May 28, 2021

By Email Only:

Bryan M. Smolock

Director, Bureau of Labor Law Compliance

Pennsylvania Department of Labor & Industry

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Dear Mr. Smolock:

Thank you for seeking stakeholder input to modernize and update regulations impacting Pennsylvania workers’ rights to wages and overtime under the Pennsylvania Wage Payment and Collection Law (“PWPCL”). We are Pennsylvania worker advocates and litigators (see signatory list below) who have decades of experience in this area and are aware of some of the shortcomings of the current system, especially for those workers most at risk of exploitation. Many of the changes outlined in this letter are long overdue from an economic standpoint in terms of the cost of living, such as the definition of a tipped employee, and particularly crucial at this moment given the economic burdens of the pandemic on low wage and frontline service workers. Pennsylvania’s women and minority workers tend to work in the hardest hit industries and face long-term impacts (see [Minority Workers Who Lagged in a Boom Are Hit Hard in a Bust - The New York Times (nytimes.com)](https://www.nytimes.com/2020/06/06/business/economy/jobs-report-minorities.html) and [Stress, delays, and confusion still plague jobless in Pennsylvania, and January brought little relief - pennlive.com](https://www.pennlive.com/news/2021/02/stress-delays-and-confusion-still-plague-jobless-in-pennsylvania-and-january-brought-little-relief.html)). We also believe that the Department of Labor & Industry (“PALI”) has the opportunity to give its investigators better tools with which to enforce its own rules and encourage further exploration.

From a policy standpoint it is important that our regulatory framework be updated so that workers and employers can understand rules that are sometimes obscured by practices that are normalized in industries and workplaces, or by inaccessible caselaw. It should be easier for a worker to find and understand applicable rules that impact on the ability to earn a living.

In February 2021, we submitted proposals for suggested regulatory updates to both the Pennsylvania Minimum Wage Act (“PMWA”) and the Pennsylvania Wage Payment and Collection Law (“PWPCL”). Here, we focus our efforts on proposed regulatory amendments to the PWPCL. Below is a summary of our suggestions; we welcome the opportunity to meet in-person to follow up on any of these items. If we are to embark on this process together in Pennsylvania, we believe our efforts need to be comprehensive and thorough as this opportunity may not soon arise again.

We welcome further discussion on all of the below ideas and any others you are considering. Please contact Community Legal Services attorney Nadia Hewka ([nhewka@clsphila.org](mailto:nhewka@clsphila.org)), Winebrake & Santillo, LLC attorney Pete Winebrake ([pwinebrake@winebrakelaw.com](mailto:pwinebrake@winebrakelaw.com)), or Lichten & Liss-Riordan, P.C. attorney Sarah Schalman-Bergen ([ssb@llrlaw.com](mailto:ssb@llrlaw.com)) if and when PALI wishes to discuss potential regulatory changes in more detail. These attorneys will promptly relay any information or requests from PALI to the signatories to this letter.

Below is a list of issues that we believe must be addressed, including some brief comments regarding each issue. We would be delighted to provide PALI with more detailed analysis and draft regulatory language upon request:

1. **Addressing the Misclassification of Workers Through the Adoption of the ABC Test by Regulation**

The PALI should update and modernize the regulations to the PWPCL and PMWA by adopting the “ABC test” to determine whether an individual is properly classified as an employee or independent contractor.  The “ABC test” is the simplest way to determine who is a true independent contractor and who is an employee.  Following California, Massachusetts, Illinois, New Jersey and New York, the Commonwealth should step forward as a leader on this issue to ensure both that workers are treated fairly and that businesses live up to their obligation to the Commonwealth and its residents.

