overtime; limit nonexempt employee hours to 40 hours a week to avoid overtime costs; allow for some overtime but reduce base pay or benefits; or raise nonexempt employee salaries above the threshold.

The Department estimates the total direct cost to the regulated community in this Commonwealth to comply with this regulation to be an average of $78.42 per employer per year across the current and next 5 fiscal years:

FY 2019-2020 Total Employer Cost: $6,961,025

FY 2020-2021 Total Employer Cost: $14,315,133—$14,734,347

FY 2021-2022 Total Employer Cost: $21,954,959—$23,508,359

FY 2022-2023 Total Employer Cost: $28,058,135—$30,394,558

FY 2023-2024 Total Employer Cost: $28,636,918—$31,041,393

FY 2024-2025 Total Employer Cost: $28,636,918—$31,041,393

This takes into consideration that all employers in the State will review the new regulation and that some will recognize that they are exempt from the regulation due to being certain municipal, public or limited types of nonprofit employers. It also considers that, given that the salary threshold will be phased in to $45,500 over 2 years, the number of newly nonexempt workers in the first year will be lower than the number of newly nonexempt workers upon full implementation.

In addition to the fiscal and economic impact on the business community, there will be a fiscal and economic impact for affected workers and for communities in this Commonwealth. Approximately 82,000 EAP workers Statewide will benefit from these updated regulations by January 1, 2022. Depending on how their employer reacts to these regulations, these individuals and their families could benefit from increased income or improved quality of work/family balance, or both.

FY 2020-2021: $3,565,467—$3,984,681 in increased worker wages

FY 2021-2022: $13,211,856—$14,765,256 in increased worker wages

FY 2022-2023: $19,871,561—$22,207,985 in increased worker wages

FY 2023-2024: $20,450,344—$22,854,819 in increased worker wages

FY 2024-2025: $20,450,344—$22,854,819 in increased worker wages

These additional wages to workers create "induced spending" in the community; this is consumer spending on retail establishments, restaurants and other goods and services. Estimated induced spending is as follows:

FY 2020-2021 Economic Impact: $1,957,441—$2,187,590 in induced spending

FY 2021-2022 Economic Impact: $7,253,309—$8,106,125 in induced spending

FY 2022-2023 Economic Impact: $10,909,487—$12,192,184 in induced spending

FY 2023-2024 Economic Impact: $11,227,239—$12,547,296 in induced spending

FY 2024-2025 Economic Impact: $11,227,239—$12,547,296 in induced spending

Finally, additional wages and induced spending creates an increase in tax revenue for State and local governments. Estimated additional tax revenues are as follows:

FY 2020-2021: $181,839—$203,219 in State and local tax revenues

FY 2021-2022: $673,805—$753,028 in State and local tax revenues

FY 2022-2023: $1,013,450—$1,132,607 in State and local tax revenues

FY 2023-2024: $1,042,968—$1,165,596 in State and local tax revenues

FY 2024-2025: $1,042,968—$1,165,596 in State and local tax revenues

5. *Clarity, feasibility and reasonableness; possible conflict with or duplication of statutes or existing regulations*

IRRC commented that the proposed rulemaking did not fully align with Federal regulations. IRRC pointed out that exemptions exist in Federal regulations for highly compensated employees, outside sales, certain computer employees, business owners and employees of educational establishments and reiterated the concern that omission of these provisions will contribute to inconsistencies and complicate compliance.

As an initial matter, "the FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees." *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 8 A.3d 866, 883 (2010). In *Bayada*, the Pennsylvania Supreme Court noted that other courts confronting related issues have held that the FLSA does not prohibit state regulation of wages and overtime if the state's standards are more beneficial to workers. Id. at 883 (citing *Pettis Moving Co., Inc. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986) ("Section 218(a) of the FLSA explicitly permits states to set more stringent overtime provisions than the FLSA.")). See also *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012) (FLSA's saving clause evinces a clear intent to preserve rather than supplant state law and undermines any suggestion that Congress intended to occupy the field of wage and hour regulation).

Thus while the FLSA's purpose is to establish a National floor under which wage protections cannot drop, the FLSA does not supersede a state's minimum wage laws, require that states adopt minimum wage and overtime standards at levels established in the FLSA, nor prohibit a state's provision of more stringent protections.

Computer employee exemption

The Department cannot create a computer exemption because that exemption does not exist in the act. While the FLSA specifically exempts "any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker" and defines the relevant duties and compensation rate, see 29 U.S.C.A. § 213(a)(17), this exemption does not exist anywhere in the act. The Department cannot add an entirely different category of exempt employee through regulation where the legislature has not so provided. *See, e.g. Nationwide Mut. Ins. Co. v. Foster*, 580 A.2d 436, 442 (Pa. Cmwlth. 1990) (agencies cannot add substantive terms to statutes which do not exist in the statute).

Other exemptions

The Department's current regulations implementing the act contain an exemption for outside sales but do not contain exemptions for highly compensated employees, business owners and employees of educational establishments. Moreover, the Department's proposed rulemaking did not address updating or creating these exemptions and, due to that lack of notice, the Department received no comments from labor organizations regarding whether the outside sales exemption should be updated, or a new exemption created. As such, it would be more appropriate to address these issues in a future rulemaking where the Department can conduct outreach and receive input from all interested parties.

Other commentators recommended that the Department mirror Federal law and adopt an 8/80 rule for the health care industry. For the Department to adopt this rule, the Department would need to amend § 231.42 (relating to workweek), which implements the act and defines the term "workweek" as a period of 7 consecutive work days. This amendment also would be better addressed in a future rulemaking to provide all interested parties an opportunity to review and comment on any proposed changes.

Other commentators noted the absence of a concurrent duties test and key definitions such as primary duty and

salary basis. While the Department has more closely aligned its regulations with Federal regulations, the Department has not adopted all Federal definitions. However, the Department does look to Federal law for guidance for interpreting its regulations. The Department will continue to review Federal regulations and may address any additional inconsistencies in future rulemakings.

Federal overtime rule

IRRC observed that many commentators, including members of the legislature, noted that the USDOL was in the process of promulgating a Federal overtime rule. Specifically, that comment was submitted by the Honorable Representative Robert Kauffman, the Honorable Senator Kim Ward, members of the House State Government Committee (The Honorable Representatives Daryl Metcalfe, Matt Dowling, Cris Dush, Seth Grove, Kristin Hill, Jerry Knowles, Brett Miller, Brad Roae, Frank Ryan, Rick Saccone, Tommy Sankey, Craig Staats, Justin Walsh, Judy Ward, and Jeff Wheeland), members of the House Labor and Industry Committee (Honorable Representatives Ryan Mackenzie, Jesse Topper, Jim Cox, Cris Dush, Sheryl Delozier, Mark Gillen, Seth Grove, Dawn Keefer, Fred Keller, Kate Klunk, David Maloney, John McGinnis, Steven Mentzer, Eric Nelson and Jack Rader), suggesting that the Department should await the USDOL rulemaking process. There were also a number of public comments to that effect, which are addressed more fully in the attached comment and response document that accompanies this final-form rulemaking.

In fact, the Department heeded the suggestion that it await the final USDOL rulemaking. The USDOL promulgated its final rule on September 27, 2019, at 84 FR 51230, establishing a new salary threshold for employees performing in EAP capacities effective on January 1, 2020. In USDOL's final rulemaking, USDOL updated its current salary threshold to qualify for the EAP exemptions from $455 per week to $684 per week for all employees except for employees who are not employed by the Federal government and who work in United States territories. The USDOL's final rule also updated the salary threshold for employees who are highly compensated employees, work in educational establishments and computer employees. In its final rule, the USDOL clarified that a weekly salary rate may be translated into an equivalent amount for periods longer than a week, and amended its rule to allow 10% of the salary amount to be satisfied by the payment of nondiscretionary bonuses, incentives and commissions paid annually or more frequently instead of quarterly or more frequently.

After reviewing the USDOL's final rulemaking, in its final regulations, the Department adjusted its initial salary threshold to $684 per week and amended the language allowing the payment of quarterly bonuses to allow the payment of yearly bonuses. The Department's final regulations will also let employers decide whether to use a calendar year, fiscal year or anniversary of hire year for calculating and paying bonuses.

Applicability

IRRC commented on the concerns of public employers. IRRC noted the comments from public employers, which are addressed more fully in the attached comment and response document that accompanies this final-form rulemaking, that public employers would incur compliance costs. As explained as follows, the Department's overtime regulations have been and continue to be inapplicable to public employers, including State-affiliated entities, counties, municipalities and public-school systems. This final-form rulemaking does nothing to change that status. Instead, the FLSA, which expressly includes state-related entities within its definition of covered employers, establishes the rules applicable to public employers.

Section 3(g) of the act (43 P.S. § 333.103(g)) defines the term "employer" as "any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employe." The term specifically omits public employers. The omission of public employers from the act's definition of "employer" indicates the intent of the General Assembly to exclude public employers from coverage under the act. Neither courts nor agencies can add requirements to a statute by interpretation. See, *e.g., Kegerise v. Delgrande*, 183 A.3d 997, 1005 (Pa. 2018) (courts "must not add, by interpretation, a requirement not included by the legislature"); *Shapiro v. State Bd. of Accountancy*, 856 A.2d 864, 877 (Pa. Cmwlth. 2004) (court may not insert a word the legislature failed to supply into a statute). In construing the Wage Payment and Collection Law (43 P.S. §§ 260.1—260.13), the Commonwealth Court held that it "must give effect to the legislature's intent as it was expressed in the language of the statute and cannot supply an omission in a statute where it appears that the matter has been intentionally omitted. Municipal corporations such as the Borough are not included within the definition of "employer," and we, as an appellate court, cannot expand the definition of "employer" to include them." *Huffman v. Borough of Millvale*, 591 A.2d 1137, 1138-39 (Pa. Cmwlth. 1991). Likewise, an agency cannot supply a term that appears to have been intentionally omitted from a statute through an interpretative rule. See, *e.g., Nationwide Mut. Ins. Co. v. Foster*, 580 A.2d 436, 442 (Pa. Cmwlth. 1990) (agencies cannot add terms to statutes which do not exist in the statute).

Although no Pennsylvania court has specifically addressed whether the act applies to public employers, in 1976 the Attorney General opined that the act does not apply to public employees. Office of Attorney General, Official Opinion No. 76-29, Applicability of Minimum Wage Act to Public Employes, 1 Pa. D.&C. 33 (Pa. A.G.), 1976 WL 401515 (October 18, 1976). The Attorney General traced the parallel development of the definition of "employer" in the act and the FLSA. The Attorney General noted that the FLSA was amended on April 8, 1974, P.L. 93-259, 88 Stat. 62 to specifically include public agencies within the definition of "employer" in 29 U.S.C.A. § 203(d), and to remove the exemption previously afforded the States and their political subdivisions. Since 1974, the FLSA has defined "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency," 29 U.S.C.A. § 203(d), and provided a definition of "employee" applicable to individuals employed by a public agency which generally includes "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." 29 U.S.C.A. § 203(e)(2)(C).

