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VIA EMAIL: kgalli@pa.gov

August 10, 2012

Julia K. Hearthway, Secretary
Pennsylvania Department of Labor and Industry
Room 1700
651 Boas Street
Harrisburg, PA 17121

Dear Secretary Hearthway:

Enclosed please find comments of SEIU Healthcare Pennsylvania on proposed regulation of the Department of Labor and Industry (ID No. 12-91; IRRC No. 2957) regarding the Prohibition of Excessive Overtime in Health Care Act. We have also submitted our comments to the IRRC.

Thank you for your consideration of our comments.

Sincerely,

Neal Bisno
President

NB:slf

Enclosure (1)

cc: File (2)

COMMENTS OF SEIU HEALTHCARE PA
ON PROPOSED REGULATION OF THE DEPARTMENT OF
LABOR AND INDUSTRY (ID NO. 12-91; IRRC NO. 2957)
RE: PROHIBITION OF EXCESSIVE OVERTIME IN HEALTH CARE ACT

I. INTRODUCTION

SEIU Healthcare Pennsylvania is the largest union of nurses and healthcare workers in the Commonwealth, representing approximately 25,000 nurses and frontline healthcare employees in hospitals, long term care centers, home and community based services, and State-operated facilities. Most of our union members are "employees" as defined by Act 102. SEIU Healthcare Pennsylvania is an affiliate of SEIU, North America's largest healthcare union, representing 1.2 million nurses and healthcare workers across the United States, Canada, and Puerto Rico. SEIU Healthcare Pennsylvania was the key organizational proponent of Act 102 and worked closely with a bipartisan coalition of legislators and with representatives of the executive branch to craft the legislation. SEIU Healthcare Pennsylvania previously submitted comments to the Department of Labor and Industry in the form of testimony at a stakeholders' meeting that took place on December 3, 2009. Written comments were also submitted at that time.

We are extremely disappointed in the proposed regulations that have now been issued by the Department of Labor and Industry. First, the scope of these rules is too limited. There is no guidance as to the substantive provisions of the law, even though the Act gives the Department the obligation to promulgate regulations to implement the Act in its entirety. We believe the Department should at some point in the near future

convene a public meeting for stakeholders to address these substantive areas.

Furthermore, we believe these regulations with respect to the complaint and hearing process for alleged violations committed under the Act provide too few rights for complaining employees, none for a Union representing those employees, and are generally inadequate for the effective enforcement of this important state law.

This "comment" document will be divided into three sections: the first dealing with specific sections of the proposed regulations; the second suggesting provisions which are lacking in the proposed regulations; and the third concerning shortcomings in the enforcement of the Act to date which the regulations should address.

II. COMMENTS ON THE PROPOSED REGULATIONS

A. The Specific Regulations Proposed

Below are our comments with respect to regulations actually proposed by the Department. For ease of reference, we are including the proposed regulation at issue followed by our comment in boldface type.

TITLE 34. LABOR AND INDUSTRY
PART XII. BUREAU OF LABOR STANDARDS
CHAPTER 225. PROHIBITION OF EXCESSIVE OVERTIME IN HEALTH CARE ACT REGULATIONS

225.1 Definitions
225.2 Purpose and scope.
225.3 Complaint and investigation procedure.
225.4 Administrative penalties.
225.5 Administrative notice of violation and proposed penalty.
225.6 Contesting an administrative decision and proposed penalty.
225.7 Hearing.
225.8 Petition to intervene.
225.9 Adjudications.
225.10 Further appeal rights.

§ 225.1. Definitions.
(a) Terms used in this chapter shall have the same meaning and be defined in the same manner as the Act.

(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:

Act -The Prohibition of Excessive Overtime in Health Care Act (43 P.S. §§ 932.1-932.6).

Bureau -The Bureau of Labor Law Compliance or its successor bureau within the Department assigned enforcement of the Act.

