PA Chamber®
of Business and Industry

December 30, 2021

Mr. Bryan Smolock
Director, Bureau of Labor Law Compliance
Pennsylvania Department of Labor & Industry
651 Boas Street
Harrisburg, PA 17121

Re: Responding to solicitation for comments with respect to the definition of Hours Worked found in 34 Pa. Code § 231.1. Definitions.

Dear Mr. Smolock:

The Pennsylvania Chamber of Business and Industry (the PA Chamber) submits these comments in response to the Pennsylvania Department of Labor and Industry's (the Department) solicitation for input with respect to potential updates to the definition of *Hours Worked* found in the Pennsylvania Minimum Wage Act (PMWA), 34 Pa. Code § 231.1. Definitions.

The PA Chamber is the Commonwealth's largest broad-based business advocacy association, with nearly 10,000 member employers of all sizes, representing every industry sector and region throughout the state. The PA Chamber advocates for public policy that will improve Pennsylvania's business climate to encourage economic development and private sector job creation. The PA Chamber is dedicated to promoting employer education and awareness and regularly solicits feedback to better understand the impact of laws and regulations, including the complexities of complying with state and federal workplace rules.

We appreciate the Department's attention to the definition of *Hours Worked*, a particularly unclear aspect of the PMWA on which employers are anxious for guidance from the Department.

One of the most common employer frustrations in the area of workplace/employment law are federal and states mandates that are similar in purpose but different in detail, complicating compliance and leaving employers vulnerable to committing inadvertent violations. Accordingly, the logical and preferred approach is to adopt the federal definition of *Hours Worked* and incorporate the Fair Labor Standards Act (FLSA) definition by reference, including the Portal-to-Portal Act and the Employee Commuting Flexibility Act. A clear, consistent definition would help alleviate confusion for both employers and employees and could be part of a broader agenda to make Pennsylvania more competitive. It would also align Pennsylvania law with our neighbors in New York, Ohio, and West Virginia, as well as with the law in most states.

Alternatively, should the Department conclude that the federal definition for *Hours Worked* is insufficient in certain respects, we urge the Department to still incorporate the FLSA definition by reference (29 C.F.R. Part 785) and then identify the specific areas in which Pennsylvania's definition deviates. While Pennsylvania employers would still be required to consult both

federal and state *Hours Worked* definitions, they at least would have the guidance necessary to craft workplace policies with confidence that they are compliant.

Whichever approach the Department pursues, we most importantly urge you to clarify whether certain preliminary and postliminary activities constitute hours worked. A recent state court decision highlighted the extent to which employers need clarity regarding the compensation status of time employees spend engaged in various activities before and after work. For instance, is an employer responsible for tracking the time it takes an employee to swipe a badge at the front door, proceed through a turnstile, or press the elevator button to get to their floor? What about a pre-work temperature screening or the time it takes to open a COVID app and answer a brief daily health survey before coming to work?

Under the FLSA (as amended by the Portal-to-Portal Act), the answer is clearly "no" – such time is preliminary or postliminary to (and not an integral or indispensable part of) the employee's principal job duties. If the Department is considering a more expansive definition of *Hours Worked*, it is important to be clear where employers are expected to draw the line. We urge the Department to avoid defining *Hours Worked* so broadly that it encompasses preliminary and postliminary activities that take only a nominal amount of time.

A related and additionally important question is whether the aforementioned or other pre- or post-work steps trigger the "continuous workday" rule, which provides that time in between the first and final work acts of the day are generally compensable. Without clarity, compliance with these rules can become perilous for employers and bring unintended consequences to employees. Take, for example, an employee who likes to arrive to work early to get coffee with coworkers at the company cafeteria, or to use the company's complimentary onsite fitness facility, or change into their work clothes (even though they are allowed to dress at home). If these activities occur after the employee has swiped their badge, temperature screened, etc., then (if the Department declares that the badge swipe or temperature screen is hours worked) would the time in the cafeteria, gym or locker room all be considered compensable under the continuous workday rule?

Consider a retail store in which the first employee to arrive for the day unlocks the door, turns off the alarm and on the lights. The employee then waits for their shift to begin, clocks in, and begins performing store opening duties. Under the FLSA, all of the activities that occur before the employee clocks in would be considered "preliminary" duties and not hours worked. If the Department determines that these types of preliminary duties constitute hours worked, however, would that mean that all time after unlocking the door is also hours worked under the continuous workday rule? If so, employers may prohibit employees from entering the work location early – even if entering early is for the employee's own convenience (e.g., they get dropped off early and prefer to wait inside for their shift to begin).

Similarly, if an employer provides an on-premises parking lot accessible with a badge, does the badge swipe constitute hours worked? Does the time spent looking for a parking spot constitute work? If the employee arrives early and waits in their car, is that time spent working? Under the FLSA, the answer is "no." The Department should carefully consider the impact of its rulemaking on activities that have never been considered hours worked.

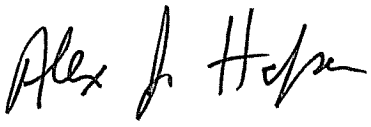
Similar issues arise at the end of the workday. For example, when a retail store employee closes down at the end of the day, the employee might complete closing duties on the clock, then clock out, walk to the door, set the alarm, turn off the lights, and lock the door. Under the FLSA, all of the activities that occur after the employee clocks out would be considered "postliminary" duties and not hours worked. If the Department determines that these types of postliminary duties constitute hours worked, however, would that mean that everything between completing the closing duties and actually leaving the workplace is also hours worked under the continuous workday rule? This may seem trivial, yet these scenarios play out frequently in a typical workplace. Imagine an employee who typically waits in the store for a ride home after closing but cannot turn off the lights and lock the door until they are leaving. Employers may be forced to choose between paying the employee extra while they wait or actually prohibiting an employee from waiting inside the store.

Again, the best approach would be to adopt the federal standard by reference. At minimum, however, the Department should avoid a rule that would prompt employers to prohibit employees from arriving early to the workplace for their own benefit and convenience and/or require employees to vacate immediately following completion of the final work act of the day. Instead, the Department should make clear that when an employee chooses to engage in an activity for their own benefit or convenience, that time is not hours worked – even if it occurs during the so-called continuous workday.

We urge the Department to clarify how employers and employees are to handle these various scenarios. Of course, the manner in which these questions are addressed will determine whether new rules bring clarity or simply substitute scant guidance with confusing guidance.

We appreciate the Department's consideration of our views on this important matter.

Sincerely,



Alex Halper
Director, Government Affairs