The General Assembly has amended the act five times since the FLSA was amended to include public entities within the definition of "employer" in 1974, but has not altered the definition of "employer" to include public entities. The General Assembly's clear intention by its omission was not to extend coverage under the act to public employers. Accordingly, because the General Assembly has chosen not to include the Commonwealth or any of its political subdivisions in the act's definition of

employer, the Department has properly interpreted the act to exclude them. This exemption is longstanding and it appears, from the relatively small number of comments, that most public employers understood that the proposed rulemaking would not apply to them.

IRRC suggested that the Department explicitly identify the types of employers which are exempt from the requirements of the act and, thus, the Department's regulations implementing the act.

The following employers are exempt from the act under section 5(a)(4) by virtue of their omission from the text of the act: Commonwealth agencies, counties, cities, boroughs, townships, state-related schools, Penn State University, public schools, conservation districts and port authorities. Additionally, there is a specific exemption in the act for weekly, semiweekly or daily newspapers with a circulation of less than 4,000, the major part of which circulation is within the county where published or counties contiguous thereto. There is also a specific exemption in the act under section 5(a)(9) for public amusement or recreational establishments, organized camps, or religious or nonprofit educational conference centers, if they do not operate for more than 7 months in any calendar year, or if during the preceding calendar year, their average receipts for any 6 months of such year were not more than 33 1/3% of its average receipts for the other 6 months of the year. The Department is also constitutionally precluded from enforcing the act against Federal entities. "Of course, under fundamental tenets of our Republic the Commonwealth of Pennsylvania has no power to make the Federal government subject to any of its laws and regulations." *Hughes v. WCAB* (*Salem Transp. Co., Inc.*), 513 A.2d 576, 578 (Pa. Cmwlth. 1986).

6. *Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors*

IRRC next commented that the Department should explain how the implementation schedule provides sufficient time for compliance and for employers to make necessary adjustments to business practices, as well as a communication strategy. IRRC noted a comment from the Honorable Representative John Galloway that suggested that the Department consider delaying the initial implementation for a period of time to allow notification to employers.

Because the Department waited for the publication of the Federal regulation, and aligned the threshold for the first year with the Federal threshold which becomes effective on January 1, 2020, this final-form rulemaking has little impact until January 1, 2021. The regulated community is already on notice of the increased Federal threshold and will have a year before the first of two graduated steps to bring the exempt salary threshold to the level warranted by Pennsylvania-specific data becomes effective.

The Department will engage in outreach activities and establish educational sessions to ensure that stakeholders are informed of the EAP exemptions' new duties tests and salary threshold and provide clarity on the differences between State and Federal requirements. Following approval of this final-form rulemaking, the Department plans to hold educational sessions for all stakeholders in Harrisburg, Scranton, Pittsburgh, Altoona, Philadelphia and Erie. In addition, the Department will work with the State and Regional Chambers and associations to distribute fact sheets and offer assistance. The Department will ensure that those organizations have the Bureau's toll-free number and the e-mail address of a resource account created specifically for this issue so that questions will be answered timely and consistently.

7. *Whether regulation is supported by acceptable data; reasonableness of requirements, implementation procedures and timetables for compliance; statutory authority; whether the regulation represents a policy decision of such a substantial nature that it requires legislative review*

Salary threshold phase-in

Many commenters expressed concern about the salary threshold's large increase from phase in through final amount, thereby potentially creating many newly nonexempt workers. IRRC pointed to commenters' statements that the average salary increases each year at 3%. However, the Department notes that the salary threshold has not increased for 15 years and on the State level for 42 years. The increase from the phase in amount to final amount is intended to compensate for the lack of appropriate updates to the salary threshold for many years.

Further, the Department's proposed increase aligns with or is less than salary threshold increases in previous State and Federal rulemakings. The Department has heeded the comments of the employer community that it cannot accommodate sharp increases to the salary threshold, and will therefore establish a Pennsylvania-specific salary threshold over 3 years and implement an automatic review and escalation mechanism every 3 years to avoid sharply increasing the salary threshold in the future.

Year	*Weekly Salary Threshold*	*% Increase from Previous Threshold*
1975 (previous rulemaking in 1970)	Short Test: $250 Long-Test for Exec & Admin: $155 Long-Test for Prof: $170	Short Test: 25% increase Long Test, E&A: 24% increase Long Test, Prof: 21% increase
2004 USDOL	$455 ($23,660 annually)	82% increase from Long Test 192% increase from Executive/Administrative Test 168% increase from Short Test
2020 USDOL	$684 ($35,568 annually)	50% from 2004
2021 PAL&I	$780 ($40,560 annually)	14% from 2020 USDOL
2022 PAL&I	$875 ($45,500 annually)	12% from PAL&I 2021

Since the proposed rulemaking was published, the Federal government has issued a rule establishing a new salary threshold for EAP employees. The Department has aligned the State threshold for the first year with the Federal threshold that will become effective on January 1, 2020. Therefore, there is no impact to employers from the Pennsylvania-specific salary threshold until January 1, 2021, when the incremental increase in the threshold would diverge from the Federal threshold. Therefore, employers will have time to prepare and adjust, and the Department will undertake a communication and educational campaign, described previously, to ensure that employers are aware of the changes and their obligations under this regulation.

Automatic Review and Adjustment Mechanism

This final-form rulemaking also includes a mechanism to automatically review and adjust the exempt salary threshold every 3 years where the data establishes that it is necessary to prevent an erosion of its effectiveness. "Experience has shown that fixed earning thresholds become substantially less effective over time. Additionally, lengthy delays between updates necessitate disruptively large increases when overdue updates finally occur." See USDOL Wage and Hour Division Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemptions for Executive, Administrative and Professional Employees (September 2019). This has been the experience in this Commonwealth where the salary threshold has eroded over the passage of 15 years during which no adjustment was made for economic growth or inflation, resulting in an artificially low threshold that allows employees working in EAP capacities to be designated as exempt and required to work often excessive overtime hours without additional compensation. In addition to the misalignment of the exempt salary level and EAP duties, sporadic large increases lead to the employer community having to play "catch up" each time the salary threshold is increased. Several commenters noted that difficulty of attempting to level-set wages in a 3-year period after so many years of regulatory inaction.

This final-form rulemaking will provide a mechanism to review and adjust the salary threshold every 3 years using the same Pennsylvania-specific data-set and methodology used to establish the Pennsylvania salary level for Year 3 of the 3-year phase-in period ($875/week or $45,500 annual pay). This is a change from the proposed rulemaking which proposed to use data based on the 30th percentile of weekly earnings of full-time nonhourly workers in the Northeast region. As previously noted, the Department agreed with commenters that the Northeast region, which includes Pennsylvania wages at the low end of high-wage eastern seaboard cities, was not the appropriate measure for the Commonwealth. Instead, this final-form rulemaking provides for a triennial adjustment of the salary threshold—based on the 10th percentile of wages in the exempt occupations in this Commonwealth based on the data. The triennial salary level adjustment would be reviewed by the Board and published in the *Pennsylvania Bulletin* at least 30 days in advance of the effective date, giving the employer community adequate time to adjust to the smaller, more predictable salary level adjustments In times of economic downturn, when wages are not expected to rise, it is unlikely that the then-current data will support an increase to the salary threshold.

The Department has the statutory authority to promulgate the automatic adjustment mechanism of the regulations. Courts in the Commonwealth have long recognized the power of an administrative agency to administer a statutorily-mandated program and under the act, has expressly delegated authority to the Department to "define and delimit" the EAP terms in section 5(a) of the act, and left it to the Department's discretion how to do so. This is the same broad delegation of authority underpinning the Department's use of a salary threshold as a characteristic to define the EAP exemption in 1977, the exercise of which authority has never been challenged in Pennsylvania. The Department has made other significant changes to the way the act is implemented under the same broad authority to define the EAP categories by deleting the long and short tests in the EAP exemptions, by allowing bonuses to count towards the salary amount and by aligning the duties more closely with the Federal regulation.

Under the automatic adjustment mechanism, salary level changes will occur at regular, 3-year intervals using the same methodology and data used to establish the original Pennsylvania-specific salary threshold. This mechanism will benefit employers and employees by replacing infrequent, and this more drastic salary level changes with gradual changes occurring at predictable intervals. The automatic adjustment mechanism was part of the Department's proposed rulemaking which established a salary threshold that adequately distinguishes between who may meet the duties requirements of the EAP exemptions and those who likely do not. The automatic review and adjustment provision merely recalculates this salary threshold every 3 years using current data and the same methodology used to establish the initial Pennsylvania EAP salary threshold. Because the methodology and dataset remain the same, the automatic adjustment mechanism merely keeps the salary threshold accurate considering changing salary levels in the Pennsylvania workplace. It does not change the duties test, salary level test or the methodology used to calculate the salary

The Department has considered the input and feedback of the regulated community in establishing the new Pennsylvania salary threshold. The automatic adjustment provision does not change the salary level test set in the Department's final regulations and which requires that exempt employees be paid a salary equal to at least the weighted average 10th percentile of wages for exempt occupations in Pennsylvania. The weighting reflects the relative number of individuals employed in the particular exempt occupations. Using the automatic adjustment provision does not substantively change the salary level test or duties test, but merely adjusts the salary threshold based on current data in the same dataset used to establish the Pennsylvania-specific salary level established in this final-form rulemaking. Thus, the automatic adjustment provision is not a new rulemaking. The standard and process for calculating the adjustment is being set in this final-form rulemaking. It is merely a mechanism to preserve the accuracy and continuing effectiveness of the salary level test. The triennial adjustment mechanism, which will be based on current data, will ensure that the salary test continues to reflect the same salary threshold based on the weighted average 10th percentile of wages for exempt occupations in this Commonwealth.

As the effectiveness of the salary threshold erodes over time, workers may be mistakenly misclassified as exempt solely based on salary alone and not in concert with the duties test. Thus, when the salary threshold is again adjusted in a regulatory update, employers are faced with a situation in which a large number of previously ex-

empted employees may now be nonexempt, either due to initial misclassification or due to the salary threshold being updated to reflect wages being paid to employees in the current labor market.

The Department has therefore indexed the adjustment of the salary threshold to the weighted average 10th percentile wage of all exempt workers in Pennsylvania and will update the salary threshold in 2023 and then every 3 years thereafter.

The automatic review and adjustment mechanism allows the regulation to be carried out as intended: there would be few instances of an employee being exempt prior to a regulatory update and subject to overtime upon update due to a large increase in the salary threshold to reflect current wages. Periodic small adjustments to the salary threshold allow the salary threshold to continue to meet the intent of the regulation without causing upheaval to the employer community.

Federal district court litigation over 2016 Federal rulemaking

IRRC asked how the Department's rulemaking differs from a Federal regulation that was rejected by a district court in Texas on the grounds that the salary level was so high that it rendered the duties test for the EAP exemptions irrelevant and whether the Department considered another methodology. As explained herein, the Department has revised its methodology in its final-form rulemaking and that methodology differs significantly from that used in the Texas case.

In May 2016, the USDOL published a regulation which raised the minimum salary level for exempt employees under the FLSA from $455 per week to $913 per week. The new salary level was based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the United States (the South), and also created an automatic updating mechanism that adjusts the minimum salary level every 3 years starting in 2020.