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

Employee-An individual employed by a health care facility or by the Commonwealth or a political subdivision or instrumentality of the Commonwealth who is involved in direct patient care activities or clinical care services and who receives an hourly wage or is classified as a nonsupervisory employee for collective bargaining purposes. The term includes an individual employed through a personnel agency that contracts with a health care facility to provide personnel. The term does not include a physician, physician assistant, dentist or worker involved in environmental services, clerical, maintenance, food service or other job classification not involved in direct patient care and clinical care services.

Employer -A health care facility defined in section 2 of the Act (43 P.S. § 932.2 (definition of *Health care facility)* or the Commonwealth, a political subdivision or an instrumentality of the Commonwealth engaged in direct patient care activities or clinically-related services.

The definition of Employer should include the complete phrase "clinically-related <u>health</u> services."

§ 225.2. Purpose and scope.

The purpose of this chapter is to implement the Act's complaint and investigation procedures, and administrative penalties assessment provisions.

§ 225.3. Complaint and investigation procedure.

(a) Upon receipt of a complaint or upon its own initiative, the Bureau will investigate alleged violations of the Act.

This proposed rule is deficient in that it contains no reference to when the Bureau

will begin to investigate alleged violations of the Act. We believe it is important to include a timeframe or at least the inclusion of a term like "promptly" to give some impetus to the investigation. For example, the regulations for the Pennsylvania Human Relations Commission ("PHRC") have such a term. *See* 16 Pa. Code § 42.41(a).

(b) An aggrieved employee who believes there is a violation of this Act against him by a health care facility may file a complaint, within 60 days of the violation, with the Department.

There are a number of difficulties with this rule. First, there is a requirement that the complaint be filed within 60 days of the violation. The 60 days timeframe is not in the Act. This is an unduly short timeframe. Again, under the PHRC Rules, a complainant has 180 days to file. 16 Pa. Code § 42.14(a). We propose a similar period. Secondly, a violation may not be immediately known to the employee. Therefore, there should be some provision allowing for tolling of the time to file, such as when the employee learns of the violation. Thirdly, the proposed rule suggests that a new complaint would have to be filed for every single violation. This would be unduly burdensome. There should be provision for continuing violations. As a comparison, regulations of the PHRC provide for this issue by stating that: "If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of the practice will be deemed to be any date subsequent to the occurrence of the practice up to and including the date upon which the unlawful discriminatory practice shall have ceased." 16 Pa. Code § 42.14(a). Fourthly, there is no provision for a class action type complaint, that is a complaint filed by one person on behalf of other persons who have been affected by the same unlawful practice. Again, a useful comparison is the PHRC regulations which allow such a complaint. 16 Pa. Code § 42.36. Finally, a Union representing employees covered by the Act should have standing to file a complaint on behalf of employees.

(c) The complaint shall be in writing, signed and shall set forth the grounds for the complaint. Complaints must contain:

(1) The name and address of complainant.
(2) The name and address of the employer against whom the complaint is filed.
(3) A statement of the facts forming the basis of the complaint or conclusion that there has been a violation of the act including the date, time and place of the alleged violation.
(4) The name of any witnesses and other information that may be pertinent to an investigation.

This section suggests that a complaint needs to be filed for each time a violation occurs, even if the violation is a continuing one. See "comments" above. This is unduly cumbersome. It is also unusual and intimidating to require that the

complaint list the name of any witnesses. That requirement should be eliminated. Witness names can be provided confidentially to the investigator after the complaint is filed.

(d) The Bureau will prepare complaint forms that will be available on the Department's website (www.dli.state.paus).

The complaint form should be available in Spanish, as well as English, as it is in the case of the Bureau's Wage Complaint form.

(e) The Bureau will accept complaints that are not placed on the complaint form.

(f) The Bureau will record the date of receipt on all complaints. If a complaint does not provide all of the information required by subsection (c), the Bureau shall advise the complainant in writing of the procedures necessary to comply with subsection (c) and will allow the party 15 days from the date of the Bureau's letter to provide the required missing information. If the party fails to provide information fully conforming to the requirements of subsection (c), the Bureau may dismiss the complaint and will notify the complainant in writing of the dismissal.

