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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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September 6, 2012

The Honorable Silvan B. Lutkewitte, III, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Regulation #12-91: Prohibition of Excessive Overtime in Health Care Act Regulations (IRRC #2957)

Dear Chairman Lutkewitte:

As the Democratic Chairman of the House Labor and Industry Committee, I respectfully submit the enclosed comments on behalf of the Democratic Members of the House Labor and Industry Committee to assist in the Independent Regulatory Review Commission's review of the above-referenced proposed rulemaking submitted by the Department of Labor and Industry.

As you are aware, the proposed rulemaking would implement regulations for the Prohibition of Excessive Overtime in Health Care Act, which was established by Act 102 of 2008. This legislation intended to protect healthcare employees from requirements by employers to work forced and excessive overtime shifts. Moreover, the Act sought to improve patient safety by reducing the numbers of tired and overworked employees involved in direct care. In approving this legislation, we understood that fatigue not only puts workers at risk, but may also result in harmful or fatal errors in sensitive settings such as hospitals or nursing care facilities.

The enclosed comments detail our specific concerns for the department's proposed regulations. However, please also know that we are supportive of comments submitted by SEIU Healthcare Pennsylvania, PSNA, PASNAP, PSEA, AFCME Council 13, and the Pennsylvania AFL-CIO. A brief overview of our comments follows.

- Employees must be provided adequate time to file or correct complaint forms, and obstacles to completing complaint forms must be avoided.
- Criteria for assessing penalties for violations should largely focus on aggravating factors and severity of violations.
- Complainants must receive notices of administrative decisions, penalties, or other enforcement actions related to their complaints.
- Determinations where no violation is found should include statements of the reason or the applicable exception under the Act.

- Complainants must have an opportunity to appeal an adverse decision, similar to the appeal process provided to employers by the proposed regulations.
- The hearing process must guarantee claimants the opportunity to participate and ensure that the burden of proof is carried by the appropriate party.
- The regulations do not address several items, including: investigative powers of the Bureau and targeted timeframes for investigations and determinations; the inclusion of an employee's representative throughout the complaint and enforcement process; complainants' protections from retaliation and related penalties; and enforcement of the Act against other state agencies.

Once again, I hope that our comments will aid the commission as well as the department in the review of these proposed regulations. If you have any questions or require clarification on any of our concerns, please do not hesitate to contact my office.

Sincerely,

William F. Keller
Democratic Chairman
Labor and Industry Committee
Pennsylvania House of Representatives

cc: The Honorable Julia Hearthway, Secretary, Department of Labor and Industry
Sean F. Creegan, Deputy Chief Counsel, UC Division, Department of Labor and Industry
Fiona E. Wilmarth, Analyst, Independent Regulatory Review Commission
Michaele A. Totino, Analyst, Independent Regulatory Review Commission
Democratic Members of the House Labor & Industry Committee

Comments of Chairman William F. Keller and the Democratic Members of the Pennsylvania House of Representatives Labor & Industry Committee on the Proposed Prohibition of Excessive Overtime in Health Care Act Regulations Regulation # 12-91 (IRRC # 2957)

§ 225.3. Complaint and investigation procedure.

- **Subsection (b) does not provide adequate time for aggrieved employees to file a complaint.**

  The Prohibition of Excessive Overtime in Health Care Act ("Act") does not impose a time limit on an employee's right to file a complaint. However, the proposed regulations seek to require a complaint to be filed within 60 days of a violation. We believe that the proposed 60-day limit is far too short as well as arbitrary in comparison to the regulations governing similar workplace protection laws enforced by the Bureau of Labor Law Compliance ("Bureau"). For example, the Bureau receives complaints filed under the Minimum Wage Act (Act 5 of 1968), the Wage Payment and Collection Law (Act 329 of 1961), the Construction Workplace Misclassification Act (Act 72 of 2010), and the Equal Pay Law (Act 694 of 1959) – these laws do not place similar, short time limits on filing complaints. As well, these regulations must take into account that employees may not initially recognize a violation of the Act or may seek to identify a pattern of violations.

  Additionally, it should be noted that certain labor laws already require employers to maintain hour and wage records – for example, the Minimum Wage Law requires recordkeeping for at least three years.

- **Subsections (c) and (f) create unnecessary burdens for workers who seek to file complaints.**

  Subsection (c) of the proposed regulations would require complainants to name witnesses on complaint forms. This places an unusual burden on workers, who may be afraid to implicate coworkers initially and in writing. The requirement is especially troublesome in light of § 225.3 (f) of the proposed regulations, which would allow the Bureau to dismiss legitimate complaints if information required by subsection (c) is not provided on the complaint form.

  Additionally, subsection (f) would only allow a complainant 15 days to correct any incomplete complaint form. We suggest that this time be doubled to 30 days.