In response, the State of Nevada and 20 other states sued the USDOL challenging the overtime regulation. The parties challenging the Federal regulation asserted that revisions to the minimum salary threshold exceeded USDOL's authority under section 213(a)(1) and was inconsistent with the intent of the FLSA because the regulation increased the minimum salary threshold to so high a level that it was no longer a plausible proxy for the job duties of an executive, administrative, or professional capacity employee. The USDOL countered that the regulation is within its delegated authority because section 213(a)(1) explicitly grants authority to the Department to define and delimit the terms "bona fide executive, administrative, or professional capacity," and, therefore, the court should defer to the USDOL's interpretation of the statute.

The Federal district court held the USDOL regulation implementing a salary increase to the FLSA's exemptions invalid. *Nevada v. United States Dep't of Labor*, 275 F.Supp.3d 795 (E.D. Texas 2017). The Federal district court noted that the USDOL has the authority to implement a salary threshold to identify those persons serving in EAP capacities and thus exempt from overtime pay, because the salary threshold serves as a defining characteristic when determining who, in good faith, performs actual EAP duties. The Federal district court determined, however, that because the regulation more than doubled the previous minimum salary level, making overtime status depend predominately on a minimum salary level, and thereby supplanting an analysis of an employee's job duties. The court noted that entire categories of previously exempt employees who perform "bona fide executive, administrative, or professional capacity" duties would now qualify for the exemption based on salary alone. The court held that because the FLSA unambiguously indicated Congress's intent that employees doing "bona fide executive, administrative, or professional capacity" duties to be exempt from overtime pay, the USDOL exceeded its authority by using a salary-level test that effectively eliminates the duties-focused test prescribed under the FLSA.

The Federal district court decision is neither precedential nor is particularly applicable to the Department's final-form rulemaking because of significant factual dissimilarities between the 2016 USDOL final rule and the Department's final regulations. The final regulations implementing the act differ in material respects from the 2016 Federal regulation, including the methodology, which relies upon Pennsylvania-specific data regarding exempt employees, and resulting exempt salary thresholds that are reflective of the existing Commonwealth workforce of exempt employees.

More specifically, the Department's regulation differs from the 2016 USDOL regulation invalidated by the Texas Federal district court in the at least three significant ways.

First, the Department's increase is smaller than the 2016 USDOL rule and is phased in over 2 years rather than immediately effective. In the *Nevada* case, the Federal district court based its decision that USDOL's regulation violated the FLSA in part on the fact that USDOL immediately doubled the salary threshold, from $455 to $913 per week, which in the court's view effectively eliminated the test based on the employee's duties. Under the Department's regulation, the salary level immediately resets to $684, to be consistent with the salary threshold set in the USDOL's new rule, which becomes effective on January 1, 2020. The Pennsylvania-specific salary threshold gradually rises to the Year 2 intermediate salary threshold of $780 (a 14% increase of the salary level effective on January 1, 2020) and in the following year to the Year 3 salary threshold of $875 (a 12% increase over the Year 2 salary level). This gradual phase-in avoids what was perceived to be a disruptively large increase.

Second, unlike the USDOL's 2016 rulemaking, which focused exclusively on the salary level of exempt employees in the EAP categories, the increase in the salary threshold is part of the larger effort to update the EAP definitions to make the more relevant in the modern marketplace and more consistent with the Federal exemptions. The Department's final-form rulemaking also updates the duties test to qualify for the EAP exemption, including eliminating the long and short tests, establishing that the duties remain the focus of the exempt analysis. The Department's comprehensive overhaul of the Commonwealth's EAP regulations undercuts the notion that the salary threshold is intended to be or will be determinative of an employee's status, in disregard of an analysis of the employee's job duties. In *Nevada*, the court noted that the USDOL's 2016 rulemaking stated that white collar employees earning less than $913 per week would be eligible for overtime "irrespective of their job duties and responsibilities." 275 F.Supp.3d at 806 (quoting 81 FR 32391, 32405 (May 23, 2016)). In this final-form rulemaking, the Department both modernized its definitions and developed a salary threshold that is consistent

with EAP duties, calculated using the data of exempt employees in this Commonwealth.

Third, the Department used a different methodology to calculate the salary threshold than the USDOL used in 2016 to calculate its salary threshold. Pennsylvania's EAP salary threshold has failed to keep pace with the rising nominal salaries of exempt salaried workers, and no longer protects most EAP workers intended by this regulation to receive minimum wage and overtime pay. The salary threshold has not been updated since 1977 and is currently $8,060 per year for executive and administrative employees under the long test. For Professional employees the salary threshold is $8,840 per year for the long test. For all the EAP exemptions, the annual salary threshold is $13,000 per year for the short test. The purpose of the salary threshold is such that nonexempt workers should be unlikely to make more than the threshold, and exempt workers should be unlikely to make less than the threshold. Today in this Commonwealth, the average yearly salary of individuals in exempt occupations is $82,480. As such, the current salary thresholds are irrelevant because virtually all white-collar workers make a higher salary than the salary threshold. This final-form rulemaking sets the salary threshold for all EAP exemptions at the weighted average of 10th percentile exempt wages (the Department's methodology for determining salary threshold) and would be $45,500 per year. This will act as a real threshold to ensure that salaried workers are properly classified as exempt.

Moreover, the decision of the Texas Federal district court is inherently flawed. The standard imposed by the court in that case created a standard that would invalidate nearly any regulation that relied on a salary threshold. An examination of the decision shows that the judge not only misunderstood the operation of the rule at issue, he based his decision on the fact that the regulation gave new overtime protections to workers whose jobs had not changed. The decision ignored the fact that the 2004 amendment to the Federal rule similarly extended overtime protections to workers whose jobs had not changed, as does the new USDOL rule, which estimates that 1.2 million workers who would otherwise be exempt under the current salary level will qualify for overtime based on the change in the salary threshold alone. See 84 FR 51238. There is no precedent for deciding that a rule is invalid based solely on its impact.

The Federal district court in Nevada did not analyze the legal validity of the automatic adjustment provision in the 2016 USDOL rulemaking, instead finding that because the salary level set in the rulemaking was invalid, so too was the automatic adjustment of that salary level.

Basis for salary increase in final regulations

There was a split in commentary from legislators who believed that the salary threshold increase proposed in the Department's proposed rulemaking was sufficiently high as to be inconsistent with the definitions of the EAP duties, and others who did not.

The Honorable Representative Robert Kauffman conceded the need to update the salary threshold but commented that the Department's proposed rulemaking increased it so significantly that the exemptions were more heavily dependent on a salary test than a duties test. The Honorable Senator Kim Ward likewise conceded that the salary thresholds should be updated, but that the proposed increase exceeded a reasonable level and, in some cases, would make the duties test irrelevant. The Honorable Senator Lisa Baker commented that the regulations would be subject to legal challenge.

However, some legislative comments were supportive of the salary threshold. The Honorable Representative John Galloway noted the severe need for improvements to minimum wage and overtime rules and estimated that when fully enacted, the threshold would expand overtime protection to 455,000 Pennsylvanians. The Honorable Senator Christine Tartaglione commented that the National mandatory overtime threshold of $23,660 is too low and results in someone who makes $11.38 per hour not qualifying for mandatory overtime pay. The members of the House Labor and Industry Committee (the Honorable Representatives John Galloway, Leanne Krueger, Morgan Cephas, Daniel Deasy, Maria Donatucci, Jeanne McNeill, Dan Miller, Gerald Mullery, Ed Neilson, Adam Ravenstahl and Pam Snyder) also supported the threshold to provide "meaningful and tangible wage protections for low-wage and middle-class workers."

IRRC requested that the Department explain the reasonableness of the final option pursued and how its methodology differs from the USDOL's methodology in deriving the exempt salary level in the now-superseded 2016 Federal rulemaking. After carefully considering the public comments and the feedback that the Department received from its roundtable discussions, the Department adjusted the methodology and dataset that it used to arrive at its salary level.

Feedback provided to the Department was also sharply split. The Department reviewed more than 1,000 public comments and hosted ten stakeholder roundtables across the State. Businesses overwhelmingly stated that $47,892 is too high for the salary threshold, and workers, labor organizations, and others stated that $47,892 is adequate or is too low.

In conjunction with its review of these comments, the Department re-examined the intent of the General Assembly in exempting EAP employees from the minimum wage and salary provisions of the act, and the purpose of the salary level test, which serves as a defining characteristic when determining who, in good faith, performs EAP duties. Defining characteristics of the current overtime exemptions are as follows:

- The individual must be paid a salary, versus an hourly wage; and

- The individual is employed in an EAP capacity—under the respective duties tests; and

- The individual must be compensated at a salary basis of a certain amount—the salary threshold (not less than $250 a week per Pennsylvania's current regulation; in current practice $455 a week as per the USDOL Fair Labor Standards Act update in 2004).

Duties Test

Regarding the duties test, the Department is in agreement with many commentators that Pennsylvania's duties test should align with the Federal regulations. The Commonwealth's current regulations align with the Federal law as it existed in 1977, which included the long and short duties test. At the time, Federal regulations included a long test with a more restrictive duties test and a lower salary threshold, and a short test with a less stringent duties requirements and a higher salary threshold. In 2004 the duties test was simplified to reflect the less stringent duties in the short test and eliminated the long test.

The duties test in the Department's proposed rulemaking still differed from the USDOL duties test. In this final-form rulemaking, the Department has mirrored the general duties test set forth in the Federal regulations, acknowledging that consistently-expressed concern of employers that the discrepancies between the Commonwealth's regulations and USDOL regulations make it difficult for employers to know if they are in compliance with the duties test. Aligning the duties test more closely to the Federal duties will provide increased clarity to both employers and employees as to who is and is not an exempt employee.

Salary Threshold

Regarding the salary threshold, the Department believes that the threshold should be set at an amount that allows the Department to enforce the intent of the act exemptions: that individuals performing actual executive, administrative or professional duties are exempt, while lower-paid white-collar workers are extended overtime protections.

The Department considered the salary thresholds that USDOL set in its previous rulemakings. Historically, USDOL examined data on actual wages paid to exempt employees, and then set the salary level at an amount slightly lower than might be indicated by data. In 1940 and 1949, USDOL looked at the average salary paid to the lowest level of exempt employee. In 1949, the USDOL created the new short test, which differed from the initial duties test, now the long test. The most significant difference between the short test and long test was that the long test limited the amount of time an exempt employee could spend on nonexempt duties, while the short test did not include a specific limit on nonexempt work. 69 FR 22122, 22165 (April 23, 2004).

Beginning in 1958, USDOL set salary levels for the long test to exclude approximately the lowest-paid 10% of exempt salaried employees.

> The salary tests have thus been set for the country as a whole. . .with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States. Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the "bona fide" executive, administrative, and professional employees without disqualifying any substantial number of such employees.

Id. at 22166. Throughout the regulatory history of USDOL using both a short and long test, the short test threshold was significantly higher than the long test threshold (see table as follows).

