

# PERFORMANCE AUDIT

---

## Pennsylvania Department of Labor and Industry

*Implementation and enforcement of Act 102*

---

April 2015



Commonwealth of Pennsylvania  
Department of the Auditor General

Eugene A. DePasquale • Auditor General

This page intentionally left blank



Commonwealth of Pennsylvania  
Department of the Auditor General  
Harrisburg, PA 17120-0018  
Facebook: Pennsylvania Auditor General  
Twitter: @PAAuditorGen  
www.PaAuditor.gov

EUGENE A. DePASQUALE  
AUDITOR GENERAL

April 21, 2015

The Honorable Tom W. Wolf  
Governor  
Commonwealth of Pennsylvania  
Harrisburg, PA 17120

Dear Governor Wolf:

Enclosed is our performance audit of the Department of Labor and Industry's (L&I) implementation of Act 102 of 2008, known as the "Prohibition of Excessive Overtime in Healthcare Act" (Act).

This audit covered the period July 1, 2009, through August 31, 2014, unless otherwise noted. Our audit was conducted under the authority of Sections 402 and 403 of the Fiscal Code and in accordance with generally accepted government auditing standards as issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective(s). We believe that the evidence obtained meets those standards.

Our audit objective sought to determine how, and the adequacy by which, L&I had implemented and enforced provisions of Act 102. More specifically, our audit objective included determining if L&I had recorded, investigated, and resolved all Act 102-related complaints received during the audit period.

The enclosed audit report contains two findings. First, we found that necessary regulations related to the Act were not promulgated in a timely manner, despite a statutory requirement to do so. Regulations were required to be promulgated within 18 months, but it actually took more than four years to do so. In the intervening years, L&I relied on internal policies and procedures, which lacked the full force of law, and which further lacked necessary clarity over the interpretation of the Act.

In our second finding, we found that L&I failed to implement adequate procedures to ensure that all Act 102-related complaints were recorded, investigated, and resolved. Most troubling to us, we found that for eight percent of the Act 102-related cases L&I received, L&I later summarily closed the cases because it lacked sufficient

Honorable Tom Wolf

April 21, 2015

Page 2

human resources to investigate the allegations. Since these cases are now closed and in many instances too much time has passed to conduct a thorough investigation, the merits of the allegations will never be known.

In the end, a lack of regulations, coupled with a lack of resources to implement the Act, impaired L&I's performance in successfully enforcing the Act. While L&I did the best it could under these strained circumstances, Act 102-protected employees deserved better assurances that their complaints of excessive mandated overtime would be fully and adequately addressed by L&I.

In closing, I want to thank L&I staff for its cooperation and assistance during the audit. L&I officials agree with the audit report's findings and recommendations, and they have vowed to begin corrective action. I am encouraged by L&I's current commitment to correct these weaknesses.

Sincerely,

A handwritten signature in black ink, appearing to read "Eugene A. DePasquale". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Eugene A. DePasquale  
Auditor General

**Department of Labor and Industry**

---

<b>Table of Contents</b>	<b>Executive Summary</b>	ii
	<b>Introduction and Background</b>	1
	<b>Finding One – The Department of Labor and Industry was more than four years late in promulgating Act 102 regulations.</b>	5
	<b>Recommendations</b>	13
	<b>Finding Two – The Department of Labor and Industry failed to implement adequate procedures to ensure that all Act 102-related complaints were recorded, investigated, and resolved.</b>	14
	<b>Recommendations</b>	24
	<b>Appendix A – Objectives, Scope, and Methodology</b>	25
	<b>Appendix B – Act 102 Regulation Implementation Timeline</b>	28
	<b>Appendix C – Response from the Department of Labor and Industry</b>	29
	<b>Appendix D – Audit Report Distribution List</b>	33

**Department of Labor and Industry**  
**Executive Summary****Executive  
Summary**

*I*t is a simple fact that overworked, fatigued, and weary employees are prone to making errors. Within the healthcare industry, such errors can have devastating impacts to patient safety. Further, fatigue can have adverse impacts to employee health, which can in turn lead to work place injuries and accidents.<sup>1</sup>

On October 9, 2008, Pennsylvania took steps to remedy these concerns by outlawing the practice of mandatory overtime for certain healthcare workers. This law's effective date was July 1, 2009. Known formally as Act 102 of 2008 (Act) or the "Prohibition of Excessive Overtime in Healthcare Act," the Act prohibits Pennsylvania healthcare employers from routinely scheduling employees for overtime. The Department of Labor and Industry (L&I) is tasked with responsibility for implementing and enforcing the Act.

*Our conclusion...*

*A "perfect storm" of lack of regulations and scarce resources lead to inadequate Act 102 enforcement by the Department of Labor and Industry.*

We reviewed L&I's implementation and enforcement of Act 102 during the period July 1, 2009, through August 31, 2014. Our audit included interviews with L&I officials, a review of L&I policies and procedures related to Act 102, and a review of a targeted selection of Act 102-related complaints received by L&I during the audit period.

In the two findings that follow, we present our audit findings and conclusions. Overall, we found conditions were ripe for a "perfect storm" of inadequate enforcement by L&I. The Act was largely an unfunded mandate placed on L&I's Bureau of Labor Law Compliance (BLLC), which was already suffering from declining human resources in light of tough budgetary constraints. L&I officials concurred with this solemn assessment of its performance.

