RULES AND REGULATIONS

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 225]

Prohibition of Excessive Overtime in Health Care Act Regulations

The Department of Labor and Industry (Department) adds Chapter 225 (relating to Prohibition of Excessive Overtime in Health Care Act regulations) to read 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. *Procedural History*

The notice of proposed rulemaking was submitted to the majority and minority Chairpersons of the House Labor and Industry Committee and the Senate Labor and Industry Committee (Committees) and the Independent Regulatory Review Commission on (IRRC) on June 26, 2012. The proposed rulemaking was published at 42 Pa.B. 4468 (July 14, 2012). The Department submitted the final-form rulemaking to IRRC and the Committees on January 16, 2014. The final-form rulemaking was deemed approved by the Committees on February 26, 2014. At a public meeting on February 27, 2014, IRRC disapproved the final-form rulemaking. IRRC issued its disapproval order to the Department and the Committees on March 17, 2014. On April 28, 2014, the Department submitted a revised final-form rulemaking to IRRC and the Committees to respond to the objections raised by IRRC in its disapproval order. At a public meeting on May 22, 2014, IRRC approved the revised final-form rulemaking. The revised final-form rulemaking was deemed approved by the Committees on June 5, 2014.

C. *Background and Description of the Rulemaking*

Final-form 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. The Department's Bureau of Labor Law Compliance (Bureau) has enforced the act since it took effect on July 1, 2009.

Beginning in October 2008, the Department met with numerous organizations whose members would be affected by the act and the 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 the regulations. The following organizations presented testimony at the stakeholders' meeting: the Pennsylvania Association of Staff Nurses & Allied Professionals (PASNAP); Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities; the Hospital & Healthsystem Association of Pennsylvania (HAP); the Service Employees International Union (SEIU); and Bruce Ludwig, Esq. The following groups provided written comments: the Department of Public Welfare; the Department of Corrections; the Pennsylvania State Education Association (PSEA); the Department of Military and Veterans Affairs; PASNAP; the Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities; HAP; the SEIU; and Bruce Ludwig, Esq. The Department also reviewed the 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 regulations are required and necessary to implement and clarify the complaint, investigation procedures and administrative penalty assessment provisions of the act. The regulations also require the Department to provide complainants notice of violations and appeals, and copies of Department determinations. This rulemaking will implement and clarify the complaint, investigation procedures and administrative penalty assessment provisions of the act.

Section 225.1 (relating to purpose and scope) states that the purpose of the regulations is to implement complaint and investigation procedures and administrative penalty assessment provisions. Section 225.2 (relating to definitions) provides definitions for terms used in the regulations. When applicable, these definitions mirror the definitions in the act. Section 225.3 (relating to complaint and investigation procedure) sets forth the complaint and investigation procedure, and establishes the time period to file a complaint, the information required in the complaint and the time period to correct the complaint if required information is missing. Section 225.4 (relating to administrative penalties) sets forth the administrative penalties as provided by the act and the factors the Department may use as a basis to calculate penalties. Section 225.5 (relating to administrative notice of violation and proposed penalty) 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 (relating to contesting an administrative decision and proposed penalty) allows a health care facility or employer to contest an administrative decision and request a hearing. Section 225.7 (relating to hearing) establishes the hearing procedure for contested administrative decisions. The hearing is de novo and the parties and the complainant will be notified of the hearing date and location. Section 225.8 (relating to petition to intervene) 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 (relating to adjudications) provides that the Secretary of Labor and Industry will issue written adjudications including the relevant findings, conclusions and the rationale for the adjudication. Section 225.10 (relating to further appeal rights) provides that an aggrieved party

may file an appeal to Commonwealth Court within 30 days of the mailing date of the decision.

Revised final-form rulemaking

In response to IRRC's disapproval order, the Department revised § 225.3 of the final-form rulemaking to require the Bureau to begin the investigation of a complaint within 60 days of receipt. In addition, this section was amended to require health care facilities and employers to establish a recordkeeping system for circumstances when employees are required to work overtime. Under this requirement, records shall be kept for 3 years.

The Department revised § 225.4(b)(3) in response to IRRC's disapproval order. IRRC was concerned with how the Department would implement the "good faith" factor in penalty assessment. The Department changed the "good faith" factor to "remedial efforts." The Department will consider voluntary "remedial efforts" designed to prevent future violations.

The Department revised § 225.5(e) in response to IRRC's concern about notification of complainant on investigation closure. A requirement that the written notice when a violation is not found will include a statement of reason was added.

The Department revised § 225.8(b)(1)(ii) to specifically include complainants' union or trade association representatives in the enumerated list of those who may have an interest to intervene in a Department hearing concerning violations of the act.