Year	*Executive*	*Administrative*	*Professional*	*Short Test*
1938	$30	$30	None	None
1940	$30	$50	$50	None
1949	$55	$75	$75	$100
1958	$80	$95	$95	$125
1963	$100	$100	$115	$150
1970	$125	$125	$140	$200
1975	$155	$155	$170	$250

Id. at 22165.

However, in 2004, USDOL departed from this methodology in its final rulemaking, streamlining the long and short duties test into a single test, as well as moving from the previous salary threshold methodology to the use of the 20th percentile of all salaried employees in the South. Id. at 22167.

USDOL justified this departure from previous methodology in two ways. First, USDOL stated that the change in salary threshold methodology was due to the change from the short and long test structure. Second, USDOL stated that "this adjustment (from use of exempt workers to all salaried workers) achieved much the same purpose as restricting the analysis to a lower percentage of exempt employees. Assuming that employees earning a lower salary are more likely nonexempt, both approaches are capable of reaching exactly the same endpoint." 69 FR 22167.

This logic underpinning the USDOL's 2004 change in methodology was flawed for two significant reasons. First, the 10th percentile of exempt workers was the method traditionally used for the long test, and as per information from previous rulemakings, the long test threshold was historically set significantly lower than the short test threshold. Therefore, when eliminating the two different tests and moving to one standard test, it would have been reasonable and logical for the USDOL to have sought a salary threshold that was more inclusive of lower-salaried workers, rather than "reaching exactly the same endpoint." Second, the setting of the salary threshold "at the lower end of the range of salaries" for exempt occupations cannot be accurately carried out if the data used to determine a lower range includes data on all salaries—exempt or otherwise. Further, exempt occupations, especially the "executive" category, employ fewer people than nonexempt occupations, as nonmanagement employees generally outnumber management employees in most establishments. Therefore, including data on all salaried employees will "water down" the dataset, providing a skewed "lower end of the range of salaries" than would be provided by considering only data on exempt occupations.

This flawed analysis was the basis for the recent Federal rulemaking that established $684 per week as the salary threshold to qualify for the EAP exemptions. However, the purpose of setting a salary threshold is to assist the Department in identifying employees that the General Assembly intended to be exempt. The use of salary data of employees who work in nonexempt job classifications does not align to this purpose.

For the Department to fulfill the intent of the General Assembly in enacting the overtime exemption into law, the Department chose a methodology for determining the salary threshold that differs from the USDOL's methodology in two distinct ways. First, the Department used data

based on exempt full-time workers, rather than the USDOL's methodology of using data based on all full-time workers. Second, the Department used wage information that is specific to Pennsylvania to determine the salary threshold, rather than the USDOL's methodology of setting the threshold using the 20th percentile of workers in the Nation's lowest wage region. The USDOL's use of income percentile in the lowest wage region is intended to ensure that the Federal salary threshold is useable in every area of the Nation—that is, that the threshold, even if used in the lowest wage areas of the country, would be highly unlikely to include actual EAP employees.

Pennsylvania's Methodology

In response to public comment, the Department changed the methodology in this final-form rulemaking from the methodology used in the proposed rulemaking. In the proposed rulemaking, the Department set the salary threshold at 30% of all salaried workers in the Northeast Region. Commentators accurately pointed out that this data included wage data from high income areas such as New York City, Boston and other northeast metropolitan areas. In consideration of this concern, the Department revised the methodology to limit the calculation of the salary threshold to Pennsylvania-specific data.

The Department's labor market information bureau, the Center for Workforce Information and Analysis (CWIA), reviewed more than 800 Standard Occupational Classification (SOC) titles and determined that 300 SOC titles have job duties that reasonably fall into the exempt EAP categories, while 500 were deemed to be potentially nonexempt. Using Pennsylvania's Occupational Employment Statistics data for 2018, the most recent year for which this data is available, CWIA identified the employment volume and 10th percentile wage for each exempt occupation. The 10th percentile wage for each occupation was multiplied by total employment in the same occupation to create a weighted 10th percentile wage for each exempt occupation. CWIA then aggregated total employment across all exempt occupations, aggregated the weighted 10th percentile wages for total weighted 10th percentile wage across all exempt occupations, and divided the aggregated weighted 10th percentile wage by aggregated employment to determine the average 10th percentile wage of all exempt workers, which is $45,500.

To set its final salary three-step implementation process, the Department raised its initial salary threshold to $684 per week which is consistent with USDOL's newly issued salary level. That salary threshold will be effective as of the date of publication in the *Pennsylvania Bulletin*. The Department dropped its proposed salary threshold of $921 per week to the final $875 per week, which will be effective 2 years after publication of the initial salary threshold in the *Pennsylvania Bulletin*. The Department's intermediate or second step increase is now $780 per week, which is halfway between the initial salary threshold and the final salary threshold and is effective 1 year from publication of the initial salary threshold in the *Pennsylvania Bulletin*: $684 on date of publication, $780 one year after publication, $875 two years after publication.

Whether this regulation represents a policy decision of such a substantial nature that it should receive legislative review

IRRC again commented that the Department should clarify to what extent it has engaged the legislature in developing the regulation. As previously noted, the Department engaged with the legislature after the proposed regulatory package was submitted to IRRC.

First, in July 2018, the Department met with staff of the Department's legislative oversight committees, which are Labor and Industry Committees of the House of Representatives and Senate. The meeting offered an overview of and an opportunity to answer questions about the Department's proposed regulations to modernize overtime regulations. Of particular note, majority committee staff from both the House and Senate expressed concerns about the new salary threshold and questioned why exemptions and technical language were not being updated to align more with Federal regulations.

Secondly, in September 2018, the House Labor and Industry Committee held a public hearing on the topic of the Department's proposed regulations. The Secretary of Labor and Industry and the Deputy Secretary for Safety and Labor Management Relations, which oversees the program area that administers and enforces labor laws in this Commonwealth, participated in this public hearing by offering oral and written testimony and answering questions asked by committee members. Moreover, the public hearing offered a valuable opportunity to hear from a range of stakeholder groups. A significant takeaway from this public hearing was that many employers and individuals indicated a fundamental misunderstanding of eligibility and applicability of overtime exemptions for workers. Lastly, the Department received written comments from legislators and standing committees during the regulatory review process, which have been taken into consideration and are addressed herein.

The Department's authority to adopt regulations defining and delimiting the EAP exemptions of the act is clear. The General Assembly has already made a basic policy decision and indicated, in enacting section 1 of the act, that it intended to protect employees from "unreasonably low" wages that were "not fairly commensurate with the value of the services rendered." The General Assembly has also specifically directed the Department to define the EAP exemptions by regulation. Section 5(a) of the act, provides that "[e]mployment in the following classifications shall be exempt from both the minimum wage and overtime provisions of this act: (5) In a bona fide executive, administrative, or professional capacity. . .(as such terms are defined and delimited from time to time by regulations of the secretary)." Therefore, this final-form rulemaking is not required to be the subject of legislation.

Inclusion of bonus pay

IRRC next commented on the inclusion of bonus pay. It cited a public comment submitted by Anna Caporuscio on behalf of Sheetz, Inc., which noted the burden on employers of making quarterly adjustments for every exempt employee for which a nondiscretionary bonus, incentive or commission is used to satisfy the salary threshold. IRRC requested that the Department explain its determination that 10% was an appropriate cap for bonus pay and provide its rationale for establishing a percentage cap as part of the salary level test.

In the proposed rulemaking, the Department proposed to allow up to 10% of the salary threshold to be satisfied by nondiscretionary bonuses, incentives, and commissions, paid quarterly or more frequently. In this final-form rulemaking, the Department's proposal regarding the percentage of the salary threshold remains at 10%; however, this final-form rulemaking states that the payment may be an annual payment. The Department selected a 10% cap for bonus pay to align with the

Federal regulation. This is also reflective of business operations without creating an undue hardship on employees.

The intent of the Department in allowing a certain percentage of salary to be payable by bonus or other incentive payment was meant to reflect the way that certain industries, business models, or occupations, or both, structure their compensation package to employees, while at the same time not creating an undue hardship on employees, especially lower-salaried employees. For instance, an individual making $36,000 a year would have a gross weekly salary of $692; allowing 10% of that salary to be paid in a lump sum reduces weekly salary to $623, a reduction of $276 a month. For lower-income workers, any reduction in wages results in hardship.

While the Department believes that requiring bonuses to be paid on at least a quarterly basis is the most beneficial to employees, it has also taken into consideration comments from employers that this creates an unnecessary administrative burden and may not take into account certain sales occupations that rely on "busy seasons" for a majority of earnings. As such, the Department's final-form rulemaking provides that bonuses may now count towards the salary threshold if they are paid on an annual basis. This is consistent with USDOL's September 2019 final rule.

8. *Clarity, feasibility and reasonableness; possible conflict with or duplication of statutes or existing regulation*

IRRC commented that the existing regulations use the phrase "customarily and regularly" to describe the discretion and independent judgment that an individual working in an administrative capacity must possess to qualify for an exemption from the overtime rule and noted that this phrase does not appear in the Federal regulation. See § 231.83(a)(2). IRRC indicated that several commentators expressed concern that the Department did not amend this provision in its proposed rulemaking. One commentator who expressed this concern applauded the Department's efforts to align the duties test with the Federal regulations. After reviewing these comments and considering IRRC's recommendation, the Department has removed this language from its final-form rulemaking and replaced it with language that mirrors the language in the USDOL's regulation defining the administrative exemption. See 29 CFR 541.200 (relating to general rule for administrative employees).

9. *Miscellaneous*

IRRC commented regarding the use of the term "handicapped worker" in § 231.1 (relating to definitions). IRRC urged the Department to update the term to "worker with a disability." The Department agrees with IRRC that this term is an outdated term that should be updated. The Department also made appropriate amendments in § 231.71—231.74.

Additional legislative comments

In addition to the comments that were referenced or adopted by IRRC, there were other comments from State lawmakers that are addressed as follows.

The Honorable Representative Robert Kauffman commented that the proposed salary thresholds are so high that they reduce the importance of the duties test. The Honorable Senator Kim Ward, while conceding that the salary threshold should be updated, expressed that the duties of the individual should be the main deciding factor.

This final-form rulemaking does not inappropriately reduce the importance of the duties test. The duties test is not, as some commentators suggested, rendered irrelevant. In fact, as discussed previously, the Department acknowledges the importance of a duties test by amending its regulations to more closely align with the Federal duties test.

The Honorable Representative Kauffman also expressed concern that the ability of the Commonwealth and counties to provide cost-effective health care and human services will be impaired by imposing these requirements on provider agencies. However, the General Assembly has already made a basic policy decision and indicated, in enacting section 1 of the act, that it intended to protect employees from "unreasonably low" wages that were "not fairly commensurate with the value of the services rendered." That employees being paid a fair wage for their work may result in some minimal cost increases is not a reason to reject this final-form rulemaking. In fact, employers have a range of options to respond to the possibility of small cost increases occasioned by this final-form rulemaking. Business response to the regulation will vary depending on the characteristics of the business's operations, current staffing structure and current scheduling practices. To adjust for this final-form rulemaking, employers may pursue one or a combination of several options:

- Pay nonexempt employees' overtime;
- Limit nonexempt employee hours to 40 hours a week to avoid overtime costs;
- Allow for some overtime but reducing base pay or benefits;
- Raise nonexempt employee salaries to above the threshold.

