Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

INDEPENDENT REGULATORY REVIEW COMMISSION

(1) Agency: Department of Labor and Industry

(2) Agency Number:

Identification Number: 12-91

IRRC Number: 2957

(3) PA Code Cite: 34 Pa.Code, Part XII, Chapter 225

(4) Short Title: Prohibition of Excessive Overtime in Health Care Act Regulation

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(6) Type of Rulemaking (check applicable box):

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation;
- ☐ Certification by the Governor
- ☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The Department is required to promulgate regulations to implement the Prohibition of Excessive Overtime in Health Care Act, the Act of October 9, 2008 (P.L. 1376, No. 102) (act) (43 P.S. §§ 932.1-932.6). This regulation implements the act's complaint and investigation procedures and administrative penalty assessment provisions.

(8) State the statutory authority for the regulation. Include specific statutory citation.

This regulation is promulgated and required under section 5 of the act (43 P.S. § 932.5).

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

Yes, section 5 of the act (43 P.S. § 932.5) provides: "The department shall, within 18 months of the effective date of this section, promulgate regulations to implement this act."

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The regulation is required and necessary to implement and clarify the complaint and investigation procedures and administrative penalty assessment provisions.

The act's purpose is to provide for better patient safety at health care facilities by prohibiting a health care facility from requiring employees to work more than agreed to, predetermined and regularly scheduled work shifts. It does not prohibit overtime for on-call time; unforeseeable emergent circumstances; highly unusual or extraordinary events affecting the need for health care services; or unexpected absences discovered at or before the commencement of a scheduled shift which could not be prudently planned. Employees may voluntarily work overtime.

This regulation establishes the complaint and investigation procedures. It also includes the procedure to notify parties and complainants of violations and the appeals and hearing procedures.

(11) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

N/A

(12) Describe who and how many people will be adversely affected by the regulation. How are they affected?

Certain Commonwealth agencies, health care facilities and certain employees of those healthcare facilities and those Commonwealth agencies as defined in section 2 of the act (43 P.S. § 932.2) will be affected by this regulation. The health care facilities and agencies affected include general or special hospitals; psychiatric hospitals; rehabilitation hospitals; hospices; ambulatory surgical facilities; long-term care nursing facilities; cancer treatment centers using radiation therapy on an ambulatory basis; inpatient drug and alcohol treatment facilities; facilities which provide clinically related health services and which are operated by the Department of Corrections, the Department of Health, the Department of Military and Veterans Affairs or the Department of Public Welfare; and mental retardation facilities operated by the Department of Public Welfare.

Employees affected are those who are involved in direct patient care activities or clinical care services and who receive an hourly wage or are classified as a nonsupervisory employee for collective bargaining purposes. Employees include individuals employed through a personnel agency that contracts with a health care facility to provide personnel.

These regulations will affect these individuals only to the extent they are involved in the complaint and hearing process for alleged violations committed under the act.

(13) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

Certain Commonwealth agencies and health care facilities as defined in section 2 of the act (43 P.S. § 932.2) will be affected by this regulation. The health care facilities and agencies affected include general or special hospitals; psychiatric hospitals; rehabilitation hospitals; hospices; ambulatory surgical facilities; long-term care nursing facilities; cancer treatment centers using radiation therapy on an ambulatory basis; inpatient drug and alcohol treatment facilities; facilities which provide clinically-related health services and which are operated by the Department of Corrections, the Department of Health, the Department of Military and Veterans Affairs or the Department of Public Welfare; and mental retardation facilities operated by the Department of Public Welfare.

Also, employees covered by the act who submit complaints for violations of the act will be required to comply with complaint submission timeframes and procedure.

(14) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

These entities throughout the Commonwealth have been required to comply with the act since July 1, 2009. This regulation only affects complaints, investigations and appeals from decisions concerning violations. This regulation should not require any increase in costs by the regulated community, and

will only affect the regulated community to the extent they are involved in the complaint and hearing process for alleged violations committed under the act. The complaint and hearing procedure may, if anything, save the regulated community time and costs associated with some complaints. Any savings would most likely be nominal and on a case by case basis.

(15) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Local governments, if operating health care facilities, have been required to comply with the act since July 1, 2009. This regulation only affects complaints, investigations and appeals from decisions concerning violations. There are few if any local governments that will be affected by this regulation. This regulation should not involve any additional costs or cost savings to local governments.

(16) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No separate budget was established for enforcement of the act or the regulations. This regulation only affects complaints, investigations and appeals from decisions concerning violations. The substantive portions of the act have been in effect since 2009. The state agencies affected by the act and the Department which enforces this act should not incur any additional expenses due to this regulation.

(17) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$ N/A	$	$	$	$	$
Regulated Community	N/A					
Local Government	N/A					
State Government	N/A					
Total Savings	N/A					
COSTS:	N/A					
Regulated Community	N/A					
Local Government	N/A					
State Government	N/A					
Total Costs	N/A					
REVENUE LOSSES:	N/A					
Regulated Community	N/A					
Local Government	N/A					
State Government	N/A					
Total Revenue Losses	N/A					

(17a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Act 102	$42,000	$42,000	$42,000	$42,000*

* Due to budgetary constraints the Department expenditures have not increased over the past 4 years.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The act requires the Department to promulgate a regulation. This regulation sets forth the complaint, investigation and appeal procedures. The benefits of providing clear guidance on these processes to those affected by it outweigh the costs to the regulated community which are already required to comply with the act.

(19) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

On December 3, 2009, the Department held a public meeting in which it provided information regarding the regulatory process and received testimony from stakeholders affected by the act and its regulations. The following organizations presented testimony at the stakeholders meeting: the Pennsylvania Association of Staff Nurses & Allied Professions; the Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities; the Hospital & Healthsystem Association of Pennsylvania; the Service Employees International Union; and Bruce Ludwig, Esquire. The following groups provided written comments: the Pennsylvania Department of Public Welfare; the Pennsylvania Department of Corrections; the Pennsylvania State Education Association; the Pennsylvania Department of Military and Veterans Affairs; the Pennsylvania Association of Staff Nurses & Allied Professions; the Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities; the Hospital & Healthsystem Association of Pennsylvania; the Service Employees International Union; and Bruce Ludwig, Esquire.

The Department reviewed the proposed rulemaking with the following Commonwealth agencies: the Department of Public Welfare; the Department of Corrections; the Department of Military and Veterans Affairs; and the Office of Administration.

The notice of proposed rulemaking was published on July 14, 2012 at 42 Pa. B. 4468. The Department received comments from the Independent Regulatory Review Commission ("IRRC"); Representative William F. Keller ("Representative Keller"); Richard E. Burridge, Pennsylvania State Education Association ("PSEA"); David Fillman, American Federation of State, County and Municipal Employees, Council 13 ("AFSCME"); Richard Bloomingdale, Pennsylvania AFL-CIO ("AFL-CIO"); Betsy Snook, Pennsylvania State Nurses Association ("PSNA"); William Cruice, Pennsylvania Association of Staff Nurses & Allied Professions ("PASNAP"); Neil Bisno, Service Employees International Union Healthcare ("SEIU"); and Paula Bussard, the Hospital & Healthsystem Association of Pennsylvania ("HAP").

The Department met with Representative Keller and members of his staff to review the drafted final form regulation on July 31, 2013. The Department invited other known interested stakeholders to a meeting to discuss the draft final form regulation on August 1, 2013. The following groups were represented at that meeting: Diakon Lutheran Social Ministries, SEIU, PA Nurse Alliance, PASNAP, PAR, Buchanan Ingersoll, PSNA, Triad Strategies, HAP, PSEA, and J.M. Uliana & Associates.

The Department solicited and received additional comments from Representative Keller and the stakeholders on the changes it made to the proposed regulation. As a result of the written comments, the Department made additional changes to the final form regulation.

(20) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

This is the first regulation promulgated under the act. Earlier working drafts of the regulation were rejected by the Department as beyond the scope of the statute.

This regulation is the least burdensome alternative to the regulated community.

(21) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There is no comparable federal statute or regulation that addresses prohibition of excessive overtime in the health care industry.

(22) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

Approximately 15 states have some form of statute or regulation regarding restrictions on overtime for nurses and/or health care workers, including New York, New Jersey, Maryland and West Virginia. This regulation is comparable and will not place Pennsylvania at a competitive disadvantage to other states.

(23) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The statute and regulation apply to state agencies that fall under the definition of "health care facility" and govern employees (hourly wage employees or those classified as non-supervisory for collective bargaining purposes) of the Commonwealth and other political subdivisions who provide direct patient care and clinical care services, defined under section 2 of the act (43 P.S. § 932.2). This includes the Departments of Corrections, Health, Public Welfare, and Military and Veterans Affairs. It does not impact any other regulation promulgated by another state agency.

(24) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The regulation will not significantly change existing reporting, record keeping or other paperwork requirements. Current forms for complaints will be updated, if necessary, following enactment of the regulation.

(25) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and

farmers.

No special provisions were developed to meet the particular needs of the groups indicated above and none are needed.

