Comments of the Independent Regulatory Review Commission

Department of Labor and Industry Regulation #12-91 (IRRC #2957)

Prohibition of Excessive Overtime in Health Care Act Regulations

September 12, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the July 14, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) (RRA). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry (Department) to respond to all comments received from us or any other source.

1. Determination of whether the regulation is in the public interest; Fiscal impact; Feasibility and reasonableness of the regulation; Implementation procedures.

Preamble and the Regulatory Analysis Form (RAF)

Section 5.2 of the RRA directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. 71 P.S. § 745.5b. When making this determination, IRRC considers criteria such as feasibility and reasonableness of the regulation. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide in the RAF pursuant to Section 5(a) of the RRA. 71 P.S. § 745.5(a).

This regulation implements the Prohibition of Excessive Overtime in Health Care Act (Act). 43 P.S. §§ 932.1 *et. seq.* According to Section 225.1, the purpose of the regulation is to establish complaint and investigation procedures for alleged violations of the Act, as well as administrative penalty provisions for violations of the Act. The Preamble and the information in the RAF do not explain why the Department is choosing to implement the administrative procedures portion of the Act only. Commentators point out that the regulation does not address the Act's prohibition of retaliation. The Department does not provide an explanation this omission. The Department also fails to explain why the regulation does not address the Act's general prohibition of mandatory overtime.

In addition, the Preamble and the RAF do not address why certain administrative and judicial processes in the regulation are appropriate. For example, the Department does not explain why the aggrieved employee does not have a right to a hearing to contest an adverse administrative decision.

Without a detailed description of these issues, it is difficult to determine whether the requirements in the rulemaking are reasonable or feasible.

In the final-form regulation submittal, the Preamble and the RAF should include a more detailed description of the basis for the amendments proposed in each section of the regulation. We will review the Department's response as part of our determination of whether the final-form regulation is in the public interest.

Fiscal impact

According to the Preamble, the Department anticipates costs associated with implementation of this regulation. However, the Department states that it "does not have adequate experience with complaints, violations and appeals to make any estimate of costs" (RAF #14, 15) and as a result, the RAF provides no estimate for the fiscal savings and costs (RAF #17). A fiscal impact analysis is required under the RRA. 71 P.S. § 745.5b(b)(1). Given that the Department has been enforcing the Act since July 2009, we recommend it use this experience to estimate the costs of implementing the regulation. We further recommend that the Department include the results of the fiscal impact analysis in the final-form RAF and Preamble.

Recommendation for an Advanced Notice of Final-Form Rulemaking

According to the RAF (RAF #19), in 2009 the Department held a public stakeholders meeting and several organizations presented testimony and submitted comments. The Department also reviewed this proposed rulemaking with the Commonwealth agencies affected.

We commend the Department for providing these stakeholders with an advanced opportunity to comment on the issues relating to the proposed regulation. We strongly encourage the Department to continue this dialogue as it develops the final-form regulation. Additionally, we recommend that the Department publish an Advanced Notice of Final Rulemaking to allow the opportunity to review and resolve any remaining issues prior to submittal of a final-form regulation.

2. Legislative comments.

On September 6, 2012, Representative William F. Keller, Democratic Chairman of the House Labor and Industry Committee, submitted comments on behalf of the Committee's Democratic members that address the following:

- 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.

These comments also include an extensive list of concerns pertaining to enforcement of the Act and the proposed regulation.

We will review the Department's responses to all of these issues in our determination of whether the final-form regulation is in the public interest.

3. Section 225.1. – Purpose and scope. – Consistency with the statute; Clarity.

This section states that this proposed chapter implements "the complaint and investigation procedures **in the act** . . ." (Emphasis added.) However, the Act does not appear to directly reference complaints and investigations. Therefore, the Department should explain what statutory provisions it is referring to and cross-reference those provisions in the final-form regulation.

4. Section 225.2. – Definitions. – Consistency with the statute; Reasonableness; Clarity.

Employer

According to the regulation, in addition to being a health care facility, an employer can be the "Commonwealth, a political subdivision or an instrumentality of the Commonwealth engaged in **direct patient care activities** or clinically-related services." (Emphasis added.) However, under the Act, a health care facility only provides "clinically-related health services." *See* 43 P.S. § 932.2. The Department should explain under what circumstances would employers, other than a health care facility, be engaged in "direct patient care activities."