There has been a Federal minimum wage since 1938 and business have found more efficient ways to operate. They can hire additional employees to supplement the work of nonexempt employees, cap employees' hours to avoid the extra cost of overtime and switch employees from a salary basis to an hourly basis without having to change duties. Employers will have the flexibility to determine what approach works best for them. But the fact that an employer provides human services should not give them the right to pay an unreasonably low wage to its workers, particularly at a level that makes their employees eligible for public assistance benefits. The General Assembly determined, in not exempting nonprofits from the act, that employees of nonprofit organizations, just like their counterparts in for-profit enterprises, are entitled to a fair wage. If that were not the case, it would be increasingly difficult for nonprofits to recruit and retain employees.

The Honorable Senator Kim Ward, along with other public commentators, raised the Federal district court decision in Texas that invalidated the USDOL's 2016 Federal regulation which promulgated a salary threshold under the FLSA for EAP employees. The public commentators that echoed this concern are listed and addressed in the comment and response document that accompanies this final-form regulation. In fact, this final-form rulemaking is distinguishable from the Federal regulation at issue in the Texas case.

The Department's final-form rulemaking differs from the rule struck down by the Texas Federal district court in a number of material ways. The Department's increase is smaller than the 2016 USDOL rulemaking and is phased in over 2 years rather than immediately effective.

The Department's final-form rulemaking is a comprehensive update that also updates the duties test to qualify for the EAP exemption to align more closely with USDOL regulations. This includes eliminating the long and short tests. Most significantly, the Department used a different methodology to calculate the salary threshold than the Federal government used to calculate its salary threshold, using Pennsylvania-specific data for exempt workers rather than a Nationwide lowest common denominator based on the region of the United States with lowest wages.

Additionally, the decision of the Texas Federal district court is inherently flawed. The standard imposed by the court in that case created a standard that would invalidate nearly any regulation that relied on a salary threshold. An examination of the decision shows that the judge not only misunderstood the operation of the rule at issue, he based his decision on the fact that fact that the regulation gave new overtime protections to workers whose jobs had not changed. The decision ignored the fact that the 2004 amendment to the Federal rule similarly extended overtime protections to workers whose jobs had not changed. There is no precedent for deciding that a rule is invalid based solely on its impact.

The Honorable Senator Ward also questions whether increasing the threshold will result in less flexibility for employees. There is nothing in this final-form rulemaking that would prohibit employers from offering employees flexibility of hours. Employers can choose to provide flexible shifts to employees previously classified as exempt. The only difference would be that employers would be required to make sure employees understand that they cannot work past 40 hours per week or pay overtime when it is necessary for employees to work more than 40 hours per week. Employers opting to provide less flexibility to employees may find themselves at a competitive disadvantage in attracting and retaining employees.

The Honorable Senator Ward further commented that she was concerned with the impact to nonprofit organizations, as well as local and State government. As explained previously, local and State governments are excluded from coverage under the act and therefore this final-form rulemaking does not increase labor costs for public sector employers. State and local governments would not be required to raise taxes or cut programs due to higher labor costs. The Department has no authority to exempt nonprofits from the scope of the act, as that basic policy decision has already been made by the General Assembly by not exempting them from the act's definition in section 3(g) for "employer." Employees of nonprofits should enjoy the same right to a fair wage as other employees. And as discussed herein, employers will have a range of options to achieve compliance. They will not automatically be required to increase labor costs.

Members of the House State Government Committee (the Honorable Representatives Daryl Metcalfe, Matt Dowling, Cris Dush, Seth Grove, Kristin Hill, Jerry Knowles, Brett Miller, Brad Roae, Frank Ryan, Rick Saccone, Tommy Sankey, Craig Staats, Justin Walsh, Judy Ward and Jeff Wheeland) expressed concern that the final-form rulemaking will require employers to engage in additional timekeeping and other recordkeeping to comply. In fact, employers are already obligated to keep such records. Section 8 of the act (43 P.S. § 333.108) specifically directs that employers keep "a true and accurate record of the hours worked by each employee and the wages paid to each." The act does not require that such records be kept only for hourly employees. There should be no impact on recordkeeping requirements, as those requirements already exist.

The Honorable Senator Lisa Baker urged the Department to support legislation that she has proposed rather than promulgate regulations. However, the bill proposed by the Honorable Senator Baker, which was significantly different from the Department's proposed rulemaking, did not move out of committee last session and, although it has been reintroduced, it remains in committee. The Honorable Senator Baker indicated in her comments that she sought closer alignment with the Federal regulations. As discussed in detail previously, this final-form rulemaking represents significantly closer alignment with the Federal regulations.

The Department also received comments supportive of the proposed rulemaking from a number of legislators. The Honorable Representative John Galloway noted that the rulemaking was consistent with the intent of the act and would benefit workers and communities in this Commonwealth. He noted that wages have been stagnant, despite low unemployment and increased demand for labor and that wealth disparities between upper-income, lower-income and middle-income families have been increasing.

The Honorable Senator Christine Tartaglione expressed her "ardent" support for the proposed regulations, pointing out that in the mid-1970s, more than 60% of salaried workers qualified for overtime, but that currently, the ratio is less than 1 in 10. She stated that approval of the regulations would benefit not only workers but the economy, as workers are also consumers and fair pay increases spending power.

Members of the House Labor and Industry Committee (the Honorable Representatives John Galloway, Leanne Krueger, Morgan Cephas, Daniel Deasy, Maria Donatucci, Jeanne McNeill, Dan Miller, Gerald Mullery, Ed Neilson, Adam Ravenstahl and Pam Snyder) expressed support for the proposed rulemaking, noting that simplifying the duties test would facilitate compliance and reduce inquiries. They also noted that modernizing the salary threshold would provide meaningful and tangible wage protections for low-wage and middle-class workers.

Other significant public comments

The Department received a large number of public comments, which were fairly divided. Public comments were considered and, due to the volume, are addressed in the comment and response document that accompanies this final-form rulemaking. However, some of the common comments are addressed here.

Geographic considerations

A number of commentators expressed concern over the use of the 30th percentile of weekly earnings for full-time salaried employees in the Northeast. As discussed at length herein, the Department has revised its methodology to use Pennsylvania-specific data. However, there were also comments that expressed concern over the differences between urban and rural areas within the State. Several commentators asserted that an increase to the salary threshold would impact rural areas disproportionately.

County-level data demonstrates that the exempt salary threshold of $45,500 is below most other county's median household income, including those in high-population and rural areas. Counties with some of the State's most significant populations—Allegheny, Dauphin, Erie, Lackawanna, Lancaster and Lehigh—have median household

income levels of 6% to 35% above $45,500. Only Philadelphia had a median household income that was lower (-11%). Counties with some of the State's sparsest populations in rural areas—Elk, Fulton and Mercer—have median household income levels of 4% to 10% above the proposed overtime threshold.

Furthermore, when drilling down to the average annual occupational wages by county, certain occupations, regardless of county, will be lower or higher than the proposed overtime threshold. Occupations that we expect to be the most impacted by the proposed overtime threshold by volume alone include management, business and financial operations, and office and administrative support.

The average annual wage for management; business and financial operations; construction and extraction; and installation, maintenance, and repair occupations was generally significantly higher than $45,500 across the State, including rural areas. For example, average wage levels for the management occupation, included those in rural regions that were above 45% (Cameron), 140% (Fulton), 127% (Elk), 83% (Forest), 147% (Fayette) and 144% (Mercer). Occupations under the office and administrative support; sales and related; production; and transportation and material moving categories typically had lower average wages than the proposed overtime threshold. Other categories, such as Community and Social Services were more mixed, depending on the county.

Employee morale/flexibility

Commentators expressed that implementation of this final-form rulemaking would be bad for employee morale, stating that it would cause organizations to shift employees from salaried to hourly, would require workers to punch a clock and track hours, and that employee flexibility would be reduced.

However, organizations have several ways in which to become compliant with this final-form rulemaking. The shift from salary to hourly is entirely an organizational decision.

Several commentators stated the loss of flexibility is bad for worker morale. Examples included that exempt workers can currently work longer hours on certain days to work fewer hours on other days, allowing them to attend their children's extracurricular activities or attend appointments. Commentators asserted that this flexibility would end once an employee becomes nonexempt and must be paid overtime for hours worked over 40. However, the regulation specifies only the number of hours that may be worked in a week before overtime must be paid; each organization still has flexibility as to how and when an employee fulfills their 40-hour workweek.

This comment seems to assume that employees must have a set schedule or that they must be on the employer's premises. The act does not contain any such restrictions. This final-form rulemaking will not prevent employers from providing flexibility to their employees. An employee that needs to be out of the office for a couple of hours on a Monday can be given the option to make up the hours on other days, or to work from home that evening. There is no requirement that employees be forced to punch a time clock.

Likewise, there is no requirement that employees be converted to hourly positions. Even if an employer chooses to convert an employee to an hourly position, any concerns about morale should be offset by the fact that the employee will be paid fairly for hours worked.

Some businesses stated that capping employee hours at 40 does not allow an employee to pursue advancement opportunities. However, by promoting employees into low-paying managerial jobs, but then taking advantage of exempt status and forcing unpaid overtime, workers are trapped in a position where they have very little time to independently improve their economic situation by pursuing education goals or working a second job to supplement income while "working their way up the ladder." Indeed, these workers become beholden to their current employer, with minimal time outside of work to pursue other opportunities. They must hope that their hard work at their current employer is noticed and that internal advancement is available, as that is the only feasible way they will improve their current situation.

The fact is, regardless of how an employer chooses to comply, workers will benefit from this final-form rulemaking. Perhaps this is the reason that the Department received no comments from or on behalf of workers raising these concerns. Some employees will have their salary raised above the threshold, so that they continue to be exempt. Some employees will become hourly and will begin being compensated for hours worked in excess of 40 hours per week. Other employees will no longer be required to work in excess of 40 hours per week without compensation. Employers that take the step of reducing wages will have difficulty retaining their employees, especially given a tight labor market.

Impact on small business

A number of commentators opined that the proposed rulemaking would be detrimental to the interests of small businesses in this Commonwealth. These comments do not recognize the flexibility that employers will have in determining how to implement this final-form rulemaking.

Affected businesses will likely adapt to the regulation in the least costly way possible. Business response to the regulation will vary depending on the characteristics of the business's operations, current staffing structure and current scheduling practices. Each affected employer must consider the regulation, including both the duties test and the salary threshold, and consider if they will adjust operations to make the regulation cost neutral, or if they wish to maintain several options for operations, including requiring employees to work beyond 40 hours a week, and therefore respond to the regulation in a way that may increase payroll costs.

To adjust for this final-form rulemaking, employers may pursue one or a combination of several options:

- Pay nonexempt employees overtime;
- Limit nonexempt employee hours to 40 hours a week to avoid overtime costs;
- Allow for some overtime but reducing base pay or benefits;
- Raise nonexempt employee salaries to above the threshold.