D. *Comments*

Notice of proposed rulemaking was published at 42 Pa.B. 4468. The Department received comments from IRRC; Representative William F. Keller; Richard E. Burridge, 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, PASNAP; Neil Bisno, SEIU Healthcare; and Paula Bussard, HAP.

General comments

Comment: IRRC commented that the Department should explain in the preamble and the Regulatory Analysis Form (RAF) why it is choosing to implement only administrative procedures in the regulations.

Response: 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. The regulations 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.

Comment: IRRC commented that the Department should explain why the regulations do not address the act's prohibition of retaliation.

Response: As the preamble of the proposed rulemaking stated, the regulations establish 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, to more clearly address the act's prohibition against retaliation and to show that the Department will issue orders when it finds retaliation, the Department amended § 225.4 to clearly state that it may order a health care facility or employer to "remedy unlawful adverse employment decisions."

Comment: IRRC commented that the Department should explain why the regulations do not address the act's general prohibition of mandatory overtime.

Response: As the preamble of the proposed rulemaking stated, the regulations establish 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 the prohibition of mandatory overtime.

Comment: IRRC commented that the preamble and the RAF did not address why certain administrative and judicial processes in the regulations 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: Section 6 of the act (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 2 Pa.C.S. §§ 501—508 and 701—704 (relating to Administrative Agency Law). The act does not give complainants or parties other than the defendant employer 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.

Comment: 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 regulations. 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.

Comment: IRRC stated that it strongly encourages the Department to continue dialogue with stakeholders as it develops the final-form regulations. IRRC recommended 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. On August 1, 2013, the Department

met with stakeholders to discuss changes to the proposed rulemaking. The Department posted the draft final-form regulations and a letter to stakeholders on its web site soliciting comments on the changes made to the proposed rulemaking. The Department used this feedback to make additional changes to this final-form rulemaking.

Comment: 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. The Department has increased the time period in final-form § 225.3(f) to respond and correct a complaint to 30 days.

Comment: 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 added additional aggravating circumstances to its consideration for penalties in § 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 as follows, after its July 31 and August 1, 2013, meetings with Representative Keller and stakeholders, the Department also added severity of the violation as a factor to be considered in penalty determinations in § 225.4(b)(5).

In addition, the Department revised § 225.4(b)(3) in response to IRRC's disapproval order. IRRC was concerned with how the Department would implement the "broad" good faith factor in penalty assessment. The Department revised the factor to a more "focused" factor of voluntary remedial efforts. The Department will consider voluntary remedial efforts designed to prevent future violations.

Comment: Representative Keller asked whether the Bureau can enforce the act 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 any way.

Response: The act regulates health care facilities as defined under section 2 of the act (43 P. S. § 932.2). The act's definition of "health care facility" 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 Commonweatlh agency would be restricted in any way, specific restrictions are not 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.

Comment: 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 notices as part of its normal business practice. In response to this comment, the Department added the requirement that notices be sent to the complainant. The final-form rulemaking has been amended to require notice to the complainant of the proposed penalty in § 225.5(b), notice of a request for a reduction in penalty in § 225.5(d), notice of hearing in § 225.7(a) and a copy of the adjudication in § 225.9(c).

Comment: Representative Keller and IRRC commented that determinations when a violation is not found should include statements of the reason or the applicable exception under the act.

Response: The Department's general practice is to provide, when possible, an explanation as to why a violation was not 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 the final-form rulemaking, the Department amended § 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.

In addition, the Department revised § 225.5(e) in response to IRRC's disapproval order. A requirement was added that the written notice when a violation is not found will include a statement of reason.

Comment: 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 a violation of the act is not found. Section 6(c) of the act specifically provides the Department's penalties and administrative order requiring a health care facility to take corrective action are subject to judicial review.

Comment: Representative Keller, IRRC and PSEA commented that the hearing process should guarantee claim-

ants 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. To ensure that is the case and to clarify that a complainant would have the right to intervene, the Department added § 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 a proceeding to show that a violation of the act occurred. This would include showing that the general rule under section 3 of the act (43 P. S. § 932.3) applied. The Department cannot legally shift this burden by regulation.

Comment: Representative Keller, IRRC and AFSCME commented that the regulations do not address several items, including the following: investigative powers of the Bureau and targeted time frames 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 special or specific investigatory powers. Additional investigative powers cannot be added by regulation. This would be beyond the scope of the act and not permissible.

Currently, the Department does not have targeted time frames 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 time frame 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 § 225.4(a)(2) to clarify that the Department could issue orders "to remedy unlawful adverse employment decisions."