The audit's first finding discusses the fact that despite a legal mandate requiring L&I to promulgate regulations by April 1, 2010, these regulations were not actually promulgated until July 19, 2014, or some four years after the required due date. L&I needed these regulations to clarify its complaint investigation procedures and to aid in the penalty assessment provisions of the Act. As a result of this delay, the BLLC

<sup>1</sup> Department of Health and Human Services, Centers for Disease Control and Prevention, National Institutes for Occupational Safety and Health, "Overtime and Extended Shifts: Recent Findings on Illness, Injuries, and Health Behaviors." Publication No. 2004-143.

**Department of Labor and Industry**  
***Executive Summary***

---

lacked necessary clarity over the interpretation of the Act and how to enforce it.

Finding two covers the results from our review of a selection of Act 102-related complaints filed with L&I. We found that L&I failed to accurately record, investigate, and respond to all Act 102-related complaints it received during the period July 1, 2009, through August 31, 2014. Most troubling, we found that for eight percent of all Act 102-related cases received by L&I, L&I summarily closed the cases because it lacked sufficient resources to investigate the allegations. Since these cases are now closed, the actual merits of the allegations are unknown.

Our report offers nine recommendations for improvement. L&I acknowledged its deficiencies and is taking steps to implement our recommendations. We caution that until L&I resolves its chronic staffing issues, and takes the steps necessary to ensure that it complies with the applicable statutory and regulatory provisions and policies, it may continue to struggle to properly and consistently enforce Act 102 in the future.



**Department of Labor and Industry****Introduction  
and  
Background**

**T**his report presents the results of our performance audit of the Pennsylvania Department of Labor and Industry's (L&I) enforcement of Act 102, known as the "Prohibition of Excessive Overtime in Healthcare Act."<sup>2</sup>

The Department of the Auditor General undertook this audit at the direction of Auditor General Eugene DePasquale, who was concerned about L&I's implementation of Act 102 after several media outlets in the Northeast part of the state reported on alleged issues involving mandatory overtime in acute care healthcare facilities.

As discussed further in Appendix A, *Objectives, Scope, and Methodology*, our audit serves as an independent assessment of L&I and its implementation of Act 102 of 2008 (Prohibition of Excessive Overtime in Healthcare).

**Background information  
on Act 102 of 2008**

Act 102 of 2008 (Act) prohibits healthcare 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."<sup>3</sup> The Act allows for mandating overtime for unforeseeable emergent circumstances<sup>4</sup> and certain other overtime exceptions<sup>5</sup>, but requires healthcare facilities or employers to use reasonable efforts to seek other available staff before overtime is mandated.<sup>6</sup> The Act also prohibits retaliation against employees for refusing to work mandatory overtime in excess of its limitations.<sup>7</sup>

<sup>2</sup> 43 P.S. § 932.1 *et seq.*

<sup>3</sup> 43 P.S. § 932.3(a).

<sup>4</sup> 43 P.S. § 932.3(c)(2).

<sup>5</sup> 43 P.S. § 932.3(c)(1) and (3).

<sup>6</sup> 43 P.S. § 932.3(c)(2)(ii). The definition of reasonable efforts is as follows: "Reasonable efforts" means "Attempts by a health care facility to: (1) seek persons who volunteer to work extra time from all available qualified staff who are working at the time of the unforeseeable emergent circumstance; (2) contact all qualified employees who have made themselves available to work extra time; (3) seek the use of per diem staff; or (4) seek personnel from a contracted temporary agency when such staff is permitted by law or regulation." See 43 P.S. § 932.2.

<sup>7</sup> 43 P.S. § 932.3(b).

**Department of Labor and Industry**

---

**Background information  
on the Department of Labor and Industry**

---

L&I employs more than 5,000 workers in 200 offices statewide. According to its website, L&I's mission statement is:

...to improve the quality of life and economic security for Pennsylvania workers and businesses, encourage labor-management cooperation, and prepare the Commonwealth workforce for the jobs of the future.

L&I oversees large state and federal program areas, including:

- Unemployment compensation.
- Workforce development.
- Labor-management cooperation.
- Assistance for people with disabilities.
- Workers' compensation.
- Labor law enforcement and prevailing wage.

L&I's budget for fiscal year 2014-15 was in excess of \$1 billion, nearly 93 percent of which comes from federal funds and other dedicated state special funds.

**Background information  
on the Bureau of Labor Law Compliance**

---

L&I's Bureau of Labor Law Compliance (BLLC) is charged with enforcing provisions of Act 102, along with 12 other labor law and safety standards.<sup>8</sup> The BLLC has had responsibility for enforcing the Act since its effective date of July 1, 2009.

Act 102 required the BLLC to promulgate regulations governing implementation and enforcement of the Act within 18 months of its passage.<sup>9</sup> Act 102 was signed into law on

---

<sup>8</sup> [http://www.portal.state.pa.us/portal/server.pt/community/labor\\_law\\_compliance/10515](http://www.portal.state.pa.us/portal/server.pt/community/labor_law_compliance/10515)

<sup>9</sup> 43 P.S. § 932.5.

## Department of Labor and Industry

October 9, 2008; thus, by our calculation, regulations were due by April 1, 2010.<sup>10</sup> These regulations, however, were not adopted until July 19, 2014, more than four years later (see Finding One).