The misclassification of workers as non-employee “independent contractors” is rampant throughout the Commonwealth and the nation. As is widely known, independent contractor misclassification hurts workers (who are denied the most basic workplace protections and benefits), taxpayers (who must subsidize companies’ non-payment of social security taxes and unemployment insurance payments), and law-abiding businesses (who must compete with free-rider companies that circumvent their workplace obligations). We are in the midst of a “race to the bottom.” Each year, more and more companies unilaterally convert W-2 employees to independent contractors. The consequences are devastating. *See generally* David Weil, *The Fissured Workplace* (Harvard Press 2014); for more detail on a particular industry, see Stephen Herzenberg and Russell Ormiston, [*Illegal Labor Practices in the Philadelphia Regional Construction Industry*](https://linkprotect.cudasvc.com/url?a=https%3a%2f%2fwww.keystoneresearch.org%2fsites%2fdefault%2ffiles%2fKRC%2520Illegal%2520Labor%2520Con%2520Final.pdf&c=E,1,Od0SpMS8yBJx2v7QUnOOVhWWG52dBcoY84grvHXgUsgN5XgY-EBAYoSbA_OmnerXt7yODrkaNPM4qn97o1YDFVSwdBWV-ZVh2Gzy3lAWHOX8jOYOyJyZXoS-FXJSfA,,&typo=1), Keystone Research Center, January 2019.

The negative impact on workers is clear: Blue collar workers who were once in labor unions – such as those who deliver bakery and snack food products to retail stores – must form “LLCs” and purchase their distribution routes. Janitors who clean retail stores must purchase their jobs through “franchise agreements” filled with difficult-to-understand legalese. Simply put, our laws have not kept up with evolving business models that have left tens of thousands of Pennsylvania workers without any PMWA or PWPCL rights.

In July 2020, the Pennsylvania Supreme Court weighed in on the issue, holding that certain gig-economy laborers, including at Uber, are eligible for unemployment compensation, notwithstanding the companies’ efforts to misclassify them as independent contractors.  *See Lowman v. Unemployment Compensation Board of Review*, 235 A.3d 278 (Pa. S. Ct. 2020).  But more widespread regulatory change is needed.

Many states have grown tired of watching the “independent contractor” business model strip workers of basic wage and hour protections. These states have implemented “ABC tests” under which workers are presumed to be employees unless the putative employer can satisfy three independent requirements.  For example, the ABC test was been adopted for purposes of the New Jersey wage and hour laws and is described by the New Jersey Supreme Court as follows:  “The ‘ABC’ test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed, including: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.  [T]he failure to satisfy any one of the three criteria results in an 'employment' classification.” *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449 (N.J. 2015).

New Jersey is not alone.  The above ABC Test has been adopted in other states, including California, Illinois, Massachusetts, and New York (for certain categories of workers). PALI should take a leadership role in protection of its workers and adopt an ABC Test here in Pennsylvania. The time has come to do so.

1. **Updating and Clarifying the Imposition of Penalties for Violations of the WPCL**

The impacts of wage theft on low-wage workers, the local economy, and the state are increasingly recognized by policy experts. *See, e.g.,* The Social Justice Lawyering Clinic at the Stephen and Sandra Sheller Center for Social Justice at Temple University Beasley School of Law, *Shortchanged: How Wage Theft Harms Pennsylvania’s Workers and Economy* (June 2015). As part of this discussion, advocates around the country point to the insufficiency of penalties on employers who violate wage laws. Many victims of wage theft are low-wage workers, and thus penalties correlated with those low wages may also be low. Furthermore, fear of retaliation or economic necessity keeps many impacted workers from come coming forward, further shrinking the pool of possibly penalties against employers. Low penalties do not serve as a deterrent against wage violations; instead, employers may choose to take their chances on shaving hours or not paying a final paycheck because consequences are minor, if they come at all. In order to address these perverse incentives, many similar state statutes provide for double or treble damages, and the FLSA provides for double damages.

The WPCL provides for penalties of 25% or $500 after 30 days have passed since the failure to pay. However, given that there are often instances of multiple pay violations over time, regulation should make it clear that penalties may be assessed by either the Department or the court system of up to $500 for each pay period in which a violation occurred. A similar structure exists in the Philadelphia Wage Theft Ordinance.

1. **Clarifying Unlawful Deductions**

34 PA Code § 9.1 is the list of authorized deductions from wages, that was enacted per 43 P.S.§ 260.3.

This section could be augmented considerably by just a few changes.  First, for example to include a regulation that codifies *Ressler v. Jones Motor Company* and expressly prohibits any deductions from wages or the manner in which wages are computed/calculated, that has not been authorized in writing by the Department and the affected employee(s).  *Ressler* is cited in the Notes of Decisions at the end of § 9.1, but it should be codified to eliminate the disputes that occur in almost every Common Pleas case I have litigated where an unauthorized and unapproved deduction is asserted by an employer.