Commentators suggest that the word "health" be added to the phrase "clinically-related services." The Act references "clinically-related **health** services." *See* 43 P.S. § 932.2. (Emphasis added.) Therefore, to maintain consistency with the statute, we recommend that the word "health" be added to the final-form regulation.

5. Section 225.3. – Complaint and investigation procedure. – Reasonableness; Need; Implementation procedures; Clarity.

Subsection (b)

Subsection (b) establishes a 60-day deadline for aggrieved employees to file a complaint against the health care facility for an alleged violation of the Act. We address three areas of concern.

First, commentators object to this deadline and argue that it does not provide the employee with enough time to bring forth a grievance. The Department should explain why this 60-day deadline is reasonable.

Second, this subsection states that "an aggrieved employee who believes there is a violation of this act against him **by a health care facility** . . ." (Emphasis added) may file a complaint with the Department. However, under Subsections (a), (d), (e) and (f), the Bureau is responsible for processing complaints. Therefore, we recommend that the final-form regulation replace the term "Department" with "Bureau." In addition, Sections 225.4, 225.5, 225.6, 225.7, and 225.8 all reference violations by "the health care facility or employer." To maintain consistency between sections, the Department should add "or employer" to Subsection (b) in the final-form regulation.

Finally, 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.

Subsection (c)

Subsection (c) lists the necessary information an aggrieved employee must include in a complaint. Subsection (c)(3) requires a complaint to contain a statement of facts forming the basis for or conclusion that there has been "a" violation of the Act. Commentators indicate that this provision would require employees to file multiple complaints for every violation alleged against a health care facility or employer. The Department should clarify whether a single complaint can include multiple violations.

Subsection (c)(4) requires the aggrieved employee to provide the names of "witnesses" in the complaint. However, the term "witness" is not defined in the regulation. Furthermore, it is unclear what role a witness would have in the complaint proceeding once identified by the aggrieved employee. Is a witness limited to answering questions on the complaint, or would a witness testify at an administrative hearing? We recommend the Department define and clarify the term "witness."

Additionally, commentators raise the concern that the inclusion of the names of witnesses in the complaint will impact employees' willingness to report violations of the Act by the health care facility or employer. Public commentators suggest that witness names be provided confidentially to the investigator after the complaint is filed. We recommend that the Department explain the reason for including the identities of witnesses in the initial complaint.

Subsection (f)

This subsection establishes procedures for an aggrieved employee to correct a deficient complaint. However, the regulation does not specify the timeframe within which the Bureau will review complaints. We recommend that the final-form regulation include the timeframe for the Bureau to conduct an initial review to assess whether the complaint meets the requirements of Subsection (c).

Should the complaint fail to meet the requirements of Subsection (c), Subsection (f) also states that the Bureau will send a letter to the aggrieved employee to amend their deficient complaint within 15 days of the letter. We question whether 15 days provides an aggrieved employee with sufficient time to amend the complaint. The Department should explain how this timeframe is reasonable.

Finally, Subsection (f) requires the Bureau to notify the aggrieved employee if the deficiencies in the complaint result in its dismissal. We recommend that the final-form regulation state that the Bureau will provide the employee with the specific reasons why the complaint fails to conform with the requirements of Subsection (c).

6. Section 225.4. – Administrative penalties. – Consistency with the statute; Reasonableness; Implementation procedures; Clarity.

Subsection (a)

Subsection (a) addresses the administrative penalties the Department can impose for violations of the Act. We raise three issues.

First, Subsection (a)(1) states that a "violation" is comprised of "each discrete time that a health care facility or employer does not comply with the act or this chapter." Section 225.4 is not the first time this term is used in the regulation, as it appears in Section 225.3 and is used throughout the regulation. To improve clarity, we recommend that the Department move the part of this subsection that defines "violation" to Section 225.2 of the final-form regulation.

Second, in Subsection (a)(1), what does the Department mean by each "discrete time" a health-care facility or employer does not comply with the Act? The final-form regulation should define or further clarify this term.

Finally, Subsection (a)(2) lists actions that may be ordered by the Department as part of the penalties imposed on the health care facility or employer, including the issuance of "nonretaliation orders." The Department should define "nonretaliation orders" in the final-form regulation. Commentators also recommend that the regulation include retaliation provisions similar to those contained in the Act. *See* 43 P.S. § 932.3(b). We agree and recommend that the final-form regulation either include a definitive prohibition against retaliation or contain a cross-reference to the Act.

Subsection (b)

Subsection (b) lists the factors on which the Department will base the imposition of administrative penalties on a health care facility or employer. We raise four issues.