In response to comments concerning the enforcement of the act against other State agencies, changes are not necessary. The act and the regulations are clear. Specifically, the definition of "health care facility" includes both State and local government. Also, the Department met with other State agencies to inform them of their obligations under the act. In addition, the Department also conducted training for other State agencies.

In response to IRRC's disapproval order, the Department revised § 225.3 to require the Bureau to begin the investigation of all complaints within 60 days of receipt.

Comment: SEIU, AFL-CIO, PSEA, PSNA and PASNAP commented that the regulations do not set forth investigative powers for the Department. While proposed § 225.3 stated 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 in a statute. There are not explicit extraordinary investigative powers given to the Department in the act. Therefore, the powers of the Department are only those limited powers in sections 2201 and 2202 of The Administrative Code of 1929 (71 P. S. §§ 561 and 562) and limited implied investigatory powers. Additional investigative powers cannot be added by regulation. This would be beyond the scope of the act and not permissible.

Comment: SEIU, AFL-CIO, PSNA, PASNAP and AFSCME commented that the regulations 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 previously stated, this would be beyond the scope of the act. 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 commentators 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 the Pennsylvania Prevailing Wage Act (43 P. S. §§ 165-1—165-17), the Wage Payment and Collection Law (43 P. S. §§ 260.1—260.12), The Minimum Wage Act of 1968 (43 P. S. §§ 333.101—333.115) and the Child Labor Act (43 P. S. §§ 40.1—40.14). The investigators have extensive experience with conducting investigations and do endeavor to interview witnesses outside the presence of supervisors and managers.

Comment: SEIU, AFL-CIO, PSNA, PASNAP and AFSCME commented that employers should be required to maintain accurate and adequate records of: (1) the "reasonable efforts" it made to obtain other staffing before attempting to mandate an employee to work overtime; (2) an employee voluntarily waiving the requirement of section 3(d) of the act; (3) the "agreed to, predetermined and regularly scheduled daily work shifts" for employees covered by the act; and (4) the employer providing the employee with necessary time, up to a maximum of 1

hour, to arrange for the care of employee's minor children, dependents, or elderly or disabled family members. These records should be open for Department inspection. PASNAP further commented that without recordkeeping 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 act does not contain recordkeeping requirements. However, in response to IRRC's disapproval order, the Department revised final-form § 225.3 to require health care facilities and employers to establish a recordkeeping system for circumstances when employees are required to work overtime in excess of their predetermined or regularly scheduled work week. Under this requirement, records shall be kept for 3 years.

Comment: SEIU, AFL-CIO, PSNA and PASNAP suggested that the Department require health care facilities to submit data regarding the effects of prohibiting mandatory overtime and that the data include whether chronic staffing shortages exist.

Response: This is beyond the scope of the act. The Department does not have authority to require data collection from health care facilities by regulation.

Comment: 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 frequently asked questions 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 not posting requirements in the act. As the commentators noted, posting is required by the The Minimum Wage Act of 1968 and the Child Labor Act. However, those requirements are in the respective statutes; they do not stand alone in the regulations.

Comment: SEIU, AFL-CIO, PSNA and PASNAP also proposed that if an employer is found to violate the act, the decision of the Bureau should be posted on its web site and the employer should be required to post a copy of the decision at the workplace for at least 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 not posting requirements in the act. The Department has numerous administrative hearings and does not, as a general rule, post decisions or orders unless posting is required by statute.

Comment: SEIU, AFL-CIO and AFSCME commented that they are disappointed because the scope of the proposed rulemaking was too limited and did not provide guidance to substantive provisions of the act. 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 1 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 rulemaking provided too few rights to complainants, no rights for the unions representing the employees and is generally inadequate to effectively enforce the act.

Response: The Department's goal with the regulations 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 amended the proposed regulations 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. A union may be able to make a showing that it has a significant interest in order to be granted intervention in a hearing. The Department did not repeat substantive requirements from the act. The Department cannot add provisions that the General Assembly did not see fit to place in the act. Many of the comments requested changes that would in essence add provisions to the act.

§ 225.1. Purpose and scope

Comment: IRRC commented that § 225.1 states that Chapter 225 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: Section 5 of the act requires the Department to promulgate regulations to implement the act. The only places the act specifically references the Department are in section 4 of the act (43 P. S. § 932.4) and section 6 of the act.

Section 2205 of The Administrative Code of 1929 (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 in this Commonwealth. Section 506 of The Administrative Code of 1929 (71 P. S. § 186) empowers administrative departments to prescribe rules and regulations for the performance of their business.

§ 225.2. Definitions

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

Response: The Department made this change.