Additionally, the Act allows the BLLC to impose administrative fines and corrective orders, following a hearing, for any healthcare facility that violates this law.<sup>11</sup>

To meet its mandates, the BLLC maintains five regional offices across the Commonwealth in addition to its central office located in Harrisburg. The regional offices are located in Altoona, Harrisburg, Philadelphia, Pittsburgh, and Scranton. Harrisburg houses both a central office, as well as a regional office. The regional offices are comprised of investigators and a supervisor, while the central office is comprised of a director, assistant director, and administrative staff. As of April 7, 2015, the most recent information available, the BLLC's complement was as follows:

Office	Total	Filled	Vacant
<b>Harrisburg Central</b>	7	4	3
<b>Harrisburg Regional</b>	6	6	0
<b>Altoona</b>	6	5	1
<b>Philadelphia</b>	9	6	3
<b>Scranton</b>	8	8	0
<b>Pittsburgh</b>	<u>7</u>	<u>6</u>	<u>1</u>
<b>Total</b>	<b>43</b>	<b>35</b>	<b>8</b>
<i>Source: Developed by Department of the Auditor General staff from information provided by L&amp;I.</i>			

See Finding Two for more information related to staffing issues within the BLLC.

As previously stated, the BLLC is charged with enforcing 13 labor laws including Act 102. The following table shows BLLC's total bureau expenses for fiscal years 2009-10 through 2013-14 for all 13 laws.

<sup>10</sup>This is in accordance with Section 1910 (relating to Time; computation of months) of the Statutory Construction Act, 1 Pa.C.S. § 1910.

<sup>11</sup> 43 P.S. § 932.6.

Department of Labor and Industry

<b>The Bureau of Labor Law Compliance Expenses                      July 1, 2009 – June 30, 2014</b>				
<b>FY                      2009-10</b>	<b>FY                      2010-11</b>	<b>FY                      2011-12</b>	<b>FY                      2012-13</b>	<b>FY                      2013-14</b>
\$3,956,569	\$3,767,397	\$4,134,142	\$4,378,459	\$3,968,175 <sup>1/</sup>
<sup>1/</sup> Our audit period also includes two months of FY 2014-15. The expenses for July and August totaled \$711,562. <b>Source:</b> Developed by the Department of the Auditor General from information obtained from SAP. We did not conduct an audit of L&I's expenses.				

**Penalties assessed by the Bureau of Labor Law Compliance for violations of Act 102**

Despite possessing explicit authority to issue penalties for violations of Act 102, BLLC has done so infrequently over the more than five-year period of the Act's existence.<sup>12</sup> According to L&I, the Act does not specify where the collected penalties are to be deposited and the current practice is for any monies collected from administrative penalties to be deposited back into the Commonwealth's General Fund. L&I states that its primary emphasis is not on assessing penalties for violations, but rather ensuring employers are complying with the law.

<sup>12</sup> The total violations were almost \$8,000 including approximately \$300 for 14 instances of mandated overtime in excess of four hours, and about \$175 for 19 instances of mandated overtime of four hours or less. These violations were settled through a settlement agreement with the healthcare facility.

## Department of Labor and Industry

## Finding

## 1

## The Department of Labor and Industry was more than four years late in promulgating Act 102 regulations.

### Overview

Act 102 required L&I to promulgate<sup>13</sup> regulations within 18 months of the applicable section's effective date,<sup>14</sup> which should have been by April 1, 2010.<sup>15</sup> L&I missed this deadline by more than four years. L&I needed these regulations to clarify its complaint investigation procedures and to aid in the penalty assessment provisions of the Act. As a result of this delay, L&I lacked necessary clarity over the interpretation of the Act and how to enforce it.

*Without regulations, L&I lacked necessary clarity over the interpretation of the Act and how to enforce it.*

L&I claimed that it had drafted regulations which would have met its statutory deadline. In 2011, however, L&I's newly installed administration believed that those regulations "exceeded the scope of the statute" and declined to submit the draft regulations to the Independent Regulatory Review Commission (IRRC) for final approval.<sup>16</sup> Failure to implement the regulations in a timely manner may have led to uncertainty and confusion among not only L&I staff members charged with enforcing the Act, but also the healthcare facilities and the Act 102-protected employees. In turn, this uncertainty and confusion diminished L&I's ability to conduct investigations and issue penalties for Act 102 violations effectively and efficiently.

<sup>13</sup> The term "promulgate" as used in the Act is defined in the "Regulatory Review Act" as follows: "To publish an order adopting a final-form or final-omitted regulation in accordance with the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law." See 71 P.S. § 745.3.

<sup>14</sup> The effective date of this section was October 9, 2008, which was also the Act's enactment date.

<sup>15</sup> Our Department calculated this period in accordance with Section 1910 (relating to Time; computation of months) of the Statutory Construction Act, 1 Pa.C.S. § 1910.

<sup>16</sup> The IRRC "reviews proposed and final regulations from Pennsylvania state agencies for consistency with the criteria contained in the Regulatory Review Act..." According to the IRRC, it reviews agency rules "to determine whether they are in the public interest." IRRC reviews regulations to ensure that they comply with Pennsylvania law and weigh their cost and benefit to the public and regulated community. See <http://www.irrc.state.pa.us/contact/faqs.cfm>.

**Department of Labor and Industry****L&I's regulations were delayed in 2011 when a new administration determined that the proposed regulations exceeded the scope of the law.**

According to our interpretation, L&I should have promulgated Act 102 regulations by April 1, 2010.<sup>17</sup> We found that L&I failed to comply with this mandate. In fact, the final regulations were not approved until July 19, 2014, more than four years after the due date.

When we asked why the regulations had not been promulgated within 18 months, L&I officials told us that the department had conducted extensive outreach to educate the public, employers, and employees about the Act. These efforts, in fact, led to the drafting of the required proposed regulations.

