INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER

Commissioners Voting:

John F. Mizner, Esq.,Chairman
George D. Bedwick, Vice Chairman
W. Russell Faber
Lawrence J. Tabas, Esq.
Dennis A. Watson, Esq.

Public Meeting Held February 27, 2014

Order Issued March 17, 2014
Regulation No. 12-91 (#2957)
Department of Labor and Industry
Prohibition of Excessive Overtime in Health Care Act Regulations

On June 26, 2012, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Department of Labor and Industry (Department). This rulemaking amends 34 Pa. Code by adding Chapter 225. The proposed regulation was published in the July 14, 2012 *Pennsylvania Bulletin* with a 30-day public comment period. On September 12, 2012, the Commission issued its comments on the proposed rulemaking pursuant to Section 5(g) of the Regulatory Review Act (71 P.S. § 745.5(g)) (RRA). The final-form regulation was submitted to the Commission on January 16, 2014.

This regulation establishes complaint and investigation procedures as well as administrative penalty provisions related to violations of the Prohibition of Excessive Overtime in Health Care Act (Act) (43 P.S. §§ 932.1 - 932.6). We find that this regulation is not in the public interest because it may impede or could serve as a deterrent to employees who may want to pursue an action against an employer. (71 P.S. § 745.5b(b).) In support of this finding, the following points are noted.

First, the Commission's second comment on the proposed regulation raised the following legislative concern: "Determinations where no violation is found should include statements of the reason or the applicable exception under the Act." The Department's response to this comment notes that such a requirement would curtail its administrative discretion. However, the Department states that its general practice is to provide, when possible, an explanation as to why no violation was found in its closing letter to the complainant. While we commend the Department for its intent to provide explanations, when possible, we believe a more reasonable approach would be to provide an explanation in all instances where no violations are found. Including such a requirement in this regulation would provide complainants and the regulated community with the basis for the Department's determination and ensure that the general practice of providing explanations where no violations are found continues into the future. (71 P.S. § 745.5b(b)(3)(iv).)

Second, the Commission's comments on § 225.3(f) recommended that the Department include the timeframe for the Bureau to conduct an initial review to assess whether the complaint meets the requirements of § 225.3(c). In response to this comment, the Department added language to Subsection (f) that states, "The Bureau will review all complaints within 60 days of receipt." In addition, the Commission's comments on § 225.3(b) state that "Subsection (b) does not include timeframes within which the Bureau will investigate complaints. The Department

should explain why such timeframes are not set forth in the regulation." At the public meeting, the Department stated that it begins its investigation immediately upon completion of its review of the complaint. To improve the clarity of § 225.3(f), we suggest that the new language be amended to state the Bureau will "review and commence investigation" of all complaints within 60 days of receipt. (71 P.S. § 745.5b(b)(3)(ii).)

Third, the Commission's sixth comment on the proposed rulemaking asked the Department to explain why the factors included in § 225.4(b) are an appropriate basis for imposing penalties. The Department's response indicates that the factors were based on its experience with administering penalties under the Pennsylvania Community and Worker Right-to-Know Act (35 P.S. §§ 7301 - 7320) and similar factors used in issuing administrative penalties found at 34 Pa. Code § 321.4. As noted during the public meeting, there is concern with how the Department will implement the "good faith" factor of § 225.4(b). The "good faith" factor found at § 321.4 sets forth very specific standards the Department can use to calculate penalties. This level of detail establishes a binding norm that could be evenly applied to all parties involved with a complaint at this time and in the future. We recommend that the Department amend § 225.4(b)(3) to include more detail on how the "good faith" factor will be implemented. (71 P.S. § 745.5b(b)(3)(iv).)

Fourth, the Commission's second comment notes that the regulation does not address several items, including the inclusion of an employee's representative throughout the complaint and enforcement process. We note that § 225.8(b)(1)(ii) lists several parties as potential intervenors in a hearing, but the list does not specifically include an employee's union representative. At the meeting, the Department explained the Commonwealth's General Rules of Administrative Practice and Procedure (1 Pa. Code, Part II) allow for union representation and such a representative would be allowed to intervene. We believe the clarity of the rulemaking would be improved if § 225.8(b)(1)(ii) specifically included an employee's union representative as a potential intervenor. (71 P.S. § 745.5b(b)(3)(ii).)

Fifth, the Department added § 225.8(c) to the final-form regulation to provide a complainant with the right to file a petition to intervene. At the public meeting, we asked why the complainant had to file a petition rather than just being made a party at the outset, particularly since it is likely that the complainant will be at the hearing as a witness. We further asked why the regulation did not allow the complainant to opt out of the process rather than take the affirmative step to opt in. Many complainants who do not have legal representation may not fully appreciate the significance of the intervention process and requiring this additional step could serve as a disincentive to their participation. We ask the Department to consider amending the language to remove this potential barrier for complainants.

Finally, we note that our second comment incorporated legislative comments that asked the Department if it would benefit from addressing certain items pertaining to the enforcement of the Act and these regulations. Among the items noted in the legislative comments was a question of whether there is a need to include investigative powers and rights to review employer records in the regulation. In the comment and response document submitted with the final-form rulemaking, the Department notes that the Act does not contain record-keeping requirements, but states that without such requirements, it would have implied authority to inspect records. In

order to assist the Department with the implementation of the Act and its review of employer records, we believe a record-keeping requirement could be added to the regulation. We are aware that other statutes administered by the Department include specific record-keeping requirements and the Act does not include similar provisions. However, we believe the implied powers noted in the comment and response document and the rulemaking authority granted to the Department by the Act (43 P.S. § 932.5) provide the mechanism to impose record-keeping requirements in the regulation. We ask the Department to consider adding such a provision to the rulemaking. (71 P.S. § 745.5b(b)(3)(iv).)

We have determined that this regulation is consistent with the statutory authority of the Department (43 P.S. § 932.5) and the intention of the General Assembly. However, after considering all of the other criteria of the RRA discussed above, we find that promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

This regulation is disapproved.

George D. Bedwick, Vice Chairman