Comment: PSNA and PASNAP recommended that the Department add a definition of "chronic short staffing."

Response: The proposed regulations did not use the term "chronic short staffing." Generally, a definition section will only define terms used within the regulations.

Comment: IRRC commented that in 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 the regulations, employers other than health care facilities would not 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 Common-

wealth, political subdivisions and instrumentalities of the Commonwealth were covered by the act and the regulations.

§ 225.3. Complaint and investigation procedure

Comment: IRRC commented that the Department should explain why time frames for the Bureau to investigate complaints are not in the regulation. SEIU, AFL-CIO, PSNA and PASNAP commented that the proposed regulation is deficient in that it does not contain a reference to when the Bureau will begin to investigate alleged violations of the act and that it is important to include a time frame. PSNA recommended that the time frame should not be longer than 10 days based on the regulations of other states. SEIU and AFL-CIO suggested that at least "promptly" be added to give some impetus to investigate citing Pennsylvania Human Relations Commission (PHRC) regulations in 16 Pa. Code § 42.41 (relating to initiation of investigation).

Response: The Department did not set time frames 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 time frame.

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

In response to IRRC's disapproval order, the Department revised final-form § 225.3 to require the Bureau to begin the investigation of complaints within 60 days of receipt.

Comment: IRRC commented that under § 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 time frame is not in the act and it is an unduly short time frame. 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 up to 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 or required reasonable efforts were not exhausted, or both.

Response: The Department's position is that 60 days is a reasonable time frame 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 a violation is to investigate and prove. In many health care 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.

Comment: 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 in 16 Pa. Code § 42.36 (relating to complaints seeking relief for persons other than the named complainant).

Response: The act does not provide for a class action type complaint. Also, 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) 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).

Section 35.45 of 1 Pa. Code (relating to consolidation) 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.

Comment: 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 a scheduled hearing under § 225.8.

Comment: IRRC commented that § 225.3(b) 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 recommended that the final-form regulation replace "Department" with "Bureau."

Response: The Department made this change.

Comment: IRRC commented that §§ 225.4—225.8 reference violations by "the health care facility or employer." To maintain consistency among sections, the Department should add "or employer" to § 225.4(b) in the final-form regulation.

Response: The Department made this change.

Comment: IRRC commented that under § 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 in 16 Pa. Code § 42.14(a) (relating to time of filing).

Response: The Department did not intend that a separate complaint would need to be filed for each violation when there are related violations. The Department has

clarified § 225.3(c)(3) to specifically allow complaints with multiple violations to be filed.

Comment: IRRC commented that under § 225.3(c) aggrieved employees are required to provide the names of "witnesses." Witness is not defined in § 225.2 and it is unclear what role a witness would have in the complaint proceeding. IRRC recommended the Department define and clarify "witness." IRRC recommended that the Department explain the reason for including the identities of witnesses in the initial complaint.

Response: The Department added a definition for "witness" in § 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, complainant 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.

Comment: Representative Keller, SEIU, AFL-CIO and AFSCME commented that complainants should not be required to name witnesses in initial complaints. These commentators suggested that this 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 commentators 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, investigative materials, notes, correspondence and reports are not considered public records and are therefore exempt from disclosure under section 708(b)(17) of the Right-to-Know Law (65 P. S. § 67.708(b)(17)). The Department does not release complainant names, witness names or 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).

Comment: 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 amended § 225.3(d) to state that the complaint form will be available in English and Spanish.

Comment: IRRC recommended that § 225.3(f) should be amended in the final-form rulemaking to include the time frame 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 commented that there was not a time frame 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 added a 60-day time frame to § 225.3(f). The Bureau will review complaints within 60 days of receipt. Moreover, in response to IRRC's disproval order, the Department has further revised this section to require that complaint investigations begin within 60 days of receipt of the complaint.

Comment: IRRC questioned whether under § 225.3(f), 15 days provides an aggrieved employee with sufficient time to amend the complaint. SEIU, AFL-CIO, PSNA and PASNAP commented that the period should be expanded 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 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 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 United States Post Office is open.

Comment: IRRC recommended 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 § 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 amended § 225.3(f) to state that the Bureau's written notification will include a statement of the basis for the Bureau's dismissal.

Comment: PSNA and PASNAP suggest adding § 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 § 225.4(a)(2) to allow the Department to issue directives to remedy unlawful adverse employment decisions as prohibited under section 3(b) of the act. This would cover all retaliation within the scope of the act.

Comment: IRRC stated that § 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." "Violation" is used in §§ 225.3 and 225.4 and throughout the regulations. To improve clarity, IRRC recommended that the Department move the part of this section regarding violations to § 225.2.