L&I officials further explained; however, that those proposed regulations were revoked during a change in the Governor's administration, which occurred in January 2011. Specifically, L&I officials noted the following:

*In January 2011, previously drafted regulations were revoked by a new incoming Governor's administration.*

The Department had an early draft regulation which was rewritten numerous times. The draft was posted on the department's website and delivered to the Office of General Counsel the 3<sup>rd</sup> week of January 2011. No action was taken on that draft regulation. In mid-2011, that draft regulation was reviewed by the current [i.e., now former] administration and determined to exceed the scope of the statute and likely to be disapproved by the Independent Regulatory Review Commission.

Subsequently, the draft regulations were rescinded—further delaying the possibility of meeting the statutory deadline.<sup>18</sup>

<sup>17</sup> See 43 P.S. § 932.5. This section of the Act required the promulgation of regulations within 18 months of the section's effective date (or October 9, 2008); however, other sections of the law were not effective until July 1, 2009.

<sup>18</sup> L&I does not appear to regularly update its regulations on various critical topics. For example, Subchapter B relating to Employment of Minors in Industry of Chapter 11 of Title 34 was first adopted in 1925 and was last amended in 1969 (see 34 Pa. Code §§ 11.21 - 11.85), even though the recently enacted Child Labor Act, 43 P.S. § 40.1 *et seq.* (Act 151 of 2012, effective January 22, 2013) requires that the Department adopt regulations for the act. See 43 P.S. § 40.10(1)(b). However, given that L&I has experience in drafting and getting regulations approved as detailed as those of the workers' compensation

## Department of Labor and Industry

---

Over the intervening years, L&I worked to revise the draft regulations until the IRRC ultimately approved the final-form regulations on July 19, 2014. Appendix B highlights the timeline in passing Act 102's regulations.

In explaining the failure to adopt final regulations in a timely manner, L&I further noted that in its judgment the 18-month statutory requirement to promulgate regulations is “directory and not mandatory.” We disagree with L&I's interpretation. The Act clearly states that L&I “shall, within 18 months of the effective date of this section, promulgate regulations.” To that end, we note that the Pennsylvania courts have consistently held that “shall” is a presumptively mandatory requirement. In other words, L&I was mandated to promulgate regulations by the deadline that was plainly established in the Act.<sup>19</sup> That deadline was April 1, 2010.

*“Shall” means “must.”  
L&I must promulgate  
regulations by April 1,  
2010—not July 19, 2014.*

### L&I's recently approved regulations lacked additional elements contained in its earlier draft.

---

The regulations approved by the IRRC on July 19, 2014, lacked the breadth of L&I's earlier drafted regulations. Specifically, we noted that the following provisions were removed from consideration:

---

regulations (see link below), we are somewhat at a loss as to why L&I could not have better anticipated the concerns that would be raised by various parties, including IRRC, about the draft regulations being beyond the scope of the statute.

<http://www.portal.state.pa.us/portal/server.pt?open=514&objID=573054&mode=2>

<sup>19</sup> In *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 205, 696 A.2d 148, 150 (1997), the Supreme Court stated: “By definition, the word ‘shall’ is mandatory. Accordingly, there is no room to overlook the statute's plain language to reach a different result.” Furthermore, Subsections (a) and (b) of Section 1921 (relating to **Legislative intent** controls) of the Statutory Construction Act provide as follows: “(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the **intention** of the General Assembly. Every statute shall be construed, if possible, to **give effect to all its provisions**. (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(a) and (b). [Emphases added.] We believe that the Act 102 regulatory requirement is mandatory even though the courts have at times stated that if a statute provides time as a factor of doing an act, the statute may be just directory. Our conclusion is that because Act 102 implicates important health and safety requirements, the Statutory Construction Act requires that legislative intent be determined by considering the nature and object of the statute. 1 Pa.C.S. § 1921 generally.

**Department of Labor and Industry**

---

- A requirement for a workplace poster to be posted at healthcare facilities.
- Clarifying definitions from Act 102, which would have provided more specificity to relevant terms, such as chronic short staffing, patient care procedure already in progress, violations, etc.
- Specific references outlining the means by which an employer may not retaliate against an employee who refuses to work excessive mandatory overtime as prohibited by the Act.

In our opinion, these additional provisions were not excessive and were not beyond the scope of the statute. In fact, the proposed requirement for a mandatory workplace poster can be found in other labor laws enforced by L&I. For example, the Child Labor Act<sup>20</sup> and the Minimum Wage Act<sup>21</sup> require such posters in its authorizing statutes.<sup>22</sup>

According to L&I, the primary goal of the January 2011 draft regulations was to prevent employees, who are responsible for the care of patients at healthcare facilities, from being overworked. A secondary goal was to improve the investigative process based on “lessons learned” from the work conducted by the BLLC since July 1, 2009, when most of the Act took effect.

Considering that the regulations were meant to improve patient safety, the promulgation of Act 102 regulations by the 18 month deadline should have been a high priority for L&I.

*Promulgation of regulations should have been a high priority for L&I.*

---

<sup>20</sup> See 43 P.S. § 40.8.

<sup>21</sup> See 43 P.S. § 333.108.

<sup>22</sup> While Act 102 does not have a similar statutory requirement, L&I could have used these laws as a basis for including a similar workplace poster requirement in the regulations.

**Department of Labor and Industry****L&I relied on internal policies and procedures that lacked the specificity and legality of duly adopted regulations.**

L&I officials told us they relied on their administrative law experience from their enforcement of other labor laws to guide them in investigating and resolving Act 102-related complaints. However, these same officials noted that the Act presented a “culture change” for L&I and required a departure from its accustomed investigative approaches.