(26) Include a schedule for review of the regulation including:

A. The date by which the agency must receive public comments: _____

B. The date or dates on which public meetings or hearings will be held: _____

C. The expected date of promulgation of the proposed regulation as a final-form regulation: _____

D. The expected effective date of the final-form regulation: _____

E. The date by which compliance with the final-form regulation will be required: _____

F. The date by which required permits, licenses or other approvals must be obtained: _____

(27) Provide the schedule for continual review of the regulation.

The regulation will be reviewed and updated as needed.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality Attorney General	Copy below is here by certified to be a true and correct copy of a document issued, prescribed or promulgated by	Copy below is hereby approved as to form and legality Executive or Independent Agencies
BY _____ (DEPUTY ATTORNEY GENERAL)	Department of Labor and Industry (AGENCY)	BY _____ SHAWN E SMITH
_____ DATE OF APPROVAL	DOCUMENT/FISCAL NOTE NO 12-91	DEC 18 2013 DATE OF APPROVAL
	DATE OF ADOPTION _____	(Deputy General Counsel)
☐ Check if applicable Copy not approved Objections attached	BY Julia K. Hearthway 10-24-13 TITLE SECRETARY (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)	☐ Check if applicable No Attorney General approval or objection within 30 days after submission

FINAL-FORM RULEMAKING

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 225.PROHIBITION OF EXCESSIVE OVERTIME IN HEALTH CARE ACT REGULATION

FINAL-FORM RULEMAKING

TITLE 34 – LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH 225]

Prohibition of Excessive Overtime in Health Care Act Regulation

The Department of Labor and Industry ("Department") amends Title 34, Labor and Industry by adding Chapter 225, Prohibition of Excessive Overtime in Health Care Act Regulations, as set forth in Annex A.

A. Statutory Authority

This final-form rulemaking is promulgated under section 5 of the Prohibition of Excessive Overtime in Health Care Act ("act"), 43 P.S. §932.5, which authorizes the Department to promulgate and amend rules and regulations necessary to administer the act.

B. Background and Description of the Rulemaking

The act prohibits health care facilities or employers that provide clinical care services from requiring its employees to work in excess of an agreed to, predetermined, and regularly scheduled daily work shift. The act allows for mandating overtime for unforeseeable emergent circumstances and requires health care facilities or employers to use reasonable efforts to obtain staff before overtime may be mandated. The act prohibits retaliation against employees for refusing to work in excess of its limitation and provides for the Department to hold hearings, implement administrative fines and order corrective action for violations of the act's provisions. The Department's Bureau of Labor Law Compliance has enforced the act since it took effect on July 1, 2009.

Beginning in October of 2008, the Department met with numerous organizations whose members would be affected by the act and its proposed regulations. Additionally on December 3, 2009, the Department held a public meeting in which it provided information regarding the regulatory process and received testimony from stakeholders affected by the act and its regulations. The following organizations presented testimony at the stakeholders meeting: the Pennsylvania Association of Staff Nurses & Allied Professions; Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities; the Hospital & Healthsystem Association of Pennsylvania; the Service Employees International Union; and Bruce Ludwig, Esquire. The following groups provided written comments: the Pennsylvania Department of Public Welfare; the Pennsylvania Department of Corrections; the Pennsylvania State Education Association; the Pennsylvania Department of Military and Veterans Affairs; the Pennsylvania Association of Staff Nurses & Allied Professions; the Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities; the Hospital & Healthsystem Association of Pennsylvania; the Service Employees International Union; and Bruce Ludwig, Esquire. The Department has also reviewed this rulemaking with the following Commonwealth agencies: the Department of Public Welfare; the Department of Corrections; the Department of Military and Veterans Affairs; and the Office of Administration.

The regulation is required and necessary to implement and clarify the complaint, investigation procedures, and administrative penalty assessment provisions of the act. It also requires the Department to provide complainants notice of violations and appeals, and copies of Department determinations. This rulemaking will add 34 Pa. Code, Ch. 225 to implement and clarify the complaint, investigation procedures, and administrative penalty assessment provisions of the act.

Section 225.1 states the purpose of the regulation is to implement complaint and investigation procedures and administrative penalty assessment provisions. Section 225.2 provides definitions for the regulation. Where applicable, these definitions mirror the definitions found in the act. Section 225.3 sets forth the complaint and investigation procedure, and establishes the time period to file a complaint, the information which is required in the complaint, and the time period to correct the complaint if any required information is missing. Section 225.4 sets forth the administrative penalties as provided by the act and the factors the Department may use as a bases to calculate any penalties. Section 225.5 sets forth the procedure the Bureau will use to issue administrative decisions and proposed penalties. This section allows health care facilities and employers to request a reduction in penalties and establishes the time period and manner in which that request must be made. Section 225.6 allows a health care facility or employer to contest an administrative decision and request a hearing. Section 225.7 establishes the hearing procedure for contested administrative decisions. The hearing is de novo and all parties and the complainant will be notified of the hearing date and location. Section 225.8 provides the procedure for interested parties to intervene. The complainant may intervene by notifying the Department in writing of his request within the prescribed time period. Section 225.9 provides that the Secretary of Labor and Industry will issue written adjudications including all relevant findings, conclusions and the rationale for the adjudication. Section 225.10 provides that any aggrieved party may file an appeal to Commonwealth Court within 30 days of the mailing date of the decision.

C. Comments

Notice of proposed rulemaking was published on July 14, 2012 at 42 Pa. B. 4468. The Department received comments from the Independent Regulatory Review Commission ("IRRC"); Representative William F. Keller ("Representative Keller"); Richard E. Burridge, Pennsylvania State Education Association ("PSEA"); David Fillman, American Federation of State, County and Municipal Employees, Council 13 ("AFSCME"); Richard Bloomingdale, Pennsylvania AFL-CIO ("AFL-CIO"); Betsy Snook, Pennsylvania State Nurses Association ("PSNA"); William Cruice, Pennsylvania Association of Staff Nurses & Allied Professions ("PASNAP"); Neil Bisno, Service Employees International Union Healthcare ("SEIU"); and Paula Bussard, the Hospital & Healthsystem Association of Pennsylvania ("HAP").

General Comments

1. IRRC commented that the Department should explain in the Preamble and RAF ("Regulatory Analysis Form") why it is choosing to implement only administrative procedures in this regulation.

Response: The Department at this point does have not sufficient experience to determine which portions of the act would benefit from clarity and what those clarifications should include. Clarifications concerning the act and what constitutes a violation will be resolved through decisions made in the administrative hearing process. The Department anticipates that as more violations move through the administrative hearing process the substantive portions of the act will be defined based on real violations and issues. This regulation

should aid the administrative hearing process and bring about administrative decisions on the substantive matters in the act.

The Department's public hearing and the comments provided from stakeholders in 2008-2010 indicated that there were very few issues on which all parties would agree. The Department determined that the best place to start in this difficult area would be with the complaint and administrative process. If the Department could establish a process for receiving, investigating and adjudicating complaints, substantive issues would be addressed in the Department's administrative agency decisions and in appellate court decisions.

2. IRRC commented that the Department should explain why the regulation does not address the act's prohibition of retaliation.

Response: As the Preamble of the proposed rulemaking states, this regulation establishes the act's complaint and investigation procedures, and administrative assessment provisions. The act speaks for itself and clearly establishes its prohibition against retaliation. It is not necessary to repeat that prohibition in a procedural regulation.

However, in order to more clearly address the Act's prohibition against retaliation and to show that the Department will issue orders where it finds retaliation, the Department in this final form regulation under section 225.4 amended the language to clearly state that it may order a healthcare facility or employer to "remedy unlawful adverse employment decisions."

3. IRRC commented that the Department should explain why the regulation does not address the act's general prohibition of mandatory overtime.

Response: As the Preamble of the proposed rulemaking states, this regulation establishes the act's complaint and investigation procedures, and administrative assessment provisions. It also includes the procedure to notify parties of violations, and the appeals and hearing procedures. It does not address the scope of the Act or substantive issues concerning the act. The act clearly establishes its prohibition of mandatory overtime.

4. IRRC commented that 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.

Response: The act at 43 P.S. §932.6 gives the Department the discretion to impose penalties and issue orders to correct violations of the act. This section also subjects the imposition of penalties and corrective orders to appeal under Administrative Agency Law. The act does not give complainants or parties other than the defendant employer any rights of appeal to the Department's determination. The courts have generally recognized an agency's administrative discretion in determining which cases to pursue for enforcement. Absent an abuse of discretion, the courts will not disturb an agency exercising its discretion.

5. IRRC commented that the Department states that it "does not have adequate experience with complaints, violations and appeals to make any estimate of costs." Given that the Department has been enforcing the act since July 2009, the Department should use this experience to estimate the costs of implementing the regulation. This should be included in the final-form RAF and Preamble.

Response: The Department receives approximately 250 complaints of alleged violations of the act per year. The Department investigates all complaints it receives. The total cost of this program has been approximately $42,000 per year.

6. IRRC stated that it strongly encourages the Department to continue dialogue with stakeholders as it develops the final-form regulation. IRRC recommends 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.