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

Comment: IRRC questioned what the Department means by each "discrete time" under § 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.

Comment: IRRC recommended that the Department define "nonretaliation orders" in the final-form regulation. Commentators also recommended that the regulation include retaliation provisions similar to those in the act. See section 3(b) of the act.

Response: The Department 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 added the following administrative action to § 225.4(a)(2): "directives to remedy unlawful adverse employment decisions as prohibited under section 3(b) of the act." 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.

§ 225.4. Administrative penalties

Comment: SEIU, AFL-CIO, AFSCME, PSNA and PASNAP commented that proposed subsection (a)(2) 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 proposed regulation stated that it could issue "nonretaliation orders" which would have included action such as reinstatement and removal of discipline. To clarify this and to alleviate concerns that the Department had the authority to issue these orders, the Department amended § 225.4(a)(2) in this final-form rulemaking. The Department added language allowing it to issue orders "to remedy unlawful adverse employment decisions" in place of nonretaliation 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.

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

Comment: PSNA and PASNAP suggested adding the following provisions to § 225.4: (1) in cases when the Bureau requests additional information from a facility, the facility shall comply within 10 working days; (2) 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; and (3) 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 does 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 the information. Investigators send out scheduling requests for administrative conferences and require documents to be produced at meetings. 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 this statement in this regulation.

Comment: IRRC recommended that the Department explain why the factors used in § 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 not a good faith defense in the act. They also state that there is not a requirement that the Department articulate its rationale for reducing a penalty and that there is not a 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, and the like.

The commentators further stated that there is not a provision on how fines would be collected or how orders would be enforced. In addition to the Secretary bringing an action to enforce, commentators 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 Worker and Community Right-to-Know Act (35 P. S. §§ 7301—7320). The Department uses similar factors in issuing administrative penalties. See § 321.4 (relating to determination of penalty amount). Those factors were adapted and simplified for this regulation.

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

wealth Court. See Pa.R.A.P. 3761 (relating to enforcement proceedings). The Department may also refer collection actions to the Office of Attorney General under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506). The Department has a process to refer collection matters to the Office of Attorney General.

The Department revised § 225.4(b)(3) in response to IRRC's disapproval order. IRRC was concerned with how the Department would implement the "broad" good faith factor in penalty assessment. The Department revised this factor to a "more narrowed and focused" voluntary remedial efforts. The Department will consider voluntary "remedial efforts" designed to prevent future violations.

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

Comment: 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 act. The Department amended the time period 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.

Comment: Commentators stated that § 225.4(b)(1) and (2) do not reference the "employer." To be consistent with other sections, these paragraphs should include "health care facility or employer."

Response: The Department made this change.

§ 225.5. Administrative notice of violation and proposed penalty

Comment: IRRC and the commentators 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 amended § 225.5(b) to clearly state that the Department will send a copy to the complainant.

Comment: IRRC commented that the Department should explain the basis for the 10-day time frame 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 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 § 225.6.

Comment: IRRC recommended 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 revised § 225.5(e) in response to IRRC's concern in its disapproval order concerning notification of complainant on investigation closure. A requirement that the written notice when violation is not found will include a statement of reason was added.

Comment: SEIU, AFL-CIO, PSNA, AFSCME and PASNAP commented that there is not a time frame established for the completion of the investigation. SEIU, AFL-CIO, PSNA, AFSCME and PASNAP stated that complaints languish and suggested a time frame 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 a time period to complete an investigation. The time frame 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 not a dedicated funding source or specific appropriation for the enforcement of this act. The Bureau enforces 13 laws with limited funding.

Comment: SEIU and AFL-CIO commented that the proposed regulation does not have a provision requiring the Bureau to inform the complainant of an employer's "request for reduction" in penalty, to allow complainant input and there is not a provision to notify the complainant of a 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 amended § 225.5(d) to state that the Department will notify the complainant of a health care 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.

§ 225.6. Contesting an administrative decision and proposed penalty

Comment: 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 health care 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 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. Section 6 of the act charges the Department with enforcing the act and imposing penalties when it finds a violation. 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 a law and the alleged violator.

The Department has administrative or prosecutorial discretion, or both, in determining when a violation has occurred and the appropriate penalty. 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's administrative or prosecutorial discretion, or both, and potentially place the Department in an adversarial position against the employee.

Comment: SEIU, AFL-CIO, PSNA and PASNAP commented that § 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 commentators stated that given that there is not a time frame for holding a hearing or issuing a decision, this allows for noncompliance with the act for a potentially unreasonable period of time. AFL-CIO also commented that there is not a 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 the 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, 65 Pa.C.S. Chapter 7 (relating to Sunshine Act) requires that hearings be open to the public.

