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PSNA
Pennsylvania State
Nurses Association

2578 Interstate Drive
Suite 101
Harrisburg, PA 17110
P 717-657-1222 | 888-707-7762 | F 717-657-3796
Email: panurses@panurses.org | www.panurses.org

COMMENTS OF PA STATE NURSES ASSOCIATION 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

Pennsylvania State Nurses Association (PSNA) is a statewide organization representing the professional interests of Pennsylvania's 211,000 registered nurses and associated health interests of the patients we serve. Mandatory overtime is one of the many workplace issues that may be contributing to nurses leaving the workforce. Concern for the long term effects of overtime leading to fatigue include potential for diminished quality of care, errors or near misses, as well as the negative impact on the care-givers health. Research indicates that risks of making an error are significantly increased when work shifts are longer than 12 hours, when nurses worked overtime, or when they worked more than 40 hours per week. Other industries have been aware for many years of the links between fatigue and accidents, mistakes, errors and near errors. For instance, the airline and trucking industries limit the number of hour's pilots and truck drivers can fly/drive. They also require a certain number of hours between "flights" or "runs". By virtue of licensure, nurses are responsible and accountable for their decisions, actions and/ or inactions. By removing the ability of the nurse to determine fitness for duty, patient safety is not only jeopardized but so is the nurse's ability to fulfill their legal obligations of licensure. The American Nurses Association (ANA) and PSNA have taken the position that regardless of the number of hours worked, each registered nurse has an ethical responsibility to carefully consider his/her level of fatigue when deciding to accept any assignment extending beyond the regularly scheduled work day or week, including mandatory or voluntary overtime assignment.

PSNA encourages the department to consider the following suggestions:

II. COMMENTS ON THE PROPOSED REGULATIONS

A. The Specific Regulations Proposed

For ease of reference, we are including the proposed regulation at issue followed by our comment in boldface type.

§ 225.1. Definitions

PSNA recommends the following definition of "Chronic Short Staffing": **Long standing vacancies in a portion of the facility's master staffing plan applicable to the work unit of an employee who files a complaint where such vacancies are a result of open positions that continually remain unfilled over a period of 90 days or more despite active recruitment efforts.**

§ 225.3. Complaint and investigation procedure

(a) **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. PSNA recommends that the timeframe be no longer than ten days based on the regulations of other states.**

(b) **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.**

- **Under the PHRC Rules, a complainant has 180 days to file. 16 Pa. Code § 42.14(a). We propose a similar period.**
- **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.**

- **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).**
- **There is no provision for a class action type complaint, which 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.**

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

(f)

- **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.**
- **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.**
- **The Bureau should be required to state specific reasons for its dismissal of a**

complaint.

(g) An employer shall not discharge or in any manner discriminate against an employee because such an employee has made any compliant to his or her employer, including the employer's representative, or accrediting institution where the employee has been required to work overtime.

(h) An employee shall have the right to file a complaint with the bureau up to two (2) years following the date of an assigned mandated overtime's shift, if the employee believes overtime was not in response to an unforeseen emergent circumstance, and/or required reasonable efforts were not exhausted.

§ 225.4. Administrative penalties.

(a) **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.**

(3) In cases where the bureau requests additional information from a facility, the facility shall comply within ten (10) working days.

(4) The bureau may also share with licensing agencies information it develops, such as number of mandatory overtime complaints filed; validity of complaints; enforcement actions appealed; enforcement actions upheld.

(5) Nothing in this chapter shall be construed to relieve a facility of its obligation to comply with licensing standards pertaining to minimum employee staffing levels.

(b) **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) **Again, 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) **There is no provision here that the Bureau will provide the complaining employee with a copy of its administrative decision. This must be corrected.**

§ 225.6. Contesting an administrative decision and proposed penalty

(a) **Under this provision, the employee cannot contest an administrative decision adverse to his/her complaint. The complainant should have the opportunity to appeal the administrative decision.**

(e) **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 for non- compliance with the law for a potentially unreasonable period of time.

§ 225.7. Hearing

(a) **Here again, 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) **PSNA requests that a definition of "party" be created and that the definition of "party" include the employee and or complainant.**

(f) **This indicates that the complainant is <u>not</u> 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 a right. See above.**

(g) **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) **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

(d) **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 to participate as a "party" and not just 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.**

- **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) .**
- **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) **Once again, there is no time set for the issuance of this adjudication, which could result in undue delay. Therefore, PSNA recommends a timeframe be set by rule.**

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

§ **225.10. Further appeal rights**

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. Omissions from the Proposed Regulations

In addition to the recommendations identified above, PSNA recommends the following additions to the proposed regulations.

1. 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 the right to subpoena records, to inspect records at the premises of the employer, and to perform audits of compliance. Those powers should be included explicitly.
2. 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:

a) 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;
b) 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;
c) 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;
d) Employers shall permit an authorized representative of the Department of Labor & Industry to interview 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;
e) In the event of such an unforeseeable emergent circumstance, the employer shall provide the employee with necessary time, up to a maximum of one (1) hour, to arrange for the care of employee's minor children, dependents or elderly or disabled family members.
f) A facility shall submit data related to the effects of prohibiting mandatory overtime, data shall include whether chronic staffing shortages exist, the licensing agency shall request this information directly from each facility.

Without requiring such recordkeeping and providing for these investigative tools, an employer could simply ignore the Department's inquiries or deny access to records. This would make it extremely difficult for L&I to investigate on its own, to investigate active complaints, or to prove a violation of the Act.

3. A third topic that is omitted by the proposed regulations concerns notice to employees. Therefore, we propose that employers covered by the Act should be required to post 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. This would be consistent witl other applicable labor laws.

4. Finally, PSNA also proposes 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.

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 inadequate to achieve the purposes of this law.

Please notify us of the adoption of the final form regulations. Thank you for the opportunity to submit our recommendations.

Regards,

Betsy M Snook

Betsy M. Snook, MEd, BSN, RN
Chief Executive Officer
Pennsylvania State Nurses Association

Dated: August 13, 2012