Response: At IRRC's suggestion the Department did continue its dialogue with stakeholders. On July 31, 2013, the Department met with Representative Keller and members of his staff, and on August 1, 2013 met with stakeholders to discuss changes to the proposed rulemaking. The Department posted the draft final-form regulation and a letter to all stakeholders on its website soliciting comments on the changes made to the proposed regulation. The Department used this feedback to make additional changes to this final-form regulation.

7. Representative Keller and IRRC commented that employees must be provided adequate time to file or correct complaint forms, and obstacles to completing complaint forms must be avoided.

Response: An employee has 60 days from the date of the alleged violation to file a complaint with the Department. The purpose of this limitation is to require complainants to file complaints when they have a recent recollection of the incident. As time passes, complainants and witnesses may forget or confuse important details that would aid the Bureau in a successful investigation. As time passes, records may become lost or misplaced. Sixty days should be ample time for an individual to determine that a violation of the act may have occurred and to decide whether to file a complaint.

Nonetheless, the Department has increased the time period for a complainant to correct or provide missing information. In this final form regulation at section 225.3(f), the Department has increased the time period to respond and correct a complaint to 30 days.

8. Representative Keller and IRRC commented that the criteria for assessing penalties for violations should largely focus on aggravating factors and severity of violations.

Response: In response to this comment the Department has added additional aggravating circumstances to its consideration for penalties in section 225.4(b)(4). Under this new subsection the Department will also consider an employer's lack of cooperation with an investigation, an employer's failure to provide requested information and any action which would constitute lack of effort to abate a violation or violations such as retaliation. Under the proposed rulemaking and part of this final-form rulemaking, the Department will also consider previous violations as an aggravating factor.

As more fully set out below, after its July 31 and August 1, 2013 meetings with Representative Keller and stakeholders, the Department has also added severity of the violation as a factor to be considered in penalty determinations in section 225.4(b)(5).

9. Representative Keller asked whether the Bureau can enforce this law or penalties against another state agency that maintains a health care facility. He further asked that when the Bureau investigates a complaint against another state agency, would communication between the Department and the other agency be restricted in anyway.

Response: The act regulates health care facilities as defined under 43 P.S. § 932.2. The act's definition includes facilities which provide clinically related health services, "regardless of whether the operation is for profit or nonprofit and regardless of whether operation is by the private sector or by State or local government." The definition specifically includes facilities "providing clinically related health services which are operated by the Department of Corrections, the Department of Health, the Department of Military and Veterans Affairs or the Department of Public Welfare." The definition also includes mental retardation facilities "operated by the Department of Public Welfare."

In response to Representative Keller's question as to whether the communication between the Department and another state agency would be restricted in anyway, no specific restrictions are found in the act. However, case law requires a "wall of separation" between a state agency's prosecutorial and adjudicatory functions. See, *Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (1992). This due process procedural safeguard applies to the Department's internal process regardless of whether the alleged violator is another state agency or private sector employer.

10. Representative Keller, IRRC, PSEA and AFL-CIO commented that complainants must receive notices of administrative decisions, penalties, or other enforcement actions related to their complaints.

Response: The Department always planned to provide complainants with such notices as part of its normal business practice. In response to this comment, the Department has added the requirement that such notices be sent to the complainant. The final form regulation has been amended to require notice to the complainant of the proposed penalty in section 225.5(b), notice of a request for a reduction in penalty in section 225.5(d), notice of hearing in section 225.7(a) and a copy of the adjudication in section 225.9(c).

11. Representative Keller and IRRC commented that determinations where no violation is found should include statements of the reason or the applicable exception under the act.

Response: The Department has administrative discretion as to which enforcement cases to prosecute. The act does not require that statement of reasons or the applicable exceptions be provided to all complaints. Requiring that such information be provided by regulation may infringe upon the Department's administrative discretion.

However, the Department's general practice is to provide, when possible, an explanation as to why no violation was found to the complainant in its closing letter. The Department intends to continue this practice unless to do so would compromise other active investigations.

In addition, the Department has amended the regulation at section 225.3(f) to state that when the Bureau dismisses a complaint for failure to provide required information, the Bureau's written notification will include a statement of the basis for the dismissal.

12. Representative Keller, IRRC and AFL-CIO commented that complainants should have an opportunity to appeal an adverse decision, similar to the appeal process provided to employers by the proposed regulations.

Response: The act does not provide standing for the complainant to appeal the Department's administrative determination when no violation of the act is found. The act at 43 P.S. § 932.6(c) specifically provides the Department's penalties and administrative order requiring a health care facility to take corrective action are subject to judicial review.

13. Representative Keller, IRRC and PSEA commented that the hearing process should guarantee claimants the opportunity to participate and ensure that the burden of proof is carried by the appropriate party.

Response: Any complainant would almost certainly meet the standard to intervene. In order to ensure that is the case and to clarify that a complainant would have the right to intervene, the Department has added to the regulation subsection 225.8(c), which states that the complainant has the right to intervene by sending a letter or notice to the hearing officer, the bureau and the health care facility or employer no later than 10 days before the scheduled hearing. This subsection also states that a complainant will not be required to demonstrate his basis for intervention.

It should be noted that some complainants may not wish to automatically become a party. Some complainants may not wish to expend the time and resources necessary to be party in a Department hearing. The Department's approach by allowing complainants to intervene by letter with no additional showing, gives all complainants the option to decide for themselves whether to become a party to a proceeding.

In response to the burden of proof comment, under the act the Department may impose penalties on a health care facility or employer that violates the act or regulations. It would be the Department's burden in any proceeding to show that a violation of the act occurred. That would include showing that the general rule under 43 P.S. §932.3 applied. The Department cannot legally shift this burden by regulation.

14. Representative Keller, IRRC and AFSCME commented that 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.

Response: The act does not give the Department any special or specific investigatory powers. Additional investigative powers cannot be added by regulation. This would be beyond the scope of the statute and not permissible.

Currently, the Department does not have targeted timeframes for investigations and determinations. Complaints have many variables that make it difficult to set any time period to complete an investigation. The Department investigates each complaint it receives. The timeframe for completion of an investigation will depend on many factors including the number of complaints filed, the facts underlying each specific complaint, and how readily available information is from both the complainant and employer.

The Department does not include the employee's union representative throughout the complaint and enforcement process. It also does not include a representative of the employer. The Department's practice is to conduct fair and impartial investigations, enforcement actions and hearings.

In response to the comment concerning the complainant's protection from retaliation, the act is clear on its prohibition against retaliation and it is not necessary to repeat it in this procedural regulation. However, the Department did amend its proposed regulation at section 225.4(a)(2) to clarify that the Department could issues orders "to remedy unlawful adverse employment decisions."

In response to comments concerning the enforcement of the act against other state agencies, no changes are necessary. The act and the proposed regulation are clear. Specifically, the definition of "Health Care Facility" includes both State and local government. Also, the Department has met with other state agencies to inform them of their obligations under the act. In addition, the Department has also conducted training for other state agencies.

15. SEIU, AFL-CIO, PSEA, PSNA and PASNAP commented that the regulation does not set forth any investigative powers for the Department. While section 225.3 of the proposed regulation states 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 included explicitly in the regulation.

Response: Typically, powers such as the right to subpoena records and the right to inspect records are set forth in a statute. There are no explicit extraordinary investigative powers given to the Department in the act. As such, the powers of the Department are only those limited powers found in the Administrative Code at 71 P.S. §§ 561-562 and limited implied investigatory powers. Additional investigative powers cannot be added by regulation. This would be beyond the scope of the statute and not permissible.

16. SEIU, AFL-CIO, PSNA, PASNAP and AFSCME commented that the regulation should require employers to permit the Department 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 mandating of overtime, and the efforts by the employer to obtain other staffing before mandating overtime.

Response: As stated above, this would be beyond the scope of the statute. Typically, special investigative powers are granted by statute. Judicial-type discovery must be authorized by statute or obtained through the courts. A procedure as contemplated by the commenters may also be intimidating to potential witnesses. The Department's investigators have business cards and contact information they leave with potential witnesses to allow them to contact the Department without the knowledge of their employers and supervisors.

The Bureau investigating complaints under the act also enforces 13 other labor statutes including Prevailing Wage, Wage Payment and Collection, Minimum Wage and Child Labor. The investigators have extensive experience with conducting investigations and do endeavor to interview witnesses outside the presence of supervisors and managers.

17. SEIU, AFL-CIO, PSNA, PASNAP and AFSCME commented that employers should be required to maintain accurate and adequate records of: (a) the "reasonable efforts" it made to obtain other staffing before attempting to mandate an employee to work overtime; (b) an employee voluntarily waiving the requirement of Section 3(d) of the act; (c) the "agreed to, predetermined and regularly scheduled daily work shifts" for employees covered by the act; and (d) the employer providing 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. Such records should be open for Department inspection. PASNAP further commented that without record keeping requirements, an employer could simply ignore the Department's inquiries or deny access to records. This would make it extremely difficult for the Department to investigate on its own, to investigate active complaints, or to prove a violation of the act.

Response: The statute does not contain record keeping requirements. The suggested record keeping requirements are beyond the scope of the statute.