§ 225.7. Hearing

Comment: 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 (for example, telephone, correspondence or e-mail) provide "reasonable notice" to the parties.

Response: The Department amended § 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.

Comment: 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 1 Pa. Code Part II, more specific hearing procedures are not needed here. Section 225.7(h) provides that 1 Pa. Code Part II applies to hearings under this regulation to the extent hearing procedures are not covered by this regulation. Part II of 1 Pa. Code provides for very specific and clear hearing procedures.

Comment: 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 in 2 Pa.C.S. § 505 (relating to evidence and cross-examination) and Pennsylvania case law interpreting this standard.

Comment: IRRC stated that commentators 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 commented that union representatives 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 "legal representation."

Response: Sections 31.21—31.23 of 1 Pa. Code (relating to appearance in person; appearance by attorney; and other representation prohibited at hearings) control who may represent a party before an agency. Specifically, 1 Pa. Code § 31.23 prohibits 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.

Comment: IRRC noted commentators 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 a 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 added § 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.

Comment: 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 not a provision that the hearing will be open to the public.

Response: The Department amended § 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.

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

Response: The Department 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.

Comment: PSNA and PASNAP requested that a definition of "party" be added 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 regulation should specify that.

Response: Under amended § 225.8, the complainant will be able to intervene by merely filing a letter with the Department indicating his desire to intervene. A 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.

Comment: SEIU, AFL-CIO, PSEA and AFSCME commented that the regulation should be amended 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. The Department is charged with enforcing the prohibitions in the act and imposing penalties.

Also, 1 Pa. Code Part II applies to these hearings. Section 31.23 of 1 Pa. Code 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.

Comment: SEIU, AFSCME, AFL-CIO, PSNA and PASNAP commented that § 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 commentators suggest that once the Bureau proves a violation of the "general rule" prohibiting mandatory overtime as set forth in section 3(a) of the act, the burden should shift to the employer to prove that the "exception" in section 3(c) of the act 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 when 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 health care facility and the complainant possess concerning the circumstances of the alleged violation including 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, the Department states this is not appropriate. The act does not establish a presumption in absence of records.

Comment: SEIU, AFL-CIO, PSNA and PASNAP commented that § 225.7(h) provides that hearings shall be governed by 1 Pa. Code Part II. 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 the Department's regulations, the entire set of general rules of administrative practice and procedure will apply. Without a clarification, there could be some ambiguity or gaps. For example, 1 Pa. Code § 35.45 provides for consolidation of proceedings. This would be an important power given the lack of class action complaints. But this regulation 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. See 1 Pa. Code Chapter 35, Subchapter B (relating to hearings and conferences).

Response: Section 225.7(h) provides that 1 Pa. Code Part II applies to hearings under this regulation to the extent not covered by this regulation. The hearing officer will have the power to consolidate proceedings when appropriate.

§ 225.8. Petition to intervene

Comment: IRRC, SEIU, AFL-CIO, PSNA and PASNAP assert that the regulation should include certain intervention provisions already in 1 Pa. Code Part II. See 1 Pa. Code § 35.28(a)(2) and (3) (relating to eligibility to intervene). Unlike § 225.7, this section does not make a reference to 1 Pa. Code Part II. 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 rulemaking.

Response: The Department amended this section to include the language of intervention provisions in 1 Pa. Code Part II.

Additionally, in response to IRRC's disapproval order, the Department revised § 225.8(b)(1)(ii) to specifically include complainants' union or trade association representatives in the enumerated list of those who may have an interest to intervene in a Department hearing concerning violations of the act.

Comment: 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. For the employee to participate as a "party" and not just a witness, he must intervene. The standards proposed in this section make intervention very difficult. It would be best if the regulation explicitly provided that the employee has a right to intervene. Alternately, some more expansive language on intervention should be adopted.

Response: To clarify that a complainant would have the right to intervene, the Department added language to § 225.8(c) to state 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 basis for intervention.

§ 225.9. Adjudications

Comment: SEIU, AFL-CIO, PSNA and PASNAP commented that there is not a time set for the issuance of this adjudication, which could result in undue delay, and suggest that a time frame be set in the regulations.

Response: The Department issues adjudications in numerous areas and generally uses the same hearing officer staff. The time frame 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 an 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 time frame 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.

Comment: 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.

§ 225.10. Further appeal rights

Comment: 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 commented that under this regulation, 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 amended § 225.10 to clearly state that an intervenor would have the right to appeal. The Department also added the reference to 42 Pa.C.S. § 763 (relating to direct appeals from government agencies).