For example, most labor laws enforced by L&I relate to the recovery of wages for an aggrieved employee, but Act 102 does not seek wage recovery. It instead focuses on monitoring compliance with appropriate staffing procedures and addressing violations and complaints. Thus, L&I investigators were required to change their focus from wage recovery issues to overtime staffing issues.

As a result, L&I should have set as a high priority the prompt establishment of final regulations, as this would have provided clearer direction to L&I and to other affected parties, such as Act 102-protected employees. As we discussed above, these regulations were not adopted in a timely manner.

In June 2009, L&I’s BLLC developed written procedures to implement Act 102, entitled “Bureau of Labor Law Compliance/Investigation Guidance.” In the absence of duly adopted regulations, this document along with information posted on L&I’s website became the de facto standard for how L&I enforced provisions of the Act.

*L&I’s policies and procedures, while a good start, lacked the necessary specificity and the weight of law.*

We also found that there were provisions in the final Act 102 regulations that were not included in the L&I’s original internal guidance document. As a result, for more than five years, L&I, healthcare facilities, and affected healthcare employees lacked clear guidance by which this important statute was to be implemented. For example, we found that the guidance document lacked the necessary specificity in the following ways:

- *Time frame for L&I to conduct its investigation.* Act 102 final regulations require that the L&I review and

**Department of Labor and Industry**

---

begin investigation of a complaint within 60 days of receipt. Further, if a complainant fails to provide the required information, L&I will advise the complainant in writing and allow the party 30 days from the date of the L&I's letter to provide the missing information. If the party fails to provide missing information, L&I may dismiss the complaint and will notify the complainant in writing of the dismissal.

- *Format of Complaints.* Act 102 final regulations generally require complaints to be submitted in writing on a formal complaint form, which sets forth the grounds for the complaint. However, the regulations also require L&I to accept written complaints that have not been completed using the standard complaint form. In addition, regardless of how the complaint reaches L&I (form or otherwise), the complaint must be signed by the complainant.
- *Completeness of complaint.* Act 102 final regulations also require that the complaint must contain the name and address of the complainant and employer, as well as the name of any known witnesses. L&I must record the complaint receipt date on a complaint.
- *Penalties and appeal.* Act 102 final regulations also provide essential directions for enforcing the Act, such as issuing violations and penalties, as well as employer appeal rights.
- *Record-keeping requirements.* Healthcare facilities and employers are now required to establish a system for keeping records of circumstances when employees are required to work in excess of their agreed work schedule.

L&I's failure to promulgate final Act 102 regulations in a timely manner did not go unnoticed by certain healthcare employers. In at least one case (see below), that failure may have aided a facility's defensibility over alleged Act 102 infractions and therefore may have also failed to protect employees.

During our review of L&I complaint files, we found that L&I had proceeded with an investigation and was prepared to issue

**Department of Labor and Industry**

---

a citation to a healthcare facility for violating Act 102. However, in a multi-part response to the citation, the healthcare facility effectively argued that since L&I had not promulgated final-form regulations timely, the Department's guidance documents lacked the legal force of regulations.<sup>23</sup>

The above issue underscores the significance of why L&I should have ensured that regulations were promulgated timely. The absence of regulations presented a serious impairment to the L&I's ability to enforce the Act efficiently and effectively.

**Other neighboring states successfully adopted mandatory overtime prohibition regulations in a timely manner and that were more encompassing than those of Pennsylvania.**



We researched three neighboring state laws and regulations, similar to Pennsylvania's Act 102 requirements. These states adopted regulations in a reasonable timeframe.

As shown by the following exhibit, all three of these states adopted regulations within two and a half years of its authorizing statutes' effective dates.

---

<sup>23</sup> Ultimately no violations were ever brought forth by L&I in this case because the facility later closed. With the facility's closing, L&I dropped its action against the facility. L&I also noted that it had difficulty pursuing the case because complainants had quit the facility and were no longer interested in pursuing the allegations.

Department of Labor and Industry

State	Statute name	Statute effective date	Regulation effective date	Elapsed time from statute's effective date to regulation adoption
<b>Pennsylvania</b>	<b>Prohibition of Excessive Overtime in Healthcare</b>	<b>July 2009</b>	<b>July 2014</b>	<b>5 years <sup>a/</sup></b>
New York	Restriction on Consecutive Hours of Work for Nurses	July 2009	October 2011	2 years, 3 months
West Virginia	Nurse Overtime and Patient Safety Act	May 2004	July 2006	2 years
New Jersey	Mandatory Overtime Restrictions for Healthcare Facilities	January 2003 for hospitals; July 2003 for all facilities	February 2004	1 year, 2 months

**Note:**

<sup>a/</sup> By our calculation regulations were not technically required until April 1, 2010; however, for purposes of this comparison, we calculated the elapsed time from the statute's effective date.

Source: Developed by Department of the Auditor General staff from review of applicable state laws and regulations.

While state to state comparisons are not always “apples to apples,” we find insufficient reasoning to explain why Pennsylvania’s healthcare workers were forced to wait about five years for regulations that were supposed to provide protections, when other states were able to act much more quickly.

Further, we found that the other states’ regulations went beyond the scope of the authorizing statutes to offer more protections for healthcare employees. For example, the other states’ regulations also included the following:

- A mandatory workplace poster requirement.
- A definition of “chronic short staffing” or a mention of reoccurring incidents on behalf of employers.
- Detailed record keeping requirements for employers, including a staffing plan to ensure all options are exhausted prior to mandating overtime.