The Department estimates the total direct cost to the regulated community in this Commonwealth to comply with this regulation to be an average of $78.42 per employer per year across the current and next 5 fiscal years:

FY 2019-2020 Total Employer Cost: $6,961,025

FY 2020-2021 Total Employer Cost: $ 14,315,133—$14,734,347

FY 2021-2022 Total Employer Cost: $ 21,954,959—$23,508,239

FY 2022-2023 Total Employer Cost: $ 28,058,135—$30,394,558

FY 2023-2024 Total Employer Cost: $ 28,636,918—$31,041,393

FY 2024-2025 Total Employer Cost: $ 28,636,918—$31,041,393

This takes into consideration that all employers in the State will review the new regulation and that some will then realize they are exempt from the regulation due to being certain municipal, public or limited nonprofit employers. It also considers that, given that the salary threshold will be phased in to $45,500 over time, the number of newly nonexempt workers will be lower initially than the number of newly nonexempt workers upon full implementation of the new salary threshold. Again, costs to employers will depend not only on if the employee is exempt and if the employer has any nonexempt workers currently on staff, but how the employer chooses to respond to the regulation.

Comments in favor of rulemaking

The Department also received comments supportive of the proposed rulemaking. In addition to the comments that are more fully addressed in the comment and response document that accompanies this final-form rulemaking, the Department received extensive comments from the following entities.

Community Legal Services, Inc (CLS) submitted both extensive legal and policy comments on behalf of their low wage clients in support of the Department's proposed rulemaking for amending and clarifying the overtime exemptions for EAP employees under the act. CLS also submitted a separate comment in support of the proposed rulemaking on behalf of itself as a nonprofit employer.

CLS explained that it supports the proposed changes because they would update the salary threshold to reflect current wage levels and keep pace with the cost of living in this Commonwealth and clarify the duties test to reduce misclassification and unnecessary litigation that are a burden on both employers and employees. Moreover, CLS noted that the regulation complies with the Regulatory Review Act since the Department has the authority to make the proposed changes, it aligns with the intent of the act and the proposal will be a net gain to the Commonwealth providing a positive effect on public health and welfare and clarity and reasonableness to existing regulations. CLS commented that the proposed rulemaking would benefit over 37,000 workers in Philadelphia alone and reduce costly litigation, for business, especially small business, by making the overtime regulations less complex and vague and more straightforward and precise.

The Women's Law Project (WLP) pointed out that clarifying the definition of EAP employees and "raising the minimum salary to reflect current wage levels" would mean that the number of misclassified workers would decrease, and that employers would find it much more difficult to improperly "get around" the overtime requirements and "workers on the lower end of the wage spectrum are paid correctly." WLP explained that "employers who do not want to pay overtime will simply choose to hire more people to work extra hours that are currently worked for free."

The Pennsylvania AFL-CIO submitted comments in support of the proposed rulemaking, commenting that the proposed regulations, which would clarify the definition of EAP employees and raise the minimum salary to reflect current wage levels, are long overdue after 40 years and would make it difficult for employers to misclassify employees to get around the overtime requirements. In the end, the AFL-CIO noted that the regulations would provide much needed relief to workers who have fallen behind the cost of living but at the same time, even with the necessary changes, would not impose much of a hardship on employers since 465,000 workers who currently fall into the EAP exemption would still remain exempt from overtime under proposed regulation.

The Philadelphia Unemployment Project (PUP), a nonprofit employer, submitted comments strongly supporting the Department's proposed changes to the overtime regulations. PUP viewed the overtime regulations as one way to provide workers with a much-needed increase in wages while employers remain reluctant to raise wages despite generous corporate tax cuts, tight labor markets and a robust economic expansion. More significantly, PUP stated that "as a small non-profit," it is "willing to live with these increases on overtime pay" for its staff and urged adoption of these regulations.

Pennsylvania Council of Churches (PCofC), a nonprofit entity, submitted comments in support of the Department's regulation regarding EAP salaried worker exemptions noting that the prior regulation has been in place since 1977 and "has not kept pace with the cost of living and housing in Pennsylvania, or with the realities of our workplace." PCofC viewed the proposed rulemaking as effectively addressing the fundamental question of worker fairness.

The International Brotherhood of Electrical Workers (IBEW) commented that employers have constantly taken advantage of the 40-year-old obsolete regulations to misclassify workers and pay sub-standard wages. IBEW goes on to note that by updating the regulations, as proposed by the Department, employers would be discouraged from misclassifying workers and job classifications and as a result, numerous Pennsylvania workers would benefit by bringing them overtime protection and additional income which would multiply into benefits throughout the Commonwealth.

The National Employment Law Project (NELP), submitted extensive comments in support of the Department's proposed rulemaking. NELP noted that the Department's proposed regulation defining EAP exemptions reinforces and advances the purposes of the act's overtime provisions and the bright-line salary test creates an effective, efficient and predictable means to define and delimit the EAP exemptions. NELP commented that the Department's salary threshold proposal is within the low range for today's labor market and its proposal for indexing the salary threshold is sound since it is a fair, predictable and efficient way to ensure that the scope of exemptions continues to keep pace with the act's intended reach. NELP supported the proposed rulemaking because it is in the public interest, complies with the agency's statutory authority and legislative intent, and will have a positive economic impact on the Commonwealth, which NELP noted is all accomplished with a clear, feasible and reasonable regulatory provisions.

Summary of Amendments

In response to IRRC's comment asking for a more detailed explanation as to why amendments are needed and why they are in the public interest, the Department provides the following explanations regarding its amendments.

Many of the Department's amendments are based upon the Department's stated goal of more closely aligning the

duties test with Federal regulations. The Department recognizes that discrepancies between the Commonwealth's regulations and Federal regulations make it difficult for employers to know if they are in compliance with the duties test. This was expressed by businesses during the ten roundtable discussions the Department organized in Spring of 2019 and in various formal comments submitted. Commentators suggest, and the Department agrees that aligning the duties test more closely to the Federal duties test will provide increased clarity to both employers and employees as to who is and is not an exempt employee, reduce misclassification, will decrease litigation arising from misclassification issues.

§ 231.1 Definitions

In the proposed rulemaking, the Department amended § 231.1 to add a definition of "general operation." The Department proposed this definition to align with the Federal regulations. See 29 CFR 541.201(b) (relating to directly related to management or general business operations). As suggested by IRRC and many commentators, adopting definitions that align with Federal regulations will assist the Department, employers and employees in properly and consistently determining whether employees are exempt under the administrative exemption. In this final-form rulemaking, the Department removes the term "general operation" from the definitional section and adds it to § 231.83 since that term exclusively applies to the section. In addition, the Department revises the term "general operation" to "directly related to management or general business operations" so that the term is consistent with Federal regulatory language. Changing the definitional term does not substantively impact the definition or the application of the definition. Further, the Legislative Reference Bureau (LRB) edited the definition to conform with the *Pennsylvania Code & Bulletin Style Manual*. However, the Department has determined that to the extent practicable, mirroring the Federal regulatory language is of the utmost importance to limit confusion and create consistency. Therefore, the Department includes the following amendments in this final-form rulemaking: at the beginning of the definition, the addition of the phrase, "To include, but is not limited to;" replaced the commas with semi-colons; and used lower case for the term "internet." The Department also amended the proposed definition by deleting the phrase "and similar activities," which is located at the end of the definition. The Department deletes this phrase because it is redundant given the inclusion of the language "includes but is not limited to" within the definition of "directly related to management or general business operations." As such, the Department added the word "and" before "legal and regulatory compliance" since that is now the last item in the list of duties. The amendments in this final-form rulemaking do not substantively impact the definition of directly related to general business operations or the application of the definition.

The Department also proposed adding a definition for the term "management." The Department proposed adding this definition to align with the Federal regulations. See 29 CFR 541.102 (relating to management). As suggested by IRRC and many commentators, adopting definitions that align with Federal regulations will assist the Department, employers, and employees in properly and consistently determining whether employees are exempt. In this final-form rulemaking, the Department removes the term "management" from the definitional section and adds it to § 231.82 since that term exclusively applies to the section. In addition, the Department amended the proposed definition by deleting the phrase "and similar activities," which is located at the end of the definition. The Department deletes this phrase because it is not a phrase used in the Federal definition. The Department also amends this final-form rulemaking to add the phrase, "to include, but is not limited to," which the LRB deleted. The Department amends the regulation in this way to mirror the Federal regulatory language. The Department submits that the phrase "including, but is not limited to" might be construed as being broader than "and similar activities." The Department makes a minor grammatical edit to conform to the Federal regulation by adding a comma in the phrase, "interviewing, selecting, and training of employees." The Department also changes the word "and" to "or" in the phrase "providing for the safety and security of the employees or the property" to mirror the Federal regulatory definition of management. Id.

The Department adds a definition for "Minimum Wage Advisory Board" to add clarity given the reference to the Board at §§ 231.82(4), 231.83(3) and 231.84(2).

The Department removes the defined term "Handicapped Worker" and replaces it with the defined term "Worker with a disability" at the suggestion of IRRC and to update outdated language. While the defined term has changed, the substance of the definition remains the same. The Department further made this terminology change in §§ 231.71, 231.72, 231.73 and 231.74.

§ 231.82 Executive

Duties test

In the proposed rulemaking, the Department amended § 231.82(1) by replacing the phrase "consists of" with "is." The Department proposed this amendment to improve the readability of the section. Additionally, the definition in the proposed rulemaking is the verbatim language from the Federal regulation. See 29 CFR 541.100 (relating to general rule for executive employees). Therefore, consistent with the Department's overall goal to align its regulations with Federal regulations where practicable, the Department's final-form rulemaking includes this amendment. As noted earlier, the Department creates new subparagraph (1)(i) to define the term "management."

The Department proposed deleting § 231.82(5) in the proposed rulemaking. Section 231.82(5) includes different wage requirements for individuals whose primary duties are executive and individuals who spend up to 20% performing nonexecutive duties. This duty requirement is inconsistent with Federal regulations with regard to executive employees. See 29 CFR 541.100. The Department's final-form rulemaking includes this amendment to align with the correlating Federal regulation.

The Department received numerous comments supporting the Department's efforts to more closely align with correlating Federal regulations, but commentators underscored the importance of amending other inconsistencies to align with Federal regulations. In response to this concern, the Department reviewed the Executive exemption to determine if it should make other amendments to further align the Department's regulations to the correlating Federal regulation. The Department therefore includes in its final-form amendment changes to § 231.82(3) which adds a comma after "hiring," deletes the word "or" before firing; adds a comma after the word "firing"; deletes the phrase "and as to the" before "advancement"; deletes the word "and" before "promotion"; and replaces the phrase "will be" with "are." These changes mirror the language in Federal regulation.

In addition, the Department includes in its final-form rulemaking the deletion of § 231.82(4), which includes a requirement that the individual "customarily and regularly exercises discretionary powers." In deleting this provision, the Department aligns the executive duties test with the correlating Federal regulations. The Department does not believe the deletion of this provision will have a substantive impact on the implementation of the executive exemption because the concept of customarily and regularly exercising discretionary powers is captured in the definition of management as adopted in this final-form rulemaking.