We agree that without record keeping requirements in the statute, it is more difficult for the Department to investigate on its own, to investigate complaints or to prove a violation of the act. However, record keeping requirements are not within the scope of the statute and the Department has no authority to require record keeping.

Other laws administered by the Department have specific record keeping requirements, such as the Minimum Wage Act at 43 P.S. §333.108, giving explicit authority to inspect employer records. Under this act, without record keeping requirements, the Department would have the implied authority to inspect those records.

18. SEIU, AFL-CIO, PSNA and PASNAP suggested that the Department require healthcare facilities to submit data related to the effects of prohibiting mandatory overtime and that the data include whether chronic staffing shortages exist.

Response: This is also beyond the scope of the statute. The Department has no authority to require data collection from healthcare facilities by regulation.

19. Representative Keller, SEIU, AFL-CIO, PSNA and PASNAP proposed in their comments, 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 with other applicable labor laws.

Response: There are no posting requirements in the act. As the commenters note, posting is required by the Pennsylvania Minimum Wage Law and the Pennsylvania Child Labor Act. However, those requirements are in the respective statutes; they do not stand alone in the regulations.

20. SEIU, AFL-CIO, PSNA and PASNAP 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.

Response: There are no posting requirements in the act. The Department has numerous administrative hearings and does not, as a general rule, post decisions or orders unless such posting is required by statute.

21. SEIU, AFL-CIO and AFSCME commented that they are disappointed because the scope of the proposed regulation was too limited and provided no guidance to substantive provisions of the law. PASNAP specifically commented that the act should include that in the event of an unforeseeable emergent circumstance the employer shall provide the employee with necessary time, up to one hour, to arrange for care of employee's minor children, dependents or elderly or disabled family members. SEIU, AFL-CIO and AFSCME further commented that the proposed regulation provided too few rights to complainants, no rights for the unions representing the employees, and is generally inadequate to effectively enforce the law.

Response: The Department's goal with this regulation is to provide a clear framework for the complaint and administrative enforcement provisions of the act. As the Department investigates more complaints and as violations move through the administrative hearing/decision process, substantive provisions of the act will be clarified. Both employees and employers will be able to use these administrative decisions as guidance on the act. Currently, many of the complaints received by the Department do not contain sufficient information to initiate an investigation. With a set complaint and administrative process, complaints should be more readily able to be investigated and be able to move more quickly through the administrative process.

The Department has amended the proposed regulation to clarify certain interests for complainants. Under the final form regulation, complainants can easily intervene by letter; and will receive notice and copies of administrative decisions, requests for reduction in penalty, hearing notices and appeal decisions.

The statute confers no rights for unions. A union may be able to make a showing that it has a significant interest in order to be granted intervention in any hearing. A complainant always has the option to privately consult with his union or whomever he feels is appropriate.

The Department did not repeat substantive requirements found in the act. And, finally, the Department cannot add provisions that the General Assembly did not see fit to place in the act. Many of the comments are requesting changes that would in essence add provisions to the act.

Comments by Regulation Section

Section 225. 1. Purpose and scope.

1. IRRC commented that section 225.1 states that this proposed chapter implements "the complaint and investigation procedures in the act." 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

Response: The act at 43 P.S. § 932.5 requires the Department to promulgate regulations to implement the act. The only places the act specifically references the Department are in 43 P.S. §§932.4 and 932.6 (defining the Department and relating to the imposition of penalties).

The Administrative Code at 71 P.S. § 565, grants the Department the power to make rules and regulations for carrying into effect the laws regulating the labor of persons within this Commonwealth, and at 71 P.S. § 186, empowers administrative departments to prescribe rules and regulations for the performance of their business.

Section 225.2. Definitions.

1. IRRC, SEIU and the AFL-CIO commented that the definition of Employer should include the complete phrase "clinically-related health services."

Response: The Department has made this change.

2. PSNA and PASNAP recommended that the Department add the definition of "Chronic Short Staffing" to the regulation.

Response: The proposed regulation does not use the term "Chronic Short Staffing." Generally, regulations will only define terms used within that regulation.

3. IRRC commented that under section 225.2 the definition of *Employer,* the Department should explain under what circumstances employers, other than a health care facility, would be engaged in "direct patient care activities."

Response: For purposes of this regulation, no employers other than health care facilities would be engaged in direct patient care activities. The Department added the definition of "Employer" for clarity and to ensure individuals reading the regulations understood that the Commonwealth, political subdivisions and instrumentalities of the Commonwealth were covered by the act and the regulations.

Section 225.3. Complaint and investigation procedure.

1. IRRC commented that the Department should explain why timeframes for the Bureau to investigate complaints are not set forth in the regulation. SEIU, AFL-CIO, PSNA, and PASNAP commented that the proposed regulation is deficient in that it contains no reference to when the Bureau will begin to investigate alleged violations of the act and that it is important to include a timeframe. PSNA recommended that the timeframe be no longer than ten days based on the regulations of other states. SEIU and the AFL-CIO suggested that at least the term "promptly" be added to give some impetus to investigate citing Pennsylvania Human Relations Commission (PHRC) regulations at 16 Pa Code §42.41.

Response: The Department did not set timeframes for the investigation of complaints because there are too many variables to consider including the cooperation of the complainant, the cooperation of the employer and the availability of potential witnesses. In addition there are other factors that would need to be considered such as the volume of complaints the Department receives at any given time. Also, there are Department factors such as funding and staffing which are subject to change and would need to be considered in the setting of any timeframe.

The Department is concerned about setting a timeframe to start or complete an investigation and not being able to meet that timeframe due to lack of necessary evidence or resources to properly make a determination. Setting a timeframe could work against complainants and the Department's goal to promote compliance with the act.

2. IRRC commented that under section 225.3(b) the Department should explain why the 60-day deadline is reasonable for aggrieved employees to file complaints. Representative Keller, SEIU, AFL-CIO, AFSCME, PSEA, PSNA, and PASNAP commented that the 60 day timeframe is not in the act and it is an unduly short timeframe. SEIU, AFL-CIO, PSNA and PASNAP reference PHRC regulations which have a 180 day time period to file a complaint. SEIU, AFL-CIO, PSNA and PASNAP state that a violation may not be immediately known to the employee and there should be some provision allowing for tolling of the time to file, such as when the employee learns of the violation. PSNA and PASNAP comment that an employee should have the right to file a complaint for a period of up to two (2) years following the date of an assigned mandated overtime shift if the employee believes overtime was not in response to an unforeseen emergent circumstance and/or required reasonable efforts were not exhausted.

Response: The Department's position is that 60 days is a reasonable timeframe for an aggrieved person to identify a violation of the act and make a determination to file a complaint with the Department. The longer time period between an alleged violation and reporting that violation, the more difficult such a violation is to investigate and prove. In many healthcare facilities overtime is regularly scheduled and used. Records may not differentiate between scheduled and mandated overtime. The longer an aggrieved party waits to make a complaint, the more confusing and unclear the acts of an employer on any given day may become. In addition, if there are witnesses to the violation, the longer the period from the violation to the investigation, the less reliable the witness's recollection may be.

3. SEIU, AFL-CIO, AFSCME, PSEA, PSNA and PASNAP commented that the proposed regulation does not contain a provision for a class action type complaint, citing the PHRC regulations at 16 Pa. Code §42.36.

Response: The act does not provide for a class action type complaint. Also, the GRAPP does not provide for a class type action. Commonwealth Court has held that class actions are unauthorized and unnecessary in administrative proceedings. See, *Brendley v. WCAB*, 926 A.2d 1276 (2007); *Sullivan v. Pa. Insurance Dept.,* 408 A.2d 1174 (1979).

GRAPP at 1 Pa. Code § 35.45 does permit consolidation of hearings involving common questions of law or fact. The Department will certainly consider consolidating hearing matters to save the parties, complainant and the Department time and costs.

4. SEIU, AFL-CIO and PSEA commented that unions representing employees covered by the act should have standing to file complaints on behalf of employees.

Response: The Department's position is that this would not be appropriate. The aggrieved employee is the individual with firsthand knowledge of the alleged violation and therefore, the best person to file the complaint and to provide information to the Department for an investigation. The Department's charge is to enforce the act. The Department does not wish to become involved in union-management issues which are outside the scope of the act.

In addition, a labor union representing the employee may be able to meet the criteria to intervene in any scheduled hearing under section 225.8.

5. IRRC commented that under section 225.3(b*),* the subsection states that "an aggrieved employee may file a complaint with the Department." However, under subsections (a), (d), (e) and (f), the Bureau is responsible for processing complaints. IRRC recommends that the final-form regulation replace the term "Department" with "Bureau."

Response: The Department has made this change.

6. IRRC commented that sections 225.4, 225.5, 225.6, 225.7, and 225.8 reference violations by "the health care facility or employer." To maintain consistency between sections, the Department should add "or employer" to subsection 225.4(b) in the final-form regulation.

Response: The Department has made this change.

7. IRRC commented that under section 225.3(c) the Department should clarify whether a single complaint can include multiple violations. SEIU, AFL-CIO, PSNA and PASNAP also

commented that the regulation suggests that a new complaint would have to be filed for every single violation and that this would be unduly burdensome. They also suggested that the Department adopt a provision for continuing violations like the PHRC has at 16 Pa. Code § 42.14(a).