**Department of Labor and Industry**

---

- A longer period than 60 days after the event for employees to file a complaint.
- A requirement for educational programs to inform employees of the law.
- A requirement for employers to give employees a written copy of the scheduling records when an employee is mandated to work overtime (excluding names of other employees who were contacted for voluntary overtime).

Accordingly, at least three other neighboring states were able to enact healthcare worker protection statutes and related regulations within a reasonable timeframe. Further, these statutes and regulations contain additional provisions beyond Pennsylvania's requirements. Many of these provisions may serve as a model for future legislative action by the General Assembly.

**Recommendations**

1. L&I should ensure that, in the future, it meets statutory implementation deadlines when it is charged with promulgating regulations related to the statutes it is charged with implementing and enforcing.
2. L&I should ensure that regulations relating to Act 102 are fully and consistently enforced.
3. L&I should review similar Act 102 laws and regulations in other states to identify areas where its regulations could be made more effective and efficient. L&I should also work with the General Assembly and the Governor's office to craft any necessary revisions to the existing Act.

## Department of Labor and Industry

Finding **2**

**The Department of Labor and Industry failed to implement adequate procedures to ensure that all Act 102-related complaints were recorded, investigated, and resolved.**

### Overview

L&I failed to accurately record, investigate, and respond to all Act 102-related complaints it received during the period July 1, 2009, through August 31, 2014. Most troubling, we found that for eight percent of all Act 102-related cases (99 of 1,246) received by L&I, L&I summarily closed the cases because it lacked sufficient resources to investigate the allegations. Since these cases are now closed, the merits of these allegations are unknown.

*Citing lack of resources, L&I closed eight percent of its cases without documenting an investigation.*

Our conclusion is based upon our review of 55 Act 102-related complaints, review of L&I's policies and procedures, and our interviews of L&I staff. Specifically, we found that:

- L&I was limited in how it could implement the Act because the Act did not contain sufficient detail about the General Assembly's intentions regarding enforcement.<sup>24</sup>
- A reliable case management system was lacking, which led to poor recordkeeping.
- Inconsistent investigative approaches were used, which contributed to non-compliance with program policies and procedures.

Going forward, L&I must improve its performance and ensure that its Bureau of Labor Law Compliance (BLLC), the bureau assigned responsibility for enforcing the Act, has the necessary tools to fully meet its enforcement responsibilities under Act 102.

<sup>24</sup> 34 Pa. Code §§ 225.1 – 225.10, effective July 19, 2014. See Finding One for more information.

## Department of Labor and Industry

**L&I lacked a reliable case management system by which it could ensure that all Act 102-related complaints were recorded, investigated, and resolved.**

L&I used an internally developed and maintained Microsoft Access database to help it track Act 102-related complaints. L&I's database was supported through hard copy files, which in some cases were digitally scanned and saved to a central network file server.

We obtained and reviewed the electronic complaint database for the period July 1, 2009, through August 31, 2014. Upon our immediate inspection, we found the database to be incomplete as certain fields were not populated. For example, key information, such as the date received or date resolved was not entered into the database. Furthermore, other data elements, such as when communications were sent to complainants and facilities were also missing. We also found that inconsistent naming conventions for healthcare facilities were used, which made it nearly impossible to aggregate data by healthcare facility.

*We could not rely on L&I's existing database. Supporting hard copy documentation was also inadequate.*

As a result, we found that L&I's existing database is ineffective because L&I cannot easily tabulate data to evaluate its performance, nor can the database be used by investigators to help them manage individual cases. An improved database/case management system could incorporate standardized business templates which would aid investigators in capturing and analyzing case information; thus, improving the efficiency by which staff investigates complaints. Further, data from an improved case management system would be invaluable to L&I in not only assigning its limited staff resources, but also in identifying business trends, such as increases in complaints by type of healthcare facility or by region.

L&I management expressed interest in pursuing a more reliable case management system, but to date, L&I has been unable to secure the funding necessary to implement such a system.

## Department of Labor and Industry

**L&I utilized inconsistent investigative practices, which led to non-compliance with its own policies and procedures.**

*Noncompliance with policies and procedures, suggests a lax approach toward complaint investigations.*

As discussed in Finding One, L&I failed to have the Act 102-related regulations approved in a timely manner. In the absence of duly promulgated regulations, L&I relied upon internally developed policies to standardize its approach to investigating Act 102-related complaints.<sup>25</sup> We found that these policies were not uniformly followed by L&I staff. Specifically, we noted concerns in the following five areas:

1. Lack of timeliness in complaint response and resolution.
2. Inconsistent contact with complainant/employees and healthcare facilities/employers.
3. Failure to appropriately ask complainant about identity disclosure.
4. Failure to complete investigative reports.
5. Failure to consistently issue closure letters.

The above areas are significant because the issues draw attention to an overly lax approach toward Act 102-related complaint investigations that existed for much of our audit period.

Conversely, had L&I established regulations in a more timely manner, placed greater emphasis on adherence to its policies and procedures, and applied the appropriate support resources by means of technology and staff, L&I would have been better suited to respond to Act 102-related complaints.