Second, although *deductions* against wages are somewhat defined in this section, the term "*wages*" is not.  In this regard a regulation that interprets and clarifies the definition of wages set forth in the statute (§ 260.2.1) would be helpful.  Employers frequently skirt this section entirely by arguing that a formula to calculate gross wages (or commissions) is not a deduction against earnings and that § 9.2 doesn't apply.  For instance, and this happens frequently with commissioned salespeople where there are formulas that involve multiple deductions of business expenses or "costs" from what ultimately becomes the gross wages, ie:  the worker earns 2% of the sale, less certain costs/expenses assessed the employer, and it is this amount that constitutes the gross wages or earnings. I have had to litigate this point repeatedly on the Common Pleas level.

1. **Updating Joint Employment Rules To Protect Workers**

Employees suffer when large companies benefitting from the employees’ labor are able to avoid liability by paying the employees through sub-contractors, subsidiary companies, third-party staffing agencies, and franchisees.  Enacting regulations that emphasize and clarify that the definition of “employer” under both the PMWA and the WPCL covers entities that exert direct or ***indirect*** control over the worker will ensure workers are able to recover for violations by these companies.  The Minimum Wage Act already defines employer expansively as including those who act “directly or indirectly, in the interest of an employer in relation to an employee.”  43 P.S. § 333.103(g).  Consistent with this broad definition, the PALI should implement clear regulations under both the PMWA and WPCL to ensure that business entities that control (either directly or indirectly) and benefit from an employee’s work can be liable for wage and hour violations.

1. **Clarifying Recordkeeping Requirements**

PALI should make clear that the burden is on employers to maintain records consistent with Pennsylvania wage laws and allow employees to present alternative evidence where an employer fails to maintain records.  For instance, PALI should consider establishment of a burden-shifting structure in which, when employers fail to comply with recordkeeping requirements, employees can present any available evidence for PALI’s use in investigations and enforcement.

1. **Enforcement issues:**

There are currently no regulations to interpret section 8 of the PWPCL, which gives the Department the "duty but not the exclusive right" to "enforce and administer" the act, to "investigate any alleged violations", or to "institute prosecutions and actions". While section 8 also requires employers to permit inspection by the Secretary of documents within 7 calendar day's notice, again, there is nothing that specifies the consequences of failure to comply or the methodology to compel inspection with a non-compliant employer.

This is a clear opportunity for rulemaking and would not require legislative approval, to include the power to administratively issue written discovery, to compel the appearance by subpoena of persons for testimony and for the production of documents, all of which could be enforced in the Dauphin County Common Pleas Court where the Secretary's main office is located.

1. **Expansion of application of PWPCL to other types of claims:**

The issue of including various other types of wage claims (such as violations of the PMWA or the PWA or similar laws) in the PWPCL could be easily accomplished by tweaking the current regulatory framework to include a more whole cloth interpretation of the definition of wages as I referenced above.  By augmenting the definition set forth at § 260.2.1 ("Wages." Includes all earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation.)  to include for instance, a regulatory interpretation that wages include any amounts due for any work suffered by an employee of an employer arising under any statute in the Commonwealth that regulates the payment of wages in the Commonwealth.  Thiswould automatically include claims arising under the PMWA or PWA.  Note that authority for a broader definition of the PWPCL already exists in § 9.2 "Restrictions", which prohibits any deduction or expense that results in wages being less than the minimum wage applicable under the PMWA.

1. **Clarification Regarding Anti-Retaliation Provision**

Many individuals reliant on the PWPCL’s protections are low-wage workers who are under economic stress. Such workers are especially susceptible to actual and threatened retaliation by employers when they complain about wage theft and other issues falling within the PWPCL’s purview. For this reason, we believe the Department should implement a regulation clarifying that it is illegal for an employer to alter an employee’s terms or conditions of employment in retaliation for the employee’s complaints concerning employer conduct the allegedly violates PWPCL provisions. This anti-retaliation regulation should protect employees who file complaints with the Department, cooperate in Department investigations, or commence civil actions per 43 P.S. sec. 260.9a. In addition, consistent with court precedent interpreting the FLSA’s anti-retaliation provision, the anti-retaliation regulation should apply to employees’ intra-company complaints to management and human resources. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1 (2011) (oral complaints to company officials covered by FLSA’s anti-retaliation provision).

Submitted by:

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