Response: The Department did not intend that a separate complaint would need to be filed for each violation where there are related violations. The Department has clarified section 225.3(c)(3) to specifically allow complaints with multiple violations to be filed.

8. IRRC commented that under section 225.3(c) aggrieved employees are required to provide the names of "witnesses." Witness is not defined in the regulation and it is unclear what role a witness would have in the complaint proceeding. IRRC recommends the Department define and clarify the term "witness." IRRC recommends that the Department explain the reason for including the identities of witnesses in the initial complaint.

Response: The Department has added a definition for "Witness" in section 225.2. The Department asked for the name of witnesses to expedite the investigation and to have the complainant preserve the information as to who has firsthand knowledge of the alleged violation. As time passes, complainants and witness recollection of an event may fade. In a health care facility setting, where overtime might be plentiful, it could be difficult to remember who was present during alleged violations. The best time to get that information is as soon as possible after the alleged violation occurs.

9. Representative Keller, SEIU, AFL-CIO and AFSCME commented that complainants should not be required to name witnesses in initial complaints. These commenters suggested that such a requirement will chill complainants from coming forward. PASNAP commented that requiring witness names on a complaint form is unusual and intimidating, and suggested that this requirement be eliminated. The commenters stated that witness names can be provided confidentially to the investigator after the complaint is filed.

Response: The purpose of requiring witness names on the complaint form is to have this information provided by the complainant as soon as possible after the alleged violation of the act. The longer a complainant waits to give the Department corroborating information such as the names of potential witnesses, the less likely it is that the complainant will remember accurately. Providing witness information in the complaint will also help the Department to more quickly investigate complaints and contact witnesses. This will also make the witness more likely to remember the events on any given day.

As to the confidentiality of witness names, all investigative materials, notes, correspondence and reports are not considered public records and are therefore exempt from disclosure under the Pennsylvania Right to Know Law at 65 P.S. §67.708(b)(17). The Department does not release complainant names, witness names or any other investigative materials absent a court order or a subpoena. Moreover, the names or identity of complainants and witnesses may be protected by an informant's privilege. See, *York Excavating Company, Inc. v. Pennsylvania Prevailing Wage Appeals Board*, 663 A.2d 840 (Pa. Cmmwlth Ct. 1995).

10. SEIU, AFL-CIO, PSNA and PASNAP suggested that the complaint form be made available in Spanish, as well as English, as it is in the case of the Bureau's Wage Complaint form. AFSCME commented that the complaint forms should be available in multiple languages.

Response: The Department will make the forms available in English and Spanish. The Department has amended section 225.3(d) to state that the complaint form will be available in English and Spanish.

11. IRRC recommended that under section 225.3(f) 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). Representative Keller, SEIU, AFL-CIO, PSNA, PASNAP and AFSCME all commented that there was no timeframe set for the Bureau to advise the complainant of alleged deficiencies in the complaint and suggest that there should be a fixed time for that action.

Response: The Department has added a 60-day time frame to section 225.3(f). The Bureau will review all complaints within 60 days of receipt.

12. IRRC questions whether under section 225.3(f), 15 days provides an aggrieved employee with sufficient time to amend the complaint. SEIU, AFL-CIO, PSNA, and PASNAP all commented that the period should be enlarged to 30 days and stated that they feared this provision would permit the Bureau to dismiss complaints on overly technical grounds. AFSCME also commented that the response time should be measured by receipt of Notice of Deficiency and not by mailing date.

Response: The Department has expanded the time period to amend the complaint to 30 days. Time periods are generally calculated from the mailing date rather than the date of receipt. Unless all notices are sent by certified mail with a receipt required, the Department would not be able to establish date of receipt. In addition, often it is difficult and costly to accomplish mail delivery when a signed receipt is required. Many individuals are at work during time periods when mail is delivered and when the post office is open.

13. IRRC recommends that the final-form regulation state that the Bureau will provide the employee with the specific reasons why the complaint fails to conform to the requirements of subsection 225.3(c). SEIU, AFL-CIO, PSNA and PASNAP also commented that the Bureau should be required to state specific reasons for its dismissal of a complaint.

Response: The Department has amended section 225.3(f) to state that the Bureau's written notification will include a statement of the basis for the Bureau's dismissal.

14. PSNA and PASNAP suggest adding an additional subsection, 225.3(g), to prohibit retaliation against an employee who makes a complaint under the act. PSNA and PASNAP suggest that the prohibition against retaliation cover complaints made by the employee union and accrediting institutions.

Response: This regulation is limited to the act's complaint and investigation procedures, and administrative penalties assessment provisions. It does not address substantive issues. However, the Department amended section 225.4(a)(2) to allow the Department to issue directives to remedy unlawful adverse employment decisions as prohibited under the act at 43 P.S. § 932.3(b). This would cover all retaliation within the scope of the act.

15. IRRC states that section 225.4(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." The term violation is used in sections 225.4, 225.3 and throughout the regulation. To improve clarity, we recommend that the Department move the part of this section regarding "violation" to section 225.2.

Response: The Department amended section 225.2 as suggested by IRRC by adding the definition of "violation."

16. IRRC questions what the Department means by each "discrete time" under section 225.4 (a)(1).

Response: By each "discrete time" the Department means each time at the end of a shift when an individual employee is mandated to work overtime in violation of the act.

17. IRRC recommends that the Department define "nonretaliation orders" in the final-form regulation. Commenters also recommended that the regulation include retaliation provisions similar to those contained in the act. *See* 43 P.S. § 932.3(b).

Response: The Department has deleted its reference to "nonretaliation order." To reference the retaliation provisions of the act and to clarify that the Department may order a remedy to adverse employment actions, the Department has added the following administrative action to section 225.4(a)(2), "directives to remedy unlawful adverse employment decisions as prohibited under the act at 43 P.S. § 932.3(b)." The Department meant to include these types of action in "nonretaliation order." This change as suggested by IRRC should make the Department's intention clear.

Section 225.4. Administrative penalties.

1. SEIU, AFL-CIO, AFSCME, PSNA and PASNAP commented that subsection (a)(2) in the proposed regulation fails to include reinstatement of an employee or removal of discipline against an employee who was unlawfully retaliated against for refusing to work overtime.

Response: The Department's proposed regulation stated that it could issue "nonretalilation orders" which would have included action such as reinstatement and removal of discipline. To clarify this and to alleviate any concerns that the Department had the authority to issue such orders, the Department has amended section 225.4(a)(2) in its final rulemaking. The Department added language allowing it to issue orders "to remedy unlawful adverse employment decisions" in place of non-retaliation orders. This very broad language will give the Department the authority and put employers on notice that the Department may order remedial actions such as reinstatement and removal of discipline.

2. SEIU, AFL-CIO and AFSCME commented that a provision should be included to require that interest at statutory rate on back pay should be included.

Response: The language of the regulation is broad enough to allow for the Department to order the payment of interest on back pay in appropriate circumstances.

3. PSNA and PASNAP suggest adding the following provisions to section 225.4: (i) in cases where the bureau requests additional information from a facility, the facility shall comply within ten (10) working days; (ii) 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, and enforcement actions upheld; (iii) 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.

Response: Requiring a facility to provide additional information within 10 working days by regulation is inflexible and will not allow investigators the latitude needed to complete an investigation. Currently, Bureau investigators use several different approaches in securing information while performing investigations. Investigators issue letters requiring information in 10-30 days depending on the scope of information they are requesting and the ease of securing such information. Investigators send out scheduling requests for

administrative conferences and require documents to be produced at the meeting. These current practices generally work for the Bureau in securing the needed information to complete investigations.

The Bureau will share information with licensing agencies upon request of the licensing agency. It is not necessary for this to be addressed by regulation. In addition, compliance with the act does not relieve agencies of any legal obligation to comply with minimum employee staffing levels for licensing. It is unnecessary and not appropriate to make such a statement in this regulation.

4. IRRC recommends that the Department explain why the factors used in section 225.4(b) for establishing penalties are appropriate. Representative Keller stated that the criteria for penalties should focus on aggravating factors. SEIU, AFL-CIO, PSNA and PASNAP commented that it is not clear where these factors come from, but they generally benefit employers. SEIU, AFL-CIO, PSNA and PASNAP commented that "good faith" is listed as a mitigating factor to consider, but there is no good faith defense set forth in the act. They also state that there is no requirement that the Department articulate its rationale for reducing a penalty and that there is no clear statement that the minimum fine has to be $100. Representative Keller further stated that he did not believe that the factors in the proposed regulation were relevant.

SEIU, AFL-CIO, PSNA and PASNAP commented that 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.

The commenters further stated that 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, commenters 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.

Response: The factors the Department used to established penalties were based on the Department's experience with administering penalties under the Pennsylvania *Community and Worker Right-to-Know Act,* 35 P.S. § 7301. The Department uses similar factors in issuing administrative penalties. See, 34 Pa. Code § 321.4. Those factors were adapted and simplified for this regulation.