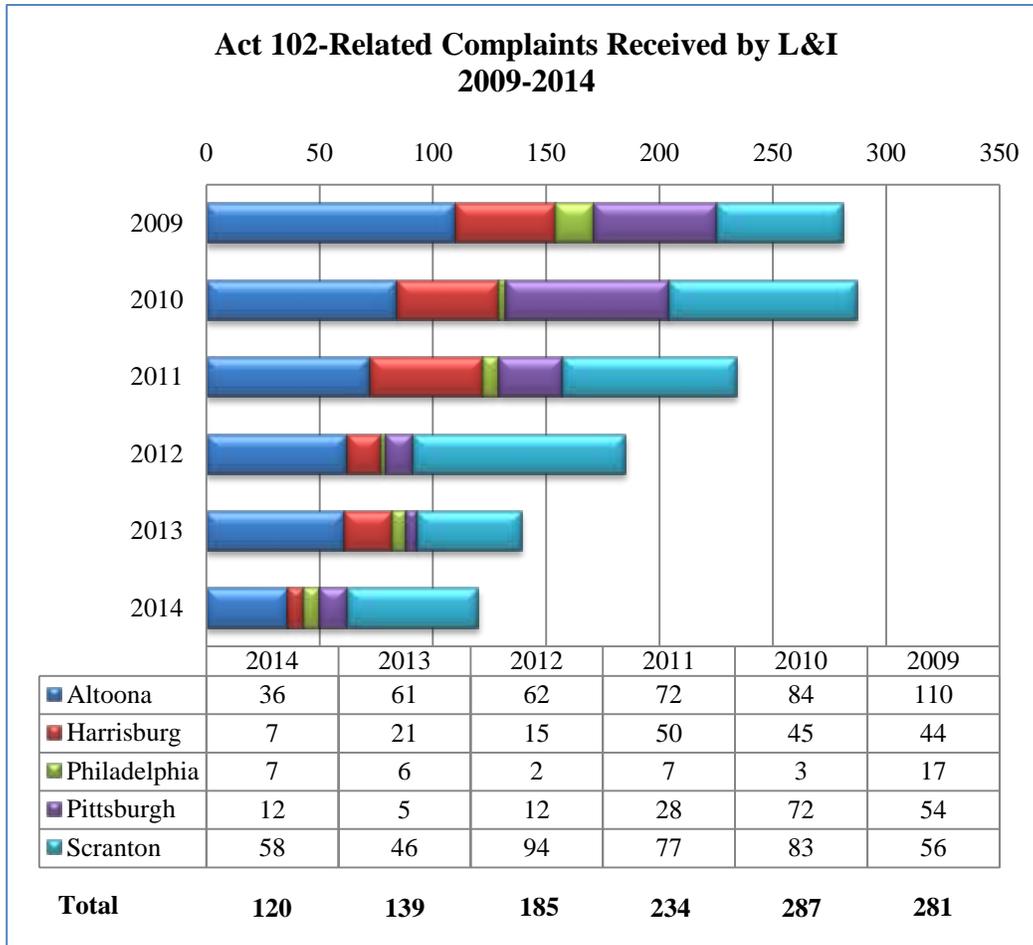
According to information obtained from L&I, we determined that there were more than 1,200 individual Act 102-related complaints, which were recorded in L&I's database for the period July 1, 2009, through August 31, 2014.<sup>26</sup> As shown in

<sup>25</sup> When we asked the BLLC management for policies and procedures regarding their Act 102 complaint handling practices, they provided us with a document entitled the "BLLC Complaint Investigation Guidance." This document was distributed to BLLC staff on June 29, 2009.

<sup>26</sup> Generally Accepted Government Auditing Standards require that we make an assessment regarding data reliability. While we found that BLLC's electronic data was unreliable to be used solely for the basis of our audit conclusions, we found that the data was reasonably sufficient to use as a basis for selecting complaints to conduct our file review.

**Department of Labor and Industry**

the exhibit that follows, the number of complaints filed with L&I has dropped by over 50 percent since the Act’s passage.



**Note:** 2009 data is for the period, July 1, 2009, through December 31, 2009. Data for 2014 is for the period January 1, 2014, through October 27, 2014. For the entire period, 1,246 complaints were recorded in L&I’s database.

**Source:** Developed by Department of the Auditor General staff from information provided by L&I.

In order to assess the adequacy of the complaint investigation and resolution process, we selected 55 of the 1,246 complaints for further review. When we requested the complaint files from L&I, we were informed that 6 of the 55 complaints were still under investigation; therefore, the files would not be available for our review. Another complaint we selected could not be investigated by L&I because an official complaint was never filed by an employee, so technically the complaint should not have been entered into the database. Finally, in one other case, L&I could not locate the complaint file;

## Department of Labor and Industry

---

consequently, we could not determine if the information entered in the database was valid or accurate.

The results of our review of the remaining 47 complaints are discussed in the sections that follows.

### Complaint Response and Resolution Timeliness

---

*87 percent of the complaints we reviewed lacked information necessary to measure L&I's performance.*

Responding<sup>27</sup> and resolving complaints in a timely manner is important, and in 87 percent of the complaints we reviewed (41 of 47), the documentation was so poor that we could not determine how long it took L&I to begin these critical steps.<sup>28</sup>

In those limited cases (six) where we could make a determination, we noted that L&I responded in 45 days or less for five of the six complaints. However, in the remaining case, L&I did not respond for more than 90 days.

Because of a new regulatory requirement on timeliness, it will be imperative for L&I to begin recording and tracking this information to ensure it is complying with regulations.<sup>29</sup>

With respect to complaint resolution timeliness, no similar time threshold exists by which Act 102-related complaints must be resolved. However, because mandatory overtime allegations impact the complainant's quality of life—and may even be an issue of public safety—L&I should be ensuring that it is resolving these complaints as quickly as possible; thus, providing the highest level of customer service possible.