First, there is no timeframe set for the Bureau to advise the complainant of alleged deficiencies in the complaint. There should be a fixed time for that action. Secondly, there is a relatively short time to "amend." That period should be enlarged to 30 days. Generally, this provision will permit the Bureau to dismiss complaints on overly technical grounds. For example, the Bureau could dismiss a complaint for failure to list a witness. Thirdly, the Bureau should be required to state specific reasons for its dismissal of a complaint.

§ 225.4. Administrative penalties.

(a) The Department may impose any and all of the following penalties under section 6 of the Act (43 P.S. § 932.6):

(1) A fine of $100 to $1,000 per violation. A violation is comprised of each discrete time that a health care facility or employer does not comply with the Act and this chapter".

(2) Order a health care facility or employer to take an action which the Department deems necessary to correct a violation of section 3 of the Act (43 P.S. § 932.3) or this chapter. Actions ordered may include: payment of restitution to employees; directives for compliance with the Act such as changes to policy and procedures to insure future compliance; and non-retaliation orders. Such orders shall be based on the facts of each individual complaint and practices of the health care facility and employer.

In listing the actions that the Department may order an employer to correct the

violation, the proposed rule alarmingly fails to include reinstatement of an employee or removal of discipline against an employee who was unlawfully retaliated against for refusing to work overtime. See 43 P.S. § 932.3b. Furthermore, interest on back pay awards or on restitution at the statutory rate (6%) should be included as a remedy.

(b) The Department may base administrative penalties on the following factors:

(1) Size of business. The Department will take into consideration the number of employees of the health care facility on the date the violation occurred.

(2) History of previous violations. The Department will take into consideration the number of assessed violations for the health care facility in a preceding 12 month period. Only violations for which penalties were assessed and which are not subject to further appeal will be included.

(3) Good faith of health care facility or employer. The Department will take into consideration the health care facility's good faith attempts to abate the violation at issue in the complaint and any attempts the facility has made to abate future violations

This section lists factors upon which the Department would base its decision on administrative penalties. It is not clear where these factors come from, but they generally benefit employers. For example, "good faith" is listed as a mitigating factor to consider, but there is no good faith defense set forth in the Act. There is no requirement that the Department articulate its rationale for reducing a penalty. There is no clear statement that the minimum fine has to be $100. There should be more attention to "aggravating" factors such as the number of employees affected by the unlawful action, whether the employer maintained adequate records, or whether the facility is operated or owned by an entity which operates or owns another facility which has violated the Act, etc. There is no provision on how fines would be collected or how orders would be enforced. In addition to the Secretary bringing an action to enforce, we suggest that the Secretary could request the Attorney General to proceed to recover penalties or fines. Reliance upon the Attorney General may be important if the fine or order is issued against a Commonwealth facility.

§ 225.5. Administrative notice of violation and proposed penalty.

(a) After the completion of an investigation on an alleged violation of the Act and upon finding that the Act has been violated, the Bureau will issue an administrative decision containing findings and proposed penalties.

There is no timeframe established for the completion of the investigation. Our experience is that complaints languish. We suggest a timeframe of 90 days from the filing of the complaint should be established at least as a target.

(b) The Bureau will serve by first class mail upon the violating health care facility or employer a copy of its administrative decision and proposed penalty.

There is no provision here that the Bureau will provide the complaining employee with a copy of its administrative decision. This should be corrected.

(c) A health care facility or employer served with an administrative decision and proposed penalty may accept the notice and pay the penalty, request a reduction in penalty or contest the administrative decision and proposed penalty pursuant to § 225.6 (relating to contesting an administrative decision and proposed penalty).

(d) A request for a reduction in the penalty shall be made in writing to the Bureau within 10 days of the mailing date of the administrative decision and shall propose an alternative penalty for Bureau's consideration setting forth mitigating circumstances. The Bureau shall expeditiously act on the request for reduction of penalty within 10 days of receipt. The filing of a request for reduction does not toll or extend the 30-day period for requesting a hearing under § 225.6.