In addition, in response to IRRC, SEIU, AFL-CIO, PSNA and PASNAP the Department added subsection 225.4(b)(4) to also consider employer's lack of cooperation with an investigation, employer's failure to provide requested information and any action which would constitute lack of effort to abate a violation or violations such as retaliation. As more fully set out below, after its July 31 and August 1, 2013 meetings with Representative Keller and stakeholders, the Department has also added severity of the violation as a factor to be considered in penalty determinations, under subsection 225.4(b)(5).

In response to the comment questioning how the Department will enforce its orders and collect penalties, the Department will follow current law and its current procedures. If an order is not complied with, the Department will take action to enforce the order in Commonwealth Court. See, Pa. Rules of Appellate Procedure, Rule 3761. The Department may also refer collection actions to the Office of Attorney General under the Commonwealth Attorney's Act. 71 P.S. § 732-101 *et seq*. The Department has a process to refer collection matters to the Office of Attorney General.

5. Because an employer could own multiple sites, the Department should clarify whether the "number of employees" is from a single site or from multiple sites.

Response: The Department has amended the regulation to clarify this point. Subsection 225.4(b)(1) has been amended to consider the number of employees from a single site.

6. IRRC commented that the Department should provide an explanation for why the 12-month period is appropriate for inclusion of prior violations.

Response: The Department reviewed this portion of the regulation and determined that 12 months may be too short of a time period to establish a pattern of noncompliance with the provisions of the act. The Department has amended this section to 36-months. Based on the number of complaints filed and the time needed to complete investigations, the Department determined that 36-months is a more appropriate time period to consider as an aggravating factor in determining penalties.

7. Commenters stated that sections 225.4(b)(1) and (2) make no references to the "employer." To be consistent with other sections, both these subsections should include the phrase "health care facility or employer" in the final-form regulation.

Response: The Department has made this change.

Section 225.5. Administrative notice of violation and proposed penalty.

1. IRRC and all commenters stated that the Department should explain why the Bureau serves a copy of the administrative decision on the employer, but not on the aggrieved employee.

Response: The Department always planned to send a copy of the administrative decision to the complainant. The Department has amended section 225.5(b) to clearly state that the Department will send a copy to the complainant.

2. IRRC commented that 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.

Response: The 10-day time frame is to avoid the filing of unnecessary appeals which would be time consuming and costly to the employer, the Commonwealth and to any intervenor, including the complainant. The filing of a request for reduction does not toll or extend the 30-day period for requesting a hearing under section 225.6.

3. IRRC recommends that the final-form regulation state that the written notice of case closing will contain the findings that are the basis for closing the investigation.

Response: The Department's position is that sometimes it may not be appropriate to state the basis of a case closing. A requirement to state the basis for all case closings may infringe upon the Department's administrative and/or prosecutorial discretion. In some cases where there are other pending investigations involving the same employer or complainant, it could have a negative effect on those pending investigations. When there are no conflicting pending investigations, the Department will provide the basis or reasoning for the case closure.

4. SEIU, AFL-CIO, PSNA, AFSCME and PASNAP all commented that there is no timeframe

established for the completion of the investigation. SEIU, AFL-CIO, PSNA, AFSCME and PASNAP all stated that complaints languish and suggested a timeframe of 90 days from the filing of the complaint should be established at least as a target.

Response: Complaints have many variables that make it difficult to set any time period to complete an investigation. The timeframe for completion of an investigation will depend on many factors including the number of complaints filed, the facts underlying each specific complaint, and how readily available information is from both the complainant and employer.

There is no dedicated funding source or specific appropriation for the enforcement of this act. The Bureau of Labor Law Compliance enforces 13 laws with limited funding.

5. SEIU and AFL-CIO commented that the proposed regulation has no provision requiring the Bureau to inform the complainant of an employer's "request for reduction" in penalty, in order to allow complainant input and there is no provision to notify the complainant of any decision to reduce penalty. SEIU and AFL-CIO further commented that this section states that the Bureau will expeditiously act on a request by an employer to reduce penalty which shows the one-sided nature of the regulations.

Response: The Department has amended section 225.5(d) to state that the Department will notify the complainant of a healthcare facility or employer's request for a reduction in penalty. A request for reduction in penalty does not toll the 30-day appeal period. The purpose of the 10 day period to determine if there will be a reduction in penalty is to save all parties, including a complainant intervenor, the time and expense of an unnecessary appeal.

Section 225.6. Contesting an administrative decision and proposed penalty.

1. IRRC commented that the Department should provide a clear justification for why the regulation does not afford the aggrieved employee the same opportunity as the healthcare facility or employer to contest an administrative decision and proposed penalty. SEIU, AFL-CIO, AFSCME, PSNA and PASNAP commented that under this section, the employee cannot contest an administrative decision adverse to his/her complaint. They commented that the complainant should have the opportunity to appeal the administrative decision.

Response: The act does not give the complainant or an aggrieved party standing to appeal the Department's finding of a violation or imposition of penalties. The Department is charged by the statute with enforcing the act and imposing penalties where it finds a violation. 43 P.S. § 932.6. The Department will be receiving complaints and when the facts establish a violation, imposing appropriate penalties. Under the act, this is not an action or complaint between the aggrieved employee and the employer; it is an enforcement action by the Department. An enforcement action is between the agency charged with enforcing the law and the alleged violator.

The Department has administrative and/or prosecutorial discretion in determining when a violation has occurred and what the appropriate penalty is. Creating an opportunity for an aggrieved employee to contest the Department's enforcement action in a regulation would be inappropriate and would infringe on the Department administrative and/or prosecutorial discretion and potentially place the Department in an adversarial position against the employee.

2. SEIU, AFL-CIO, PSNA and PASNAP commented that subsection 225.6(e) provides that the

filing of a request for a hearing by employer stays the administrative decision on the violation and the proposed penalties. The commenters state that 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. AFL-CIO also commented that there is no provision that the hearings are to be open to the public

Response: An automatic supersedeas is common in administrative proceedings. If the supersedeas were not automatic, the Department and all parties including intervenors would expend resources in requesting and answering petitions for supersedeas. The hearing officer and ultimately the court can order penalties and directives to remedy unlawful adverse employment decisions to compensate the complainant and other employees for violations of the act. The process allows for the complainant to be made whole. In addition, the Sunshine Act at 65 Pa.S.C. § 701 *et. seq* requires that such hearings be open to the public.

Section 225.7. Hearing

1. IRRC commented that subsection (a) provides that the parties will receive "reasonable notice." The Department should establish how much time constitutes "reasonable notice." The Department should also specify what forms of communication (e.g., telephone, correspondence, e-mail) provide "reasonable notice" to the parties.

Response: The Department has amended section 225.7(a) to state that all parties and the complainant will receive written notice of the hearing date, time and place by first class mail at least 30 days prior to the scheduled date of the hearing, unless another method of notification is requested.

2. IRRC commented that 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.

Response: Due to GRAPP, more specific hearing procedures are not needed here. Section 225.7(h) provides that 1 Pa. Code, Part II, the "General Rules of Administrative Practice and Procedure (GRAPP)" will apply to hearings under this regulation to the extent hearing procedures are not covered by this regulation. GRAPP provides for very specific and clear hearing procedures.

3. IRRC commented that the Department should clarify what it considers "reasonable examination and cross-examination" of witnesses.

Response: The Department does not believe it is appropriate to define this term. "Reasonable examination and cross-examination" is a legal standard found in Pennsylvania's Administrative Agency Law at 2 Pa.C.S. § 505 and Pennsylvania case law interpreting this standard.

4. IRRC stated that commenters also suggested that union representatives should be permitted to represent aggrieved union employees at these hearings. Representative Keller, SEIU, PSEA, AFSCME, AFL-CIO and PASNAP all commented that union representative should be permitted to represent employees at hearings. IRRC questioned whether the Department considered this option. IRRC also recommended that the final-form regulation define the term "legal representation."

Response: GRAPP at 1 Pa.Code §§ 31.21-31.23 controls who may represent a party before an agency. Specifically, 1 Pa.Code § 31.23 would prohibit representation at a hearing by persons other than the appearance in person by a party or by a licensed attorney. It is not necessary to define legal representation. Legal representation is representation by a licensed attorney.

5. IRRC noted commenters objected to the omission of aggrieved employees as parties to 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." IRRC stated that 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.

Response: Actions by the Department under the act are enforcement actions. The act charges the Department with the responsibility to enforce the act. It would not be appropriate for the complainant to automatically be a party in an enforcement action. The Department's role under this act is not merely that of an adjudicator of employer-employee disputes.

In addition, there may be many complainants who would not wish to be a party. A party in an action would be required to represent himself or seek legal representation. A party may also have a burden of proof and may need to present evidence, prepare for a hearing and attend a hearing. An aggrieved employee would meet the requirement of having a direct interest in the action and would be granted the right to intervene at any hearing under the act and this regulation.

To clarify that the complainant would have the right to intervene and to simplify that process, the Department has added section 225.8(c). The complainant will have the right to intervene by sending a letter or notice to the hearing officer, the bureau and the health care facility or employer no later than 10 days before the scheduled hearing. The complainant will not be required to demonstrate his basis for intervention.