Additional comments

To solicit feedback on its changes to the proposed rulemaking, the Department provided Representative Keller and stakeholders a copy of its draft final-form rulemaking. 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 rulemaking and a letter to stakeholders on its web site. The Department e-mailed copies of the PowerPoint presentation to the stakeholders who attended the August 1, 2013, meeting. The Department also solicited comments from the stakeholders on the changes it made to the proposed rulemaking. 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 § 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 time frames 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 regulations, 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 rulemaking. The Department clarified § 225.3(c)(4) to add language that "known" witnesses be included on the complaint form. This clarifies that complaints would not be dismissed if witnesses were not 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 rulemaking made as a result of the July 31 and August 1, 2013, meetings was the addition of § 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 in the proposed rulemaking.

Revised final-form rulemaking

In response to IRRC's disapproval order, the Department revised § 225.3 to require the Bureau to begin the investigation of complaints within 60 days of receipt, and require health care facilities and employers to establish a recordkeeping system for circumstances when employees

are mandated overtime under the act. The Department revised § 225.4(b)(3) changing the broad good faith factor in penalty assessment to a more focused factor of voluntary remedial efforts. The Department revised § 225.5(e) to require a statement of reason in the notification sent to a complainant on investigations when a violation is not found. Finally, the Department revised § 225.8(b)(1)(ii) to specifically include complainants' union or trade association representatives in the enumerated list of those who may have an interest to intervene.

E. *Affected Persons*

Under section 3 of the act, Chapter 225 will apply to health care 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 health care facility to provide personnel.

F. *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.

G. *Paperwork Requirements*

The Bureau has already prepared and posted information and complaint forms on the Department's web site at www.dli.state.pa.us. The act does not contain a recordkeeping requirement for employers. This final-form rulemaking requires health care facilities and employers to establish a recordkeeping system for circumstances when employees are mandated overtime under the act.

H. *Sunset Date*

The regulations will be monitored through practice and application. Therefore, a sunset date is not designated.

I. *Effective Date*

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

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 26, 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, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on February 26, 2014, the final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on February 27, 2014, and disapproved the final-form rulemaking. IRRC issued its disapproval order on March 17, 2014.

The Department delivered the revised final-form rulemaking, together with a copy of IRRC's disapproval order and the supporting report required under section 7(c) of the Regulatory Review Act (71 P. S. § 745.7(c)) to IRRC and the Committees on April 28, 2014. Under section 5.1(j.2) of the Regulatory Review Act on June 5, 2014, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 22, 2014, and approved the final-form rulemaking.

K. *Findings*

The Department finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(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. 4468.

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

L. *Order*

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

(a) The regulations of the Department, 34 Pa. Code, are amended by adding §§ 225.1—225.10 to read as set forth in Annex A.

(b) 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.

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

(d) This order shall take effect upon publication.

JULIA K. HEARTHWAY,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 3470 (June 7, 2014).)

Fiscal Note: Fiscal Note 12-91 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

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

Sec.

§ 225.1. Purpose and scope.

This chapter implements the complaint and investigation procedures in the act, and the administrative penalties assessment provisions in the act.

§ 225.2. Definitions.

(a) Terms used in this chapter have the same meanings and are 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.

Department—The Department of Labor and Industry of the Commonwealth.

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 nonsuperpvisory 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 as 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:

(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:

(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 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 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 the 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 one or more violations of the act, including the date, time and place of the alleged violation. A complaint may contain multiple violations.

(4) The name 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 web site at www.dli.state.pa.us. The forms will be available in English and 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 a complaint. The Bureau will review and begin investigation of a complaint within 60 days of receipt. If a complaint does not provide the information required under subsection (c), the Bureau will advise the complainant in writing of the procedures necessary to comply with subsection (c) and allow the party 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.

(g) All health care facilities and employers shall establish a system for keeping records of circumstances when employees are required to work in excess of an agreed to, predetermined and regularly scheduled daily work shift, or in excess of 40 hours per week. These records shall be kept for 3 years.

§ 225.4. Administrative penalties.

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

(1) A fine of $100 to $1,000 per violation.

(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 directives to remedy unlawful adverse employment decisions as prohibited under section 3(b) of the act. An order will 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 36-month period. Only violations for which penalties were assessed and which are not subject to further appeal will be included.

(3) *Remedial efforts.* The Department will consider voluntary remedial efforts designed to prevent future violations and reinforce the importance of compliance with the act.

(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 action which would constitute a lack of effort to abate a violation, 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 on an alleged violation of the act and upon finding that the act has been violated, the Bureau will issue an administrative decision containing findings and proposed penalties.