There is no provision that the Bureau will inform the complaining employee of a "request for reduction" in the penalty, in order to allow input by the employee. There is no provision that the employee shall be notified of any decision of the Bureau to reduce a penalty. Inconsistent with the provision dealing with investigating a complaint by an employee, here the regulations state that the Bureau shall "expeditiously act" on the request <u>by an employer</u> for a reduction of penalty. This rule demonstrates the one-sided nature of the regulations.

(e) After the completion of an investigation of alleged violations of the Act and upon no findings that the Act has been violated, the Bureau will provide written notice to the complainant and the health care facility or employer that the investigation has been closed.

§ 225.6. Contesting an administrative decision and proposed penalty.

(a) A health care facility or employer may contest an adverse administrative decision by requesting a hearing.

Under this provision, the employee cannot contest an administrative decision adverse to his/her complaint. We are aware of cases in which the Bureau has dismissed complaints on grounds that are factually inaccurate, *e.g.*, that the employee was not mandated to work overtime when he or she was mandated. .

The complainant should have the opportunity to appeal the administrative decision.

(b) The health care facility or employer contesting the administrative decision shall file an original and two copies of a written request for a hearing with the Bureau within 30 days of the mailing date of the administrative decision. The hearing request shall be mailed to the Bureau at the address listed on the administrative decision.

(c)The Bureau will notify the complainant of any request made for hearing under this section.

(d) An untimely request for a hearing may be dismissed without further action by the Bureau.

(e) Filing of a request for a hearing shall act as a supersedes of the administrative decision on the violation and proposed penalties.

This section provides that the filing of a request for a hearing by employer stays the administrative decision on the violation and the proposed penalties. Given that there is no timeframe for holding a hearing or issuing a decision, this allows an employer to escape complying with the law for a potentially unreasonable period of time.

§ 225.7. Hearing.

(a) The Secretary will assign the request for a hearing to a hearing officer who will schedule a de novo proceeding. All parties will receive reasonable notice of the hearing date, time and place.

There is no timeframe set for the Secretary to schedule a hearing or appoint a hearing officer. This presents another opportunity for delays. Because the complainant is not a "party," it is not clear that the complainant will receive notice of the hearing date. There is no provision that the hearing will be open to the public.

(b) The hearing will be conducted in a manner to provide all parties the opportunity to be heard. The hearing officer will not be bound by strict rules of evidence. All relevant evidence of reasonably probative value may be received into evidence. Reasonable examination and cross--examination of witnesses will be permitted.

Because the employee or his/her Union is not automatically a party, this rule denies the complainant due process.

(c) The parties may be represented by legal counsel, but legal representation at the hearing is not required.

The rule should be amended to permit a complainant to be represented by his/her Union, without legal counsel.

(d) Testimony will be recorded and a full record kept of the proceeding.

(e) All parties will be provided the opportunity to submit briefs addressing issues raised at the hearing.

(f) The Bureau and the health care facility or employer shall be the parties at the hearing.

This indicates that the complainant is not a party. As such, the employee would not be permitted an opportunity to be heard and is otherwise denied due process. Party status should be afforded the complainant as of right.

(g) The Bureau shall have the burden of proving by a preponderance of the evidence that the health care facility violated the Act and that the proposed penalty is appropriate under the factors listed in section 225.4(b).

This rule places an unrealistic burden on the Bureau. The rule should be amended to provide that once the Bureau establishes that there has been a violation of the "General Rule" prohibiting mandatory overtime as set forth in 43 P.S. § 932.3a, the burden should shift to the employer to prove that the "Exception" set forth in 43 P.S. § 932.3c applies. This is consistent with the structure of the Act. It is only reasonable for the employer to have to prove that an "unforeseeable emergent circumstance" took place and that the other three conditions permitting mandation existed. Otherwise, the Bureau is being forced to prove a negative, *i.e.*, that an "unforeseeable emergent circumstance" did not occur. Furthermore, there should be a rule that, if the employer does not maintain adequate records of a contemporaneous nature to establish both the "unforeseeable emergent circumstance" and the existence of the other three conditions warranting the exception, then there is a presumption that the employer violated the Act.