6. SEIU, AFL-CIO, PSNA and PASNAP commented that 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.

Response: The Department amended section 225.7(a) to state that all parties and the complainant will receive written notice of the hearing. The hearing will be open to the public.

7. SEIU and AFL-CIO commented that because the complainant or his/her union is not automatically a party, the complainant is denied due process.

Response: The Department has amended this regulation to allow a complainant to intervene by merely sending a letter and to provide notice of administrative decision and notice of the hearing to the complainant. A complainant will have notice and the opportunity to be heard. The complainant's due process will not be violated under this regulation.

8. PSNA and PASNAP requested that a definition of "party" be created and that the definition of "party" include the employee and or complainant. SEIU, AFL-CIO, AFSCME, PSNA and PASNAP commented that since the complainant is not a party, he would not be

permitted an opportunity to be heard and he would be denied due process. Party status should be afforded the complainant as a right. AFSCME commented that the complainant should be a party or in the alternative have automatic intervention status. A Complainant is directly affected and the proposed rule should specify that.

Response: Under amended section 225.8, the complainant will be able to intervene by merely filing a letter with the Department indicating his desire to intervene. Complainant does not need to meet any other criteria to be granted intervenor status. It should be noted that some complainants may prefer not to actively participate in the administrative process. Complainants who are parties may need to expend financial and other resources.

9. SEIU, AFL-CIO, PSEA and AFSCME commented that the regulation should be changed to allow employees to be represented by their union like in unemployment compensation hearings.

Response: Hearings under this regulation will not be similar to unemployment compensation hearings. Unemployment compensation hearings are not enforcement actions. They are matters between the employee and the employer. Here the Department is charged with enforcing the prohibitions in the act and imposing penalties.

Also, GRAPP applies to these hearings. GRAPP at 1 Pa.Code § 31.23 prohibits representation at a hearing by any person other than the party or by a licensed attorney unless allowed by an agency in a specific case

10. SEIU, AFSCME, AFL-CIO, PSNA and PASNAP commented that subsection 225.7(g) requires the Bureau to establish that there has been a violation of the act by a preponderance of the evidence, which places an unrealistic burden on the Department. The commenters suggest that once the Bureau proves 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. 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.

Response: As a general rule in an administrative proceeding where an agency is taking an enforcement action, the agency would be required to prove a violation of the law/standard by a preponderance of the evidence. The fact that an exception to the general rule could apply, may be an affirmative defense proven by the employer.

During its investigation the Bureau would gather information to establish whether an exception to the act could be established. The Bureau would need any and all information the healthcare facility and the complainant possess concerning the circumstances of the alleged violation including any information to establish an exception to the act's general rule concerning mandating overtime. The Bureau would need to collect and analyze information concerning exceptions prior to issuing an administrative decision on a violation of the act.

In response to the suggestion that the regulation include a provision that if the employer does not maintain adequate records of a contemporaneous nature to establish an exception to the act's prohibition against mandatory overtime there is a presumption that the employer violated the act, this is not appropriate. The act does not establish record keeping requirements and does not establish a presumption in absence of records. Without an

affirmative statutory duty to maintain records, such a regulatory provision would be beyond the scope of the statute and not legally permissible.

11. SEIU, AFL-CIO, PSNA and PASNAP commented that section 225.7(h) 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.*

Response: The regulation at section 225.7(h) provides that 1 Pa. Code, Part II, the "General Rules of Administrative Practice and Procedure (GRAPP)" will apply to hearings under this regulation to the extent not covered by this regulation. The hearing officer will have the power to consolidate proceedings where appropriate.

Section 225.8. Petition to intervene.

1. IRRC, SEIU, AFL-CIO, PSNA and PASNAP 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 should not be included in the final-form regulation.

Response: The Department has amended this section to include the language of intervention provisions in GRAPP.

2. SEIU, AFL-CIO, AFSCME, PSNA and PASNAP commented that under the proposed regulation, the employee who files the complaint is not 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.

Response: In order to clarify that a complainant would have the right to intervene, the Department has added to the regulation subsection 225.8(c) which states that the complainant has the right to intervene by sending a letter or notice to the hearing officer, the Bureau and the health care facility or employer no later than 10 days before the scheduled hearing. This subsection also states that the complainant will not be required to demonstrate his/her basis for intervention.

§ 225.9. Adjudications.

1. SEIU, AFL-CIO, PSNA and PASNAP commented that there is no time set for the issuance of this adjudication, which could result in undue delay, and suggest that a timeframe be set in the regulations.

Response: The Department issues adjudications in numerous areas and generally uses the same hearing officer staff. The timeframe for issuing adjudications depends on many factors, some of which are not within the control of the Department. The most important factor in the time to issue adjudication is the number of cases appealed. The Department simply cannot predict how many appeals will be filed or the complexity of those appeals. To set a certain timeframe to issue adjudications could result in less scrutiny for those decisions which could result in more Commonwealth Court appeals and more cost for all parties including complainants.

2. SEIU AFL-CIO AFSCME, PSNA and PASNAP commented that the complainant 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.

Response: The Department always intended to serve the complainant with a copy of the written adjudication. Section 225.9 has been amended to require that the complainant be served with a copy of the written adjudication.

Section 225.10. Appeal rights.

1. IRRC suggested that the Department explain why aggrieved intervenors 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. SEIU, AFL-CIO, PSNA and PASNAP comment that under this provision, unless the employee was granted intervention, he would not be able to appeal the adjudication to Court and state that this right should be afforded the complainant.

Response: An aggrieved intervenor would be a party aggrieved by the decision and would have the right to file an appeal. The Department has amended section 225.10 to clearly state that an intervenor would have the right to appeal. The Department has also added the reference to the Judicial Code at 42 Pa.C.S. § 763.

Additional Comments

In order to solicit feedback on its changes to the proposed regulation, the Department provided Representative Keller and stakeholders a copy of its draft final-form regulation. On July 31, 2013, the Department met with Representative Keller and members of his staff to discuss the Department's changes to the proposed rulemaking. Representative Keller's staff provided the Department with comments on the draft final-form rulemaking before the meeting.

On August 1, 2013, the Department met with stakeholders and provided a PowerPoint presentation concerning the Department's responses to the public comments and the changes made to the proposed rulemaking. In attendance at the stakeholders meeting were representatives from Diakon Lutheran Social Ministries, SEIU, PA Nurse Alliance, PASNAP, PAR, Buchanan Ingersoll, PSNA, Triad Strategies, HAP, PSEA, and J.M. Uliana & Associates.

The Department posted the draft final-form regulation and a letter to all stakeholders on its website. The Department emailed copies of the PowerPoint presentation to all the stakeholders who attended the August 1st meeting. The Department also solicited comments from the stakeholders on the changes it made to the proposed regulation. In addition to comments from Representative Keller, the Department also received additional comments

from Diakon Lutheran Social Ministries, SEIU, PSNA, HAP and PSEA. The Department considered all of the comments made on the changes to the proposed rulemaking.

The additional stakeholder comments included both negative and positive comments on the Department's clarification of subsection 225.4(b)(1) using single work sites in considering the employers past violation history for the purpose of determining penalties. The comments also included suggestions concerning the timeframes for filling complaints; facilities to comply with orders; the Bureau to begin investigations; holding hearings; and issuing decisions. The Department also received comments on consolidating complaints and hearings; allowing class actions; the scope of the regulation; requiring witness names on the complaint form; expanding the factors for determining penalties to include more aggravating factors; allowing union representation at hearings; and shifting the burden of proof at hearing. Many of these comments were not directed at the changes the Department made to the proposed regulations, but repeated comments made during the formal public comment period.

One new comment encouraged the Department to provide continuing education to its investigators and examiners on the Department's new procedures and ongoing education on policy matters.

As a result of the written stakeholder comments and comments made at the July 31 and August 1, 2013 meetings, the Department made two additional changes to the final form regulation. The Department clarified section 225.3(c)(4) to add language that "known" witnesses be included on the complaint form. This was to clarify complaints would not be dismissed if there were no witnesses named in the complaint. The Department's position remains that the best time to provide witness information to the Department is when the Complainant would have the freshest recollection and that is when the complaint is filed. At the stakeholders' meeting the Department again reassured stakeholders that complaint forms including witness names are not public information and will not be released to the employer upon request.

The other change to the draft final form regulation made as a result of the July 31 and August 1, 2013 meetings was the addition of subsection 225.4(b)(5). Representative Keller commented that the factors to be considered by the Department in imposing penalties should include the severity of the violation. Other comments indicated that additional factors should be considered in determining penalties. The Department added the length of the mandated overtime and other factors concerning the severity of the violation to the factors listed in the proposed rulemaking.

D. Affected Persons

Pursuant to section 3 of the act, this regulation will apply to healthcare facilities which provide clinically related health services including facilities operated by state and local government. This includes individuals employed through a personnel agency that contracts with a healthcare facility to provide personnel.

E. Fiscal Impact

It is anticipated the cost to the Department as a result of this proposed rulemaking will be $42,000 per year. These costs are based on the Department's current costs in enforcing the act. It is not expected that the levying of administrative fines will demonstrably offset costs. The Bureau has enforced the act since July 2009.

