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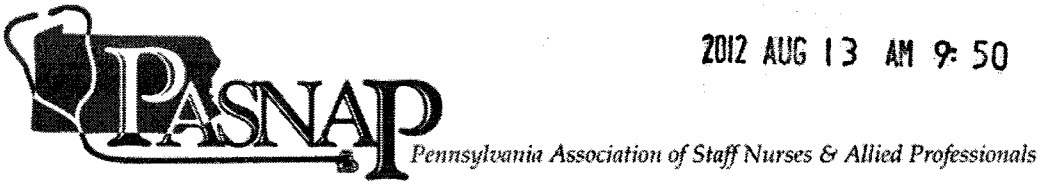

Comments of Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) on Proposed Regulation of The Department of Labor and Industry (ID NO. 12-91; IRRC NO. 2957)

RE: PROHIBITION OF EXCESSIVE OVERTIME IN HEALTH CARE ACT

PASNAP is a statewide union of Registered Nurses and other health professionals. Our 5,000 members work predominantly in acute care hospitals and are covered by Act 102. Together with SEIU Healthcare Pennsylvania, PASNAP was the key organization responsible for mobilizing public opinion and for building the bipartisan coalition of legislators to win passage of this important patient safety measure.

Our specific comments on the proposed regulations are detailed below. In general, PASNAP believes that the biggest gap in the proper effectuation of Act 102 is the positively anemic enforcement of the new law. The proposed regulations don't do nearly enough to solve this fundamental problem.

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Specific Comments

Below are our comments with respect to the regulations proposed by the Department. We include the text of those sections of the regulations that we are commenting on, followed by our comments in bold.

§ 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.

It is essential that a time frame for the initiation of such an investigation be included in this section. We would recommend inserting the word "promptly."

(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.

This 60 day deadline to file is not part of the statute and seems arbitrary and unduly limiting. PHRC rules provides for a 180 day window to file and charges of unfair labor practices under Act 195 may be filed up to 120 days after the alleged violation of the Act. We believe the deadline here should be 180 days.

In addition, it is not made clear that a complainant may file on behalf of other employees similarly situated, a right afforded to employees under both PHRC and PLRB rules. Finally, unions that represent employees who allege violations of the Act should have standing to file complaints on their behalf.

(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.

To the extent that this section is read to require a fresh complaint for each alleged violation, rather than to consider the complaint a "continuing violation," it should be clarified to clearly establish that such complaints encompass ongoing violations. It should not be necessary to list witnesses on the initial complaint. Such witness names can be provided confidentially to the investigator.

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

(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.

§ 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.

This proposed section is wholly incomplete as it does not provide for a thorough "make whole" remedy, including reinstatement, for employees who may have been retaliated against for exercising their rights under the law.

(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 proposed section is inadequate in that it seems to not take into effect aggravating factors such as the number of employees impacted by the violation and whether or not other entities owned by the offending employer have also been cited for violating the Act.

§ **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.

Our union's experience with ACT 102 enforcement so far is that investigations seem to take far too long than should be necessary. We would suggest that most complaints should be investigated within 60-90 days. There really must be a time frame for completion in the body of the regulations.

(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.

Without question, the complaining employee is entitled to a copy of the administrative decision.

(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.

(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.

In addition, the complaining employee or other entity with standing should have the opportunity to appeal the administrative decision. After all, the Department could be basing its decision on erroneous factual information.

(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.

§ 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 should be a targeted timeframe to schedule such a hearing. Such hearings should 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.

The complaining employee and/or their union should be afforded party status to the hearing; to not do so violates the employee's rights to due process.

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

Complaining employees should be permitted to be represented by his/her Union representative, 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.

As noted above, Party status should be afforded to the complaining employee.

(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).

(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).

§ 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.

Complaining employees must either (a) be granted Party status, or (b) have an automatic right to intervene in the proceeding.

§ **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.

(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.

Complaining employees, if for some reason are not made Parties under this rule, should also be served with a copy of the written adjudication.

General Comments

The proposed rules do not provide a mechanism for employees covered by the Act to be so notified of their rights. The rules should include a provision requiring a reasonable notice posting by employers to all covered employees, similar to other Commonwealth statutes.

If an employer is found to violate the Act, they should be required to post the Department decision at the workplace where other such notices are typically posted, including any penalties administered to the employer.

The experience of Registered Nurses in our union so far has been that enforcement of the Act has been extremely ineffectual. Employees have been told by Department employees that they should not file complaints, that violations of the Act don't count "until employers have violated the act many times...there must be a pattern." Investigations of complaints have taken many, many months to complete. It seems to us that employers have come to believe they can violate the Act with impunity.

We respectfully request that the Department, the Legislative Standing Committees and the IRRC seriously consider the above suggestions for amendments to the rules. The rules as currently proposed will not effectuate the vital substantive rights conferred under the Act. If necessary, the rules should be withdrawn and re-issued to ensure that employee rights and patient safety are properly protected in the process.

By: _____

William Cruice, Executive Director
Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP)

Dated: August 13, 2012