(h) To the extent not covered by this chapter, hearings shall be governed by 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

This provides that "hearings" shall be governed by the "general rules of administrative practice and procedure." It is unusual that the regulations do not reference what other rules from the "general rules" apply and which ones do not apply. There should be a provision that, except as otherwise provided in their own regulations, the entire set of general rules of administrative practice and procedure will apply. Without such a clarification, there could be some ambiguity or gaps. For example, the general rules provide for consolidation of proceedings.

1 Pa. Code Subchapter A § 35.45. This would be an important power given the lack of class action complaints. But this rule is technically not part of the general rules governing "hearings;" thus the Department may lack the power to consolidate the complaints of two similarly situated employees. 1 Pa. Code Subchapter B § 35.101, *et seq.*

§ 225.8. Petition to intervene.

(a) The Bureau and the health care facility or employer shall be the parties at the hearing.

(b) A person other than the Bureau and the health care facility or employer may request to intervene in a hearing under the following conditions:

(1) He or she can demonstrate any of the following:

(i) A right conferred by law.

(ii) An interest which may be so directly affected that it may be bound by the Department's action and its interest is not adequately represented by existing parties in the hearing.

(2) The party files a petition to intervene with the presiding officer and the existing parties in the hearing under 1 Pa. Code § 35.29 (relating to form and contents of petition to intervene) no later than 30 days before the scheduled hearing unless the party shows good cause and there is no prejudice to the existing parties from the late filing. Existing parties may file an answer under 1 Pa Code § 35.36 (relating to answers to petitions to intervene) within 20 days or other time set by the presiding officer.

(c) As soon as possible after the time set for filing of answers, the hearing officer will rule on the petition and may grant or deny intervention in whole or in part, or may limit the intervener's participation in the hearing. The hearing officer may tentatively grant intervention before the hearing only to avoid detriment to the public interest and if the hearing officer issues a final ruling on intervention before the hearing commences .

(d) A hearing officer may not grant a petition to intervene during a hearing unless good cause is shown for the late filing, all parties have the opportunity to respond or object, and the petition complies with this section.

This rule becomes important because, under the proposed rules, the employee who files the complaint is <u>not</u> a party to the proceedings. In order for the employee or his/her union to participate as a party, and not just as a witness, they must intervene. The standards proposed in this section make such intervention

very difficult. It would be best if the rule explicitly provided that the employee has a right to intervene. Alternately, some more expansive language on intervention should be adopted. The general rules of administrative procedure have been borrowed in part by L&I, but two important provisions of 1 Pa. Code § 35.28(a) were omitted. First, L&I omitted the explanation that employees may have an interest which may be so "directly affected" that they should be permitted to intervene. 1 Pa. Code § 35.28(a)(2) . Secondly, the proposed regulation omits a provision on intervention which recognizes "other interests of such nature that participation of the petitioner may be in the public interest." 1 Pa. Code § 35.28(a)(3). Both should be added to the proposed regulation.

§ 225.9. Adjudications.

(a) The Secretary will issue a written adjudication. The adjudication will include all relevant findings and conclusions, and the rationale for the adjudication.

There is no time set for the issuance of this adjudication, which could result in undue delay. Therefore, a timeframe should be set by rule.

(b) The adjudication will include a notification to all parties of appeal rights to Commonwealth Court.

(c) The adjudication will be served upon all parties, interveners and counsel of record.

Under this proposed provision, the complaining employee would not be entitled to be served with a copy of the written adjudication. This should be changed to make it obligatory to serve the complainant.

§ 225.10. Further appeal rights.

Any party aggrieved by an adjudication rendered pursuant to § 225.9 (relating to adjudications) may file an appeal to Commonwealth Court within 30 days from mailing of the decision as prescribed by law or rule of court.

Under this provision, unless the employee was granted intervention, he/she would not be able to appeal the adjudication to Court. This right should be afforded the complainant.