(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 under § 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 the 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. The written notice when a violation is not found will include a statement of the reason.

§ 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 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 all 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 will 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 § 225.4(b) (relating to administrative penalties).

(h) To the extent not covered by this chapter, hearings will 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 will 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 can demonstrate any of the following:

(i) A right conferred by law.

(ii) An interest which may be so directly affected and which is not adequately represented by the existing parties, and as to which petitioners may be bound by the Department's actions. The following may have an interest:

(A) Complainants' union or trade association representatives.

(B) Consumers, patients or other patrons served by the respondent.

(C) Holders of securities of the health care facility or employer.

(D) Employees of the health care facility or employer.

(E) Competitors of the respondent.

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

(2) The party files a petition to intervene with the hearing officer and the existing parties in the hearing under 1 Pa. Code § 35.29 (relating to form and contents of petitions 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 under 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.

(e) A hearing officer will not grant a petition to intervene during a hearing unless good cause is shown for the late filing, the 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 all relevant findings and conclusions, and the rationale for the adjudication.

(b) The adjudication will include a notification to the 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 in 42 Pa.C.S. § 763 (relating to direct appeals from government agencies).

[Pa.B. Doc. No. 14-1491. Filed for public inspection July 18, 2014, 9:00 a.m.]

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CHS. 1187 AND 1189]

Rate Setting for County Nursing Facilities that Change Ownership

The Department of Public Welfare (Department), under the authority of sections 201(2), 206(2), 403(b) and 443.1 of the Public Welfare Code (62 P. S. §§ 201(2), 206(2), 403(b) and 443.1), amends Chapters 1187 and 1189 (relating to nursing facility services; and county nursing facility services).

Purpose of Final-Form Rulemaking

The purpose of this final-form rulemaking is to amend § 1187.97 (relating to rates for new nursing facilities, nursing facilities with a change of ownership, reorganized nursing facilities and former prospective payment nursing facilities) to codify the rate setting methodology used when a county nursing facility has a change of ownership from county ownership to a nonpublic nursing facility provider. The Department is also amending the terminology used in certain definitions in §§ 1187.2 and 1189.2 (relating to definitions).

The final-form rulemaking is needed to codify the methodology for setting rates for county nursing facilities that change ownership to a nonpublic nursing facility provider. Since county nursing facilities have been phased-out of the rate setting process under Chapter 1187, updated cost data audited to verify compliance with Chapter 1187 is no longer available to establish a per diem rate for a former county nursing facility.

Summary

A complete description of the rulemaking was published at 43 Pa.B. 5822 (October 5, 2013).

Affected Individuals and Organizations

This final-form rulemaking affects a county nursing facility that changes ownership from county ownership to a nonpublic nursing facility provider and remains in the Medical Assistance (MA) Program.

Accomplishments and Benefits

This final-form rulemaking codifies the rate setting methodology for county nursing facilities that change ownership to a nonpublic nursing facility provider and remain in the MA Program.

Fiscal Impact

Cost to the Commonwealth, local government, nursing facility providers or MA recipients is not anticipated as a result of this final-form rulemaking.

Paperwork Requirements

There are no new or additional paperwork requirements.

Public Comment

The Department received one letter through the public comment process from the Pennsylvania Association of County Affiliated Homes (PACAH). The Independent Regulatory Review Commission (IRRC) did not comment on the proposed rulemaking.

Comment

PACAH stated that it did not have objections to the proposed rulemaking.

Response

The Department appreciates PACAH's comment.

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 20, 2013, the Department submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 5822, to IRRC and the Chairpersons of the House Committee on Human Services and the Senate Committee on Public Health and Welfare for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on June 18, 2014, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC effective June 18, 2014.

Findings

The Department finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of this final-form rulemaking in the manner provided by this order is necessary and appropriate for the administration and enforcement of the Public Welfare Code.

Order

The Department, acting under sections 201(2), 206(2), 403(b) and 443.1 of the Public Welfare Code, orders that:

(a) The regulations of the Department, 55 Pa. Code Chapters 1187 and 1189, are amended by amending §§ 1187.2, 1187.97 and 1189.2 to read as set forth at 43 Pa.B. 5822.

(b) The Secretary of the Department shall submit this order and 43 Pa.B. 5822 to the Offices of General Counsel and Attorney General for approval as to legality and form as required by law.

(c) The Secretary of the Department shall certify and deposit this order and 43 Pa.B. 5822 with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

BEVERLY D. MACKERETH,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 4263 (July 5, 2014).)

Fiscal Note: Fiscal Note 14-536 remains valid for the final adoption of the subject regulations.

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