As a result of the deletion of paragraph (4) of § 231.82, the Department renumbers paragraph (5) to paragraph (4) and paragraph (6) to paragraph (5).

§ 231.83 Administrative

Duties test

In the proposed rulemaking, the Department amended § 231.83(1) by replacing the phrase "consists of" with "is." The Department proposed this amendment to improve the readability of the section. Additionally, the definition in the proposed rulemaking is the verbatim language from the Federal regulation. See 29 CFR 541.200. Therefore, consistent with the Department's overall goal to align its regulations with Federal regulations where practicable, the Department's final-form rulemaking includes this amendment to align with the correlating Federal regulation. In this final-form rulemaking at § 231.83(1), the Department also amends the term from "general operation" to "directly related to management or general business operations" to align with the terminology used in Federal regulations. See 29 CFR 541.201. As noted earlier, the Department creates a new subparagraph 231.83(1)(i) to define the term "directly related to management or general business operations."

In the proposed rulemaking, the Department amended § 231.83(2) by including the phrase, "with respect to matters of significance." The Department proposed this amendment to clarify that administrative personnel must regularly exercise judgment and discretion in matters of significance and to also align with the Federal regulations. See 29 CFR 541.200(a)(3). The phrase "with respect to matters of significance" is the verbatim language from the Federal regulation. Id. Consistent with the Department's overall goal to more closely align with Federal regulations, the Department makes one further amendment in this final-form rulemaking. The Department amends § 231.82(2) to mirror the Federal regulatory language in 29 CFR 541.200(a)(3) by replacing "who customarily and regularly exercises" with "whose primary duty includes the exercise of" discretion and independent judgment with respect of matters of significance. This change will provide greater clarity to employers that employees are not exempt under the administrative exemption unless they have the ability to exercise discretion on important matters.

In the proposed rulemaking, the Department deleted § 231.83(3) to ensure that employees who only assist other executives and administrative personnel or who only perform work requiring specialized training, experience or knowledge or who only perform specialized tasks or assignments are no longer classified as exempt. The Department deleted § 231.83(4), which contains wage requirements for individuals whose primary duties are administrative and individuals who spend up to 20% performing nonadministrative duties. These amendments were adopted in the proposed rulemaking to align the Commonwealth's regulation with Federal regulations at 29 CFR 541.200. The Department includes these amendments in its final-form rulemaking to align with the correlating Federal regulation. Aligning the regulatory language with the correlating Federal regulation will provide employers in this Commonwealth with only one duties test to determine whether an employee is exempt from the minimum wage and overtime under the administrative exemption.

§ 231.84 Professional

Duties test

In the proposed rulemaking, the Department amended § 231.84(1) by replacing the phrase "consists of" with "is." The Department proposed this amendment to improve the readability of the section. Additionally, the definition in the proposed rulemaking is the verbatim language from the Federal regulation. See 29 CFR 541.300 (relating to general rule for professional employees). The Department also made minor clarifications in the proposed rulemaking to conform to proper regulatory style under the *Pennsylvania Code & Bulletin Style Manual*. Therefore, consistent with the Department's overall goal to align its regulations with Federal regulations where practicable, the Department's final-form rulemaking includes the proposed amendments to align with the correlating Federal regulation.

In addition, the Department replaces the language "the performance of work that is original and creative in character in a recognized field of artistic endeavor" with "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." This language mirrors the language in the Federal regulation.

In the proposed rulemaking, the Department deleted § 231.84(4), which contains wage requirements for individuals whose primary duties are professional and individuals who spend up to 20% performing nonprofessional duties. This amendment was proposed in the proposed rulemaking to align the Commonwealth's regulation with Federal regulations at 29 CFR 541.300. The Department includes this amendment in this final-form rulemaking to align with the correlating Federal regulation. Aligning the regulatory language with the correlating Federal regulation will provide employers in this Commonwealth with only one duties test to determine whether an employee is exempt from the minimum wage and overtime under the professional exemption.

In the final-form rulemaking, the Department deletes § 231.84(2) and (3). These changes align the Department's final-form regulation with the correlating Federal regulation. Aligning the regulatory language with the correlating Federal regulation will provide employers in this Commonwealth with only one duties test to determine whether an employee is exempt from the minimum wage and overtime under the professional exemption.

As a result of the deletion of paragraphs (2) and (3) of § 231.84, the Department renumbers paragraph (4) to paragraph (2) and paragraph (5) to paragraph (3).

Short and Long Duties Tests and Salary Threshold for Executive, Administrative and Professional Exemptions

The Commonwealth's existing regulations align with the Federal law as it existed in 1977, which included the long and short duties test. See §§ 231.82(6) (renumbered in this final-form rulemaking as § 231.82(4)), 231.83(5) (renumbered in this final-form rulemaking as § 231.83(3)) and 231.84(5) (renumbered in this final-form rulemaking as § 231.84(3)). The long test includes a more

restrictive duties test and a lower salary threshold, and the short test includes a less stringent duties requirements and a higher salary threshold. Id.

In 2004, Federal regulations eliminated the short and long duties test and adopted less stringent duties in the short test. See 69 FR 22122. However, the Department did not make a change to its regulations. As such, the discrepancies between the Department's regulations and USDOL's regulations make it difficult for employers in this Commonwealth to know if white-collar salaried employees are entitled to receive overtime. This was expressed by businesses during the ten roundtable discussions the Department organized in Spring 2019 and in various formal comments submitted. Aligning the duties test in this final-form rulemaking to the duties test in the Federal regulations will eliminate this burden, making it easier for employers to comply with the law and for employees to know if they should be classified as an exempt or nonexempt EAP employee. Accordingly, the Department's proposed amendments eliminated the long duties test found in §§ 231.82(6) (renumbered in this final-form rulemaking as 231.82(4)) and 231.83(5) (renumbered in this final-form rulemaking as 231.83(3)) and 231.84(5) (renumbered in this final-form rulemaking as 231.84(2)). The Department includes this amendment in this final-form rulemaking to align with the correlating Federal regulation.

In the proposed rulemaking, at §§ 231.82(5)(i)—(iv) (renumbered in this final-form rulemaking as 231.82(4)(i)—(iv)); 231.83(3)(i)—(iv) (renumbered in this final-form rulemaking as 231.83(3)(i)—(iv)); and 231.84(4)(i)—(iv) (renumbered in this final-form rulemaking as 231.84(2)(i)—(iv)), the Department's salary thresholds increased the minimum salary amount to $610 per week effective the date of publication of this final-form rulemaking; to $766 per week effective 1 year after the date of publication of this final-form rulemaking; to $921 per week effective 2 years after the date of publication of this final-form rulemaking. In proposing these figures, the Department reviewed data regarding salaried workers in the Northeast region. The Department also proposed, effective 3 years after the date of publication of this final-form rulemaking and January 1st of every 3rd year thereafter, an increase 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 USDOL, Bureau of Labor Statistics. As more fully discussed earlier in this preamble, the Department amends the salary thresholds in this final-form rulemaking to $684 per week effective the date of publication of this final-form rulemaking; to $780 per week effective 1 year after the date of publication of this final-form rulemaking; and to $875 per week effective 2 years after the date of publication of this final-form rulemaking. The Department also modified its methodology for subsequent 3-year adjustments as more fully discussed elsewhere in this preamble. These adjustments will be published 3 years after the date this final-form rulemaking is published in the *Pennsylvania Bulletin* and every 3 years thereafter.

Finally, in this final-form rulemaking, the Department amends the editor notes at §§ 231.82(4)(i)—(iv); 231.83(3)(i)—(iv); and 231.84(2)(i)—(iv) to ensure the effective dates of the salary thresholds are clear. The LRB modified the editor notes to read, "The blank refers to the effective date of the adoption of this proposed rulemaking." The Department intends for the effective date to begin as of the date of the publication of this final-form rulemaking. To avoid confusions regarding effective dates, the Department amends the editor notes to reference the date of publication of this final-form rulemaking instead of the proposed rulemaking. The Department also amends the number of days to numbers of years to allow for easier comprehension.

In addition, in this final-form rulemaking the Department adds a role for the Board. At least 90 days prior to the publication required by §§ 231.82(4)(iv), 231.83(3)(iv) and 231.84(2)(iv), the Department shall present the adjusted weekly salary rate and supporting information to the Board. At a meeting to be held no later than 60 days prior to the effective date, the Board will have the opportunity to advise and consult the Secretary regarding the adjusted weekly salary rate. At least 30 days prior to the effective date for the adjusted weekly salary rate, the Department will be required to publish this figure on its web site and in the *Pennsylvania Bulletin*. The Board consists of three representatives of established recognized associations of labor organizations, three representatives of established recognized associations of employers and three members from the general public. See section 6(b) of the act (43 P.S. § 333.106(b)). The Department makes this change because the Board is representative of the communities affected by the adjusted weekly salary rate. As such, it is able to advise the Department on whether the data the Department will use to set the adjusted weekly salary rate is complete and accurate.

Bonuses, Incentives, and Commissions or Executive, Administrative and Professional Exemptions

Finally, in the proposed rulemaking, the Department added additional provisions at §§ 231.82(6) (renumbered in this final-form rulemaking as 231.82(5)), 231.83(4) and 231.84(2) (renumbered in this final-form rulemaking as 231.84(4)), which allows up to 10% of the salary amount to be paid by nondiscretionary bonuses, incentives or commissions. Under the proposed regulations, bonuses, incentives or commissions must be paid on at least a quarterly basis. If by the last quarter, the salary and bonuses, incentives or commissions do not equal at least 13 times the weekly salary threshold, then the employer must make a one-time payment equal to the amount of the underpayment by the end of the next pay period of the next quarter. This one-time payment only counts towards the payment requirements of the previous quarter. The Department proposed this regulation to align with Federal regulations that were published in 2016 and later enjoined.

The USDOL recently published a new final rule updating and revising the regulations issued under the FLSA implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. See 84 FR 51230, 51235 (September 27, 2019). The new Federal regulations became effective on January 1, 2020, and include an updated approach to considering bonuses, incentives or commissions. Under the new Federal regulations, up to 10% of the salary amount may be satisfied by the payment of nondiscretionary bonuses, incentives and commission payments, that are paid annually or more frequently. Id. at 51307. Additionally, the employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive and commission payments received is less than 52 times the weekly salary amount required by the applicable Federal

regulation, the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid. Id.

In an effort to align the Department's regulations with the Federal regulations, the Department adopted the standards as promulgated by the USDOL as set forth in the *Federal Register*. Id. While quarterly payments are the most beneficial to employees while still allowing the use of bonus/incentive payments to be counted towards the salary threshold, this creates an unnecessary administrative burden for employers and may not take into account certain sales occupations that rely on "busy seasons" for a majority of earnings. As such, allowing bonus to count for a salary as they are paid on a yearly basis is more appropriate. It is also more appropriate to allow the employer to choose whether a year is a calendar, fiscal or work anniversary year to provide employers with more flexibility.