§ 225.4. Administrative penalties.

- **Subsection (b) proposes criteria for assessing penalties that are not fully relevant.**

  The regulations propose new criteria, which are not set forth in the Act, to determine whether an administrative penalty is necessary. It would permit the Bureau to consider three factors: the size of the business; history of previous violations; and good faith effort of the health care facility in abating the violation and future violations.

  We do not believe that these factors are entirely relevant. Instead, if a violation has occurred, the penalty should be based largely on the aggravating factors and severity of the violation.

Additionally, of the factors stated in the regulations, the consideration of previous violations should be increased from the currently proposed 12 months to three years, as well as include review of whether previous penalty assessments have been paid in full.

§ 225.5. Administrative notice of violation and proposed penalty.

- **The regulations must ensure that a complainant receives copies of notices of administrative decisions and penalties.**

  Subsection (b) of the proposed regulations requires the Bureau to send notice of decisions and penalties via first class mail. The regulations do not require a copy of these materials to be sent to the complainant. We strongly recommend including the requirement that the Bureau provide a copy of these materials or similar written notices to complainants. Likewise, the complainant should be notified of requests for reductions of penalties by the employer. We also believe that the Bureau would benefit from sending notices electronically as well as through the mail.

- **If no violation is found, such notice should include the reasoning or the applicable exception under the Act that led to the determination.**

  Subsection (e) proposes that if no violation is found, "the Bureau will provide written notice to the complainant and the health care facility or employer that the investigation has been closed." This section should also state that the Bureau will provide an explanation or cite an applicable exception contained in the Act that led to the determination. We believe that providing such information will create a better understanding of rights and protections under the Act and benefit all parties involved in a complaint.

§ 225.6. Contesting an administrative decision and proposed penalty.

- **The proposed regulations must allow a process for workers to contest an adverse administrative decision by requesting a hearing.**

  The proposed regulations provide that "a health care facility or employer may contest an adverse administrative decision by requesting a hearing." However, the regulations would not create a similar appeal process for complainants to contest a determination that is not in their favor. We believe it is fair and necessary to provide employees the same opportunity to appeal an initial determination by the Bureau.

225.7. Hearing.

- **The proposed regulations should state that the complainant will be provided the opportunity to participate in the hearing.**

  Subsection (f) of the proposed regulations names the Bureau and the health care facility as parties at a hearing. While the Bureau may represent the complainant's interests at a hearing, it should be stated that the complainant will be notified of hearings as well as guaranteed the opportunity to participate.

- **Subsection (g) of the proposed regulations may create an unrealistic standard of proof for the Bureau in certain cases.**

  Subsection (g) of the proposed regulations would require the Bureau to prove that a violation occurred and that a penalty should be applied. However, this standard should be clarified to provide that the Bureau would carry the initial burden of proof of a violation of section 3(a) of the Act, but that the burden of proof would shift to an appealing employer that seeks to claim an exception under section 3(c) of the Act. Otherwise, as noted in comments by SEIU, this provision may require the Bureau to prove a negative – *i.e.,* that the exception did not exist.

Additional Concerns

We believe that the Department of Labor and Industry would benefit from addressing the following items pertaining to enforcement of the Act and these regulations:

- The regulations must ensure that complaints can be filed jointly by employees and that each complainant who provides contact information will receive individual notice of actions related to the complaint and the opportunity to participate in the investigation and enforcement process.

  Please know that this concern is based on a legislative inquiry into the status of a complaint filed under the Act by several health care employees. The inquiry found that the Bureau had contacted only two of the complainants and closed the investigation without notice to others.

- The regulations must ensure that an employee's representative may file a complaint on the employee's behalf and may be included throughout the complaint and appeal process.

- Is there a need to include investigative powers and rights to review employer records? Similar powers are provided to the Bureau to carry out similar investigations under other labor laws.

- Would complainants benefit from time limits on investigations and determinations of violations or adjudication decisions? The regulations propose times limits on filing complaints and relating to appeals, but do not include targeted time frames actions by the Bureau and department.

- Comments by the Pennsylvania State Nurses Association (PSNA) note the need to include a definition for "chronic short staffing." The Bureau and complainants may benefit from this addition, which may provide direction on identifying patterns of violations.

- Should the regulations outline a process by which the Bureau may determine if retaliation against a complainant has occurred? Should it be made clear that a violation of the anti-retaliation provision will be subject to administrative penalties set forth by the Act?

- Should the department develop a workplace poster of employee rights and protections under the Prohibition of Excessive Overtime in Health Care Act?

- Can the Bureau enforce this law or penalties against another state agency that maintains a health facility? If the Bureau may investigate a complaint against another state agency, would communication between the department and that agency or facility be restricted in any way?