F. Paperwork Requirements

The Bureau has already prepared and posted information and complaint forms on its website (www.dli.state.pa.us). The act contains no record keeping requirement for employers.

G. Sunset Date

The regulation will be monitored through practice and application. Thus, no sunset date is designated.

H. Effective Date

This rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S, § 745.5a(a)), on July 14, 2012, the Department submitted a copy of the notice of proposed rulemaking, published at 42 Pa. B. 4468, to IRRC and the Chairpersons of the Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department provided IRRC and the Committees with copies of the comments received during the public comment period and other information as requested. In preparing this final-form rulemaking, the Department has considered the comments received from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)) on _____, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved this final-form regulation.

J. Findings

The Department finds that:

(1) Under sections 201 and 202 of the Commonwealth Documents Law, 45 P.S. §§ 1201 and 1202, and the regulations thereunder at 1 Pa. Code §§ 7.1 and 7.2, the Department gave public notice of its intention to promulgate this rulemaking by publication at 42 Pa. B. _____.

(2) A public comment period was provided as required by law, and all comments received were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 42 Pa. B._____.

(4) This final form rulemaking is necessary and suitable for the administration of the act.

K. Order

The Department, acting under the authority of the Law, orders that:

(1) The regulations of the Department, 34 Pa. Code Chapter 225, are amended as set forth in Annex A.

(2) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(3) The Secretary and the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(4) This order shall take effect upon publication in the Pennsylvania Bulletin and as provided above in Section H. Effective Date.

Julia K. Hearthway, Secretary

COMMENTATORS LIST-REGULATION 12-91

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Annex A

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 225. PROHIBITION OF EXCESSIVE OVERTIME IN HEALTH CARE ACT REGULATION

§ 225.1. Purpose and scope.

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

§ 225. 2. 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.

Employee-

(i) 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.

(ii) The term includes an individual employed through a personnel agency that contracts with a health care facility to provide personnel.

(iii) 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) or the Commonwealth, a political subdivision or an instrumentality of the Commonwealth engaged in direct patient care activities or clinically-related health services.

Health Care Facility –

(i) A facility which provides clinically related health services, regardless of whether the operation is for profit or nonprofit and regardless of whether operation is by the private sector or by State or local government.

(ii) The term includes the following:

(A) A general or special hospital, a psychiatric hospital, a rehabilitation hospital, a hospice, an ambulatory surgical facility, a long-term care nursing facility, a cancer treatment center using radiation therapy on an ambulatory basis and an inpatient drug and alcohol treatment facility.

(B) A facility which provides clinically related health services and which is operated by the Department of Corrections, the Department of Health, the Department of Military and Veterans Affairs or the Department of Public Welfare.

(C) A mental retardation facility operated by the Department of Public Welfare.

(iii) The term does not include any of the following:

(A) An office used primarily for private or group practice by a health care practitioner.

(B) A facility providing treatment solely on the basis of prayer or spiritual means in accordance with the tenets of a church or a religious denomination.

(C) A facility conducted by a religious organization for the purpose of providing health care services exclusively to clergy or other individuals in a religious profession who are members of the religious denomination conducting the facility.

Secretary- The Secretary of the Department or the Secretary's designee.

Violation- Each discrete time that a health care facility or employer does not comply with the Act.

Witness- A person with personal knowledge of an alleged violation of the Act.

§ 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.

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

(c) The complaint must be in writing, signed and set forth the grounds for the complaint. A complaint 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] one or more violations of the act including the date, time and place of the alleged violation. A complaint may include multiple violations.

(4) The names of known witnesses.

(5) Other information that may be pertinent to an investigation.

(d) The Bureau will prepare complaint forms that will be available on the Department's website www.dli.state.pa.us. The forms will be available in English and in Spanish.

(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. The Bureau will review all complaints within 60 days of receipt. 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 allow the party [15] 30 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. The Bureau's written notification will include a statement of the basis for the Bureau's dismissal.

§ 225.4. Administrative penalties.

(a) The Department may impose any of the following penalties under Section 6 of the act (43 P.S. § 932.6):

(1) Impose 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 ensure future compliance, and [non-retaliation orders] directives to remedy unlawful adverse employment decisions as prohibited under the Act at 43 P.S. § 932.3(b). An order must be based on the facts of each individual complaint and practices of the health care facility and employer.

(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 or employer on the date the violation occurred at the site where the alleged violation occurred.

(2) History of previous violations. The Department will take into consideration the number of assessed violations for the health care facility or employer in a preceding [12] 36-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.

(4) Degree of cooperation. The Department will also consider an employer's lack of cooperation with an investigation, an employer's failure to provide requested information and any action which would constitute lack of effort to abate a violation or violations such as retaliation.

(5) Length of mandated overtime. The Department will take into consideration the length of the mandated overtime and other factors concerning the severity of the violation.

§ 225.5. Administrative notice of violation and proposed penalty.

(a) After the completion of an investigation of 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.

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

(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 propose an alternative penalty for Bureau's consideration setting forth mitigating circumstances. The Bureau will expeditiously act on the request for reduction of the 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. The Bureau will provide notice of the request for reduction in penalty to the complainant.

(e) After the completion of an investigation of alleged violations of the act and upon findings that the act has not 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.

(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 supersedeas 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. The parties and the complainant will receive [reasonable] written notice of the hearing date, time and place by first class mail at least 30 days prior to the scheduled date of the hearing, unless another method of notification is requested.

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

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

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

(e) The 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.

(g) The Bureau will 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 in section 225.4(b) (relating to administrative penalties).

(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 and [that] which is not adequately represented by the existing parties, and as to which petitioners may be bound by the Department's actions [and its interest is not adequately represented by existing parties in the hearing]. The following may have an interest: consumers, patients or other patrons served by the respondent; holders of securities of the healthcare facility or employer; employees of the healthcare facility or employer; competitors of the respondent.

(iii) Any other interest of such nature that participation of the petitioner may be in the public interest.

(2) The party files a petition to intervene with the [presiding] hearing 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 10 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 hearing officer.

(c) The complainant will have the right to intervene by sending a letter or notice to the hearing officer, the Bureau, and the health care facility or employer no later than 10 days before the scheduled hearing. The complainant will not be required to demonstrate his basis for intervention as required by subsection (b).

(d) 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 intervenor'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 begins.

[(d)](e) 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.

§ 225.9. Adjudications.

(a) The Secretary will issue a written adjudication. The adjudication will include 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, complainants, intervenors and counsel of record.

§ 225.10. Further appeal rights.

A party, including an intervenor, aggrieved by an adjudication rendered under § 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. A direct appeal from an agency adjudication to Commonwealth Court is provided by statute at 42 Pa.C.S. §763.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR & INDUSTRY
HARRISBURG PENNSYLVANIA 17121

THE SECRETARY

January 16, 2014

David Sumner, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Notice of Final Rulemaking
Department of Labor and Industry
31 Pa. Code, Chapter 225
Prohibition of Excessive Overtime in Health Care Act
Document No. 12-91

Dear Director Sumner:

Enclosed is a final rulemaking package consisting of a Face Sheet, Preamble, revised Annex A and Regulatory Analysis Form.

The Department of Labor & Industry is submitting this rulemaking to implement the complaint, hearing and appeals procedures for the Prohibition of Excessive Overtime in Health Care Act (Act 102) (43 P.S. §932.5) and section 2205 of the Administrative Code. (71 P.S. §565).

Comments, suggestions or questions should be directed to Karen Galli, Deputy Chief Counsel, Office of Chief Counsel, Department of Labor & Industry, 10th Floor, Labor and Industry Building, 651 Boas Street, Harrisburg, PA 17121; Telephone: (717) 787-4186; Fax: (717) 783-5027. The email address is: kgalli@pa.gov.

The Department's staff will provide your staff with any assistance required to facilitate your review of this proposal.

Sincerely,

Julia K. Hearthway
Secretary

cc w/encl: Arthur F. McNulty, Chief Counsel
J. Scott Robinette, Deputy Secretary for Safety and Labor-Management Relations
David Greineder, Director of Legislative Affairs
Eric Kratz, Policy Director, Office of Policy, Planning & Development
Karen Galli, Deputy Chief Counsel
Richard Lengler, Deputy Chief Counsel

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER:	12-91
SUBJECT:	PROHIBITION OF EXCESSIVE OVERTIME IN HEALTH CARE ACT
AGENCY:	DEPARTMENT OF LABOR & INDUSTRY

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
		HOUSE COMMITTEE ON LABOR & INDUSTRY
1/16/14	J Hoffman	MAJORITY CHAIR Mario M. Scavello
1/16/14	J Marsiglio	MINORITY CHAIR William F. Keller
		SENATE COMMITTEE ON LABOR & INDUSTRY
1/16/14	Vicki K Scott	MAJORITY CHAIR John R. Gordner
1/16/14	[illegible]	MINORITY CHAIR Christine M. Tartaglione
1/16/14	[illegible]	*INDEPENDENT REGULATORY REVIEW COMMISSION*
		ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)

December 18, 2013