B. <u>Omissions from the Proposed Regulations</u>

In addition to the deficiencies pointed out above, the proposed regulations are lacking in important respects. First and foremost, there are no proposed rules setting

forth the investigative powers of the Department. While § 225.3 of the proposed regulations state the Bureau can investigate on its own initiative, it does not provide the Bureau with the tools necessary to investigate. The Bureau needs the right to subpoena records, to inspect records at the premises of the employer, and to perform audits of compliance. Those powers should be explicitly included.

Secondly, there is no requirement, as there should be, that an employer maintain accurate records so that the Bureau can assure compliance with the Act. Accordingly, we would suggest the following recordkeeping provisions be incorporated into the regulations:

1. Employers should be required to maintain accurate and adequate records of the "reasonable efforts" it made to obtain other staffing before attempting to mandate an employee to work overtime. Those records should be open for inspection by the Bureau;

2. Employers should maintain accurate and adequate records with respect to any case where an employee voluntarily waives the requirement of Section 3(d) of the Act, and such records should be open for inspection by the Bureau;

3. Employers should maintain accurate and adequate records to establish the "agreed to, predetermined and regularly scheduled daily work shifts" for employees covered by the Act and such records should be open for inspection by the Bureau;

4. Employers shall permit an authorized representative of the Department of Labor & Industry to interrogate employees in private and without the presence of a supervisor or manager, at the place of employment and during work hours with respect to overtime hours mandated, the circumstances surrounding that mandation, and the efforts by the employer to obtain other staffing before mandating overtime;

Without requiring such recordkeeping and providing for these investigative tools, the proposed regulations would permit an employer to simply ignore the Bureau's inquiries

or deny access to records. This would make it extremely difficult for the Bureau to investigate on its own, to investigate active complaints, or to prove a violation of the Act.

A third topic omitted by the proposed regulations concerns notice to employees. We propose that employers covered by the Act should be required to post, in a conspicuous place or places in the workplace, a summary of the ACT and the FAQs written by the Bureau, or a similar notice to be created by the Bureau, so that employees are informed of their rights under the Act. The Department requires mandatory postings for other laws in order that employees have information about applicable labor laws. This law should be no exception.

Finally, we also propose that if an employer is found to violate the Act, the decision of the Bureau should be posted on its website and the employer should be required to post a copy of the decision at the workplace for at least a period of three (3) months. An employer's failure to post a decision or the required notice should be considered a violation of the Act subject to penalty.

C. Experience under the Act

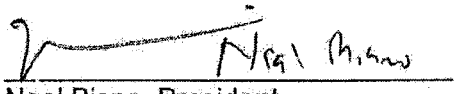
Thus far, the experience of SEIU Healthcare PA and the employees it represents in dealing with the Department of Labor and Industry with respect to complaints of violations of the Act have been extremely disappointing. A number of complaints have been filed, and in some cases, multiple complaints with regard to the same employer and the same unlawful practices. Yet very little has been remedied. If the Bureau does act, it acts extremely slowly. By the time an investigation is launched, memories have faded and records are not available.

In response to a "right to know" request made by Union representatives, the Department stated it has received 864 complaints since Act 102 went into effect on July 1, 2009 and of those 510 (59%) remain open. This demonstrates a lack of attention to this law. Delay in enforcement is the equivalent of non-enforcement. For these reasons, we are urging the Department to bolster its responsiveness to complaints, to adopt timeframes for the processing of complaints to afford employees and their unions greater rights, and to require employers to maintain records which can be easily inspected by the Bureau.

III. CONCLUSION

We respectfully urge the Department, the Legislative Standing Committees, and the IRRC to carefully consider the comments set forth above. The proposed regulations, at present, are ineffective and inadequate to achieve the purposes of this law. They should be substantially amended or withdrawn and revised.

Please notify us of the adoption of the final form regulations. Thank you.

By: 

Neal Bisno, President
SEIU Healthcare Pennsylvania

Dated: August 10, 2013