First, the Department should explain why these factors establish an appropriate basis for imposing penalties.

Second, Subsection (b)(1) states that the Department will take into consideration the "number of employees of the health care facility." Because an employer could own multiple sites, the Department should clarify whether this number amounts to those employees who were onsite where the violation occurred or whether it includes the total number of persons employed by the health care facility.

Third, Subsection (b)(2) allows the Department to consider the number of assessed violations in a preceding 12-month period. The Department should provide an explanation for why the 12-month period is appropriate.

Finally, Subsections (b)(1) and (2) make no references to the "employer." To be consistent with other sections, we recommend that both these subsections include the phrase "health care facility or employer" in the final-form regulation.

7. Section 225.5. – Administrative notice of violation and proposed penalty. – Reasonableness; Implementation procedures; Clarity.

This section pertains to the issuance of an administrative decision and penalties once the Bureau determines whether a violation has occurred. We raise three issues.

First, in Subsection (b), the Department should explain why the Bureau serves a copy of the administrative decision on the health care facility or employer, but not on the aggrieved employee who filed the initial complaint.

Second, Subsection (d) pertains to requests for reduction in the penalty amount. The Department should explain the basis for the 10-day timeframe within which the Bureau will act on a request for reduction of a penalty.

Finally, Subsection (e) states that once the Bureau concludes that a violation did not occur, the Bureau will provide written notice to the complainant that the investigation has been closed. We recommend that the final-form regulation state that the written notice will contain the findings that are the basis for closing the investigation.

8. Section 225.6. – Contesting an administrative decision and proposed penalty. – Reasonableness; Need; Implementation procedures; Clarity.

This section permits the health care facility or employer to contest the administrative decision and proposed penalty. As a result, it is unclear what recourse is available to aggrieved

employees who receive an unfavorable decision on their complaint. The Department should provide a clear justification for why the regulation does not afford the aggrieved employee the same opportunity as the health care facility or employer to contest an administrative decision and proposed penalty.

9. Section 225.7. – Hearing – Consistency with the statute; Reasonableness; Need; Implementation procedures; Clarity.

This section explains the procedures necessary for conducting hearings on contested administrative decisions. We raise four issues.

First, Subsection (a) provides that the parties receive "reasonable notice" of the hearing date, time, and place. The Department should establish how much time constitutes "reasonable notice." The Department should also specify what forms of communication (i.e., telephone, correspondence, e-mail) provide "reasonable notice" to the parties.

Second, in Subsection (b), the Department expects the hearing "will be conducted in a manner to provide parties the opportunity to be heard." The final-form regulation should establish more specific hearing procedures. In addition, the Department should clarify what it considers "reasonable examination and cross-examination" of witnesses.

Third, Subsection (c) permits parties to be represented by legal counsel, but states that "legal representation" is not required. Commentators also suggest that union representatives should be permitted to represent aggrieved union employees at these hearings. Has the Department considered this option? We recommend that the final-form regulation define the term "legal representation."

Finally, Subsection (f) allows the Bureau and the health care facility or employer to be the parties at the hearing. Commentators object to the omission of aggrieved employees as parties in the hearing, and argue this omission violates their due process rights. Representative Keller suggests that the aggrieved employee "should be notified of hearings as well as guaranteed the opportunity to participate." The Department should explain why an aggrieved employee is not a party in hearings on these matters. As part of this explanation, the Department should establish how it can reconcile excluding the aggrieved employee from participating in the hearing with affording the employee the opportunity to be heard on any adverse issues pertaining to the complaint.

10. Section 225.8. – Petition to intervene. – Reasonableness; Need; Implementation procedures; Clarity.

This section explains the process to petition for intervention in a hearing. Commentators assert that the regulation should include certain intervention provisions already contained in the General Rules of Administrative Practice and Procedure (GRAPP). *See* 1 Pa. Code §§ 35.28(a)(2) and (a)(3). Unlike Section 225.7, this section makes no reference to GRAPP. The Department should explain the reason these rules do not apply to the regulation's

intervention process. The Department should also explain why the provisions suggested by commentators should not be included in the final-form regulation.

11. Section 225.10. – Appeal rights. – Reasonableness; Need; Clarity.

This section states that a "party" aggrieved by an adjudication may appeal to Commonwealth Court. The Department should explain why aggrieved interveners are not afforded the right to appeal. This section also states that an appeal may be filed within 30 days "as prescribed by law or rule of court." This phrase is vague and the final-form regulation should cross-reference the relevant law or rule of court that establishes this 30-day requirement.