Miscellaneous Clarity

In this final-form rulemaking, the Department also amends the regulations to delete the use of the word "his" and insert a gender-neutral reference. None of the amendments are substantive in nature. See §§ 231.1, 231.82(4), 231.83(1) and (3) and 231.84(2).

Fiscal Impact

There is minimal impact to the Department in enforcing the changes in this final-form rulemaking. The potential fiscal impact to employers is detailed more fully in response to comments from IRRC about economic and fiscal impact, as well as in response to comments regarding costs to small business. This potential impact is largely dependent on which of the multitude of available options an employer chooses in response to this final-form rulemaking.

Affected Persons

This final-form rulemaking will affect all employers in this Commonwealth covered by the act and all individuals who are employed by these entities.

Reporting, Recordkeeping and Paperwork Requirements

This final-form rulemaking will not require the creation of new forms and reporting requirements.

Sunset Date

A sunset date is not appropriate for this final-form rulemaking because the Department believes that the regulation is necessary to carry out the Departmant's statutory duty under the act. However, the Department will continue to monitor the impact and effectiveness of the regulation.

Effective Date

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

Contact Person

The contact person for this final-form rulemaking is Jennifer Berrier, Deputy Secretary for Safety and Labor-Management Relations, 651 Boas Street, Room 1701, Harrisburg, PA 17121, (717) 787-8665, or by e-mail to jeberrier@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 the notice of proposed rulemaking, published at 48 Pa.B. 3731, to IRRC and the Chairpersons of the House and Senate Labor and Industry Committees for review and comment. Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

On October 17, 2019, the Department delivered the final-form rulemaking to IRRC, and the Chairpersons of the House and Senate Labor and Industry Committees. The Department withdrew this regulation on November 21, 2019, to add clarifying language to §§ 231.82(4)(iv), 231.83(3)(iv) and 231.84(2)(iv) and to fix typographical and spelling errors.

On December 9, 2019, the Department re-delivered the final-form rulemaking to IRRC, and the Chairpersons of the House and Senate Labor and Industry Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on January 31, 2020, and approved the final-form rulemaking. Under section 7(d) of the Regulatory Review Act, the final-form rulemaking was deemed approved by the House and Senate Committees.

Findings

The Department finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), known as the Commonwealth Documents Law and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law, and all comments received were considered.

(3) This final form rulemaking is necessary and suitable for the administration of the act.

Order

The Department, acting under its authorizing statute, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapter 231, are amended by amending §§ 231.1, 231.71—231.74 and 231.82—231.84 to read as set forth in Annex A.

(*Editor's Note*: Amended §§ 231.71—231.74 did not appear in the proposed rulemaking published at 48 Pa.B. 3731.)

(b) The Department shall submit this order, and Annex A to the Office of Attorney General and the Office of General Counsel for approval, as required by law.

(c) The Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(d) The regulations shall take effect upon publication in the *Pennsylvania Bulletin*.

W. GERARD OLEKSIAK,
Secretary

Fiscal Note: Fiscal Note 12-106 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 231. MINIMUM WAGE

GENERAL PROVISIONS

§ 231.1. Definitions.

* * * * *

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

* * * * *

Department—The Department of Labor and Industry of the Commonwealth.

Domestic services—Work in or about a private dwelling for an employer in the 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.

Hotel or motel—An establishment which as a whole or part of its business activities offers lodging accommodations for hire to the public, and services in connection therewith or incidental thereto.

* * * * *

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

Minimum Wage Advisory Board—A Board created in the Department of Labor and Industry under section 6 of the act (43 P.S. § 333.106) regarding the Minimum Wage Advisory Board.

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.

* * * * *

Week—A period of 7 consecutive days starting on any day selected by the employer.

Worker with a disability—An individual whose earning capacity for the work to be performed is impaired by physical or mental deficiency or injury.

EMPLOYMENT OF WORKERS WITH A DISABILITY

§ 231.71. Procedure.

(a) An employer who wishes to employ workers with a disability at less than the prescribed minimum wage shall complete an application on forms furnished by the Secretary.

(b) The application shall set forth the following information:

(1) The nature of the disability in detail.

(2) A description of the occupation at which the worker with a disability is to be employed.

(3) The wage the employer proposes to pay the worker with a disability per hour.

(4) Other information as may be required by the Secretary.

(c) The application shall be signed jointly by the employer and the worker with a disability for whom such application is being made, except as otherwise authorized by the Secretary.

§ 231.72. Conditions for granting certificate.

A certificate may be issued if the application is in proper form and sets forth facts showing that:

(1) The disability impairs the earning capacity of the worker for the work the employee is to perform.

(2) The proposed minimum wage is commensurate with the production capacity of the employee.

§ 231.73. Special certificate.

If the application and other available information indicate that the requirements of these §§ 231.71—231.76 (relating to employment of workers with a disability) are satisfied, the Secretary will issue a certificate. If issued, copies of the certificate will be mailed to the employer and the worker with a disability, and if the certificate is not issued, the employer and the worker with a disability will be given written notice of the denial.

§ 231.74. Specifications of the certificate.

(a) A certificate will specify, among other things, the name of the worker with a disability, the name of the employer, the occupation in which the worker with a disability is to be employed, the authorized subminimum wage rate and the period of time during which such wage rate may be paid.

(b) A certificate shall be effective for a period to be designated by the Secretary. The worker with a disability employed under the certificate may be paid subminimum wages only during the effective period of the certificate.

(c) The wage rate set in the certificate will be fixed at a figure designated to reflect adequately the earning capacity of the worker with a disability.

(d) A money received by a worker with a disability by reason of a state or Federal pension or compensation program for persons with a disability may not be considered as offsetting any part of the wage due the worker with a disability by the employer.

(e) Except as otherwise provided in section 5(a)—(c) of the act (43 P.S. § 333.105(a)—(c)), the worker with a disability shall be paid not less than 1 1/2 times the regular rate for hours worked in excess of 40 in the workweek.

(f) The terms of a certificate, including the subminimum wage rate specified therein, may be amended by the Secretary upon written notice to the parties concerned if the facts justify the amendment.

SPECIAL DEFINITIONS

§ 231.82. Executive.

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

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

(i) For this section the term "management" is defined as follows: to include, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting employees' rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the

purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used to perform work; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget, and monitoring or implementing legal compliance measures.

(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, firing, advancement, promotion or any other change of status of other employees are given particular weight.

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

(i) $684 per week exclusive of board, lodging or other facilities, effective October 3, 2020.

(ii) $780 per week exclusive of board, lodging or other facilities, effective October 3, 2021.

(iii) $875 per week exclusive of board, lodging or other facilities, effective October 3, 2022.

(iv) Effective October 3, 2023, and each 3rd year thereafter, and at a rate equal to the weighted average 10th percentile wages for Pennsylvania workers who work in exempt executive, administrative or professional classifications as determined by the Department with advice and consultation by the Minimum Wage Advisory Board and based on an annual wage survey of all worker classifications conducted by the Department.

(A) At least 90 days prior to the effective date of each 3-year period in subparagraph (iv), the Department will submit to the Minimum Wage Advisory Board, the adjusted weekly salary rate under subparagraph (iv) and the information supporting the adjusted salary rate.

(B) Upon review of the information submitted by the Department and at a meeting to be held no later than 60 days before the effective date of the adjusted weekly salary rate, the Minimum Wage Advisory Board may provide advice and consultation to the Secretary regarding the adjusted weekly salary rate.

(C) At least 30 days prior to the effective date of each 3-year period in subparagraph (iv), the Department will publish the adjusted weekly salary rate on its web site and in the *Pennsylvania Bulletin*.

(5) Up to 10% of the salary amount required under paragraph (4) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions that are paid annually or more frequently. The employer may use any 52-week period as the year, such as a calendar year, fiscal year or anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. If by the last pay period of the year the sum of the employee's weekly salary plus nondiscretionary bonus, incentive and commission payments received does not equal 52 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 year. A final payment made after the end of the year may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

§ 231.83. Administrative.

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

(1) Whose primary duty is the performance of office or nonmanual work directly related to management or general business operations of the employer or the customers of the employer.

(i) For the purpose of this section the term "directly related to management or general business operations" is defined as follows: to include, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance.

(2) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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

(i) $684 per week exclusive of board, lodging or other facilities, effective October 3, 2020.

(ii) $780 per week exclusive of board, lodging or other facilities, effective October 3, 2021.

(iii) $875 per week exclusive of board, lodging or other facilities, effective October 3, 2022.

(iv) Effective October 3, 2023, and each 3rd year thereafter, at a rate equal to the weighted average 10th percentile wages for Pennsylvania workers who work in exempt executive, administrative or professional classifications as determined by the Department with advice and consultation by the Minimum Wage Advisory Board and based on an annual wage survey of all worker classifications conducted by the Department.

(A) At least 90 days prior to the effective date of each 3-year period in subparagraph (iv), the Department will submit to the Minimum Wage Advisory Board, the adjusted weekly salary rate under subparagraph (iv) and the information supporting the adjusted salary rate.

(B) Upon review of the information submitted by the Department and a meeting to be held no later than 60 days before the effective date, the Minimum Wage Advisory Board may provide advice and consultation to the secretary regarding the weekly salary rate.

(c) At least 30 days prior to the effective date of each 3-year period, 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 yearly or more frequently. The employer may use any 52-week period as the year, such as a calendar year, fiscal year or anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. If by the last pay period of the year the sum of the employee's weekly salary plus nondiscretionary bonus, incentive and commission payments received does not equal 52 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 year. A final payment made after the end of the year may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

§ 231.84. Professional.

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

(1) Whose primary duty is the performance of work requiring 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.

(ii) Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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

(i) $684 per week exclusive of board, lodging or other facilities, effective October 3, 2020.

(ii) $780 per week exclusive of board, lodging or other facilities, effective October 3, 2021.

(iii) $875 per week exclusive of board, lodging or other facilities, effective October 3, 2022.

(iv) Effective October 3, 2023 and each 3rd year thereafter, at a rate equal to the weighted average 10th percentile wages for Pennsylvania workers who work in exempt executive, administrative or professional classifications as determined by the Department with advice and consultation by the Minimum Wage Advisory Board and based on an annual wage survey of all worker classifications conducted by the Department.

(A) At least 90 days prior to the effective date of each 3-year period in subparagraph (iv), the Department will submit to the Minimum Wage Advisory Board, the adjusted weekly salary rate under subparagraph (iv) and the information supporting the adjusted salary rate.

(B) Upon review of the information submitted by the Department and a meeting to be held no later than 60 days before the effective date, the Minimum Wage Advisory Board may provide advice and consultation to the secretary regarding the weekly salary rate.

(C) At least 30 days prior to the effective date of each 3-year period, the Department will publish this figure on its web site and in the *Pennsylvania Bulletin*.

(3) Up to 10% of the salary or fee amount required under paragraph (2) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions that are paid yearly or more frequently. The employer may use any 52-week period as the year, such as a calendar year, fiscal year or anniversary of hire year. if the employer does not identify some other year period in advance, the calendar year will apply. If by the last pay period of the year the sum of the employee's weekly salary plus nondiscretionary bonus, incentive and commission payments received does not equal 52 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 year. A final payment made after the end of the year may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

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