One significant way that L&I could improve its customer service is to ensure that anticipated complaint response and resolution times are communicated to the complainant. Yet, as

---

<sup>27</sup> By “responding” we mean that the complaint was assigned to an investigator for investigation. However, this definition does not necessarily mean that the investigator actually began his/her investigation on that date. During our audit period, no mandate existed for how timely L&I should be; however, effective July 19, 2014, L&I is required by regulation to review and begin an investigation of a complaint within 60 days of receipt.

<sup>28</sup> We refer to complaint resolution as the time by which a complaint is assigned to an investigator and some sort of closing action is made on the complaint. These actions may include, but are not limited to, internal email regarding the case status, a formal closing letter, or other evidence substantiating the case status as closed.

<sup>29</sup> See 34 Pa. Code § 225.3(f).

## Department of Labor and Industry

---

discussed in the previous section, to date L&I is unable to provide any reliable information on timeliness to its complainants/customers.

While we were generally unsuccessful in calculating timeliness, our efforts did disclose a troubling condition with respect to older Act 102-related complaints received by L&I. As we previously mentioned, our initial complaint selection included two cases where scant information was available in the complaint file; yet, both files had been closed within a day of each other—an odd occurrence since the complaints were lodged nearly three years apart.

When we looked further at this issue, we found that among *all* 1,246 Act 102-related complaints, 118 complaints (or nearly 10 percent) were all closed on the same date in April 2014.<sup>30</sup> Upon further research into these cases, L&I stated that in 19 of the 118 complaints an investigation was conducted. However, in those remaining 99 cases, L&I was unable to verify that an investigation was ever completed. Consequently, for more than eight percent of the total Act 102-related complaints, L&I cannot assert that it ever completed an investigation into the allegation. Worse yet, because these complaints have all now been summarily dismissed without explanation, the actual merits of these allegations will never be known.

### **Contact with Complainant (employees) and Healthcare facilities (employers)**

---

While L&I outlined procedures requiring investigators to contact the complainant and the healthcare facility during the investigation, we found that investigators did not always do so. For example, we were only able to find evidence that the investigator contacted the complainant in 43 percent (20 of 47) complaints we tested. With regard to investigators contacting the healthcare facility, contact was made in 68 percent (32 of 47) of the complaints we tested.

As a best business practice, we would have expected L&I investigators to document its contact with each complainant and with each healthcare facility to verify and collect

---

<sup>30</sup> 53 of these cases were from 2009, 50 were from 2010, 10 were from 2011, and 5 were from 2012.

## **Department of Labor and Industry**

---

information about the complaint. From a customer service perspective alone, it is important to acknowledge the complaint, so that the complainant is reassured that his/her complaint is receiving its due attention. Furthermore, communication with both parties involved in the complaint is extremely important in cases where the investigation lasted for more than 90 days, as occurred in one of the cases we reviewed.

### **Identity Disclosure**

---

As discussed in Finding One, in the absence of duly promulgated regulations, L&I relied upon a “guidance document” to outline its procedures. This document instructed investigators to ask the complainant for permission to disclose their identity to the healthcare facility. We reviewed the extent to which investigators documented this step and found that investigators requested this permission in only 28 percent (13 of 47) of the complaints we tested.

It is generally a good practice to discuss anonymity with the complainant because complainants may not want their name disclosed to their employer for fear of retaliation. Therefore, the extent to which the complainant is comfortable having his/her identity disclosed must be established as a rudimentary step before any investigation can begin at the complainant’s workplace. Further, special measures are needed to ensure that whistleblowers’ complaints are received and handled in confidence.

Failure to comply with this important procedural step is yet another example of L&I’s lax approach towards Act 102-related complaint investigations.

### **Investigation Reports**

---

An investigation report documents the actions taken by the investigator, as well as the conclusions about the allegation. From a “best management practice” perspective, investigation reports should be completed to bring appropriate closure to the investigation. In fact, L&I’s guidance document instructed investigators to prepare such investigation reports for each investigation.

**Department of Labor and Industry**

---

We found, however, that investigation reports were completed in only 55 percent of the cases (26 of 47) we tested. In the remaining 20 cases (or 43 percent) while no investigation report existed, we did see evidence to support that some action was taken to resolve the case; therefore, we can assume that the investigator did respond to the complaint. In one other case, no evidence existed to document any action had been taken to resolve the complaint, and we are unable to ascertain if the complaint was investigated.

When we asked L&I about the inconsistency with completed investigation reports found in the complaint files, L&I responded that there was no formal guideline as to what information should be in an investigation summary prior to September 2011. L&I further stated that some regional offices had developed their own report forms, but there was no consistent requirement to do so among all regional offices. This lack of uniformity reiterates the issue of a lack of standardization as to how L&I approached Act 102 investigations.

**Closure Letters**

---

Closure letters are a critical step in the complaint investigation process because it informs both the complainant and the healthcare facility of the results of L&I's investigation. Further, closure letters serve to inform the parties of any consequential steps should an allegation be founded.

In 2009, L&I's Office of Chief Counsel started a practice by which the investigative staff was to send both the complainant and the healthcare facility a form letter stating that the complaint had been closed. These closure letters were to include the particulars of the investigation, as well as any findings or decisions reached about the complaint.

During our review of the 47 complaint files, we found that L&I sent a closure letter to the complainant in just 57 percent (27 of 47) of the complaints we reviewed. With regard to healthcare facilities receiving closing letters, we found that only 23 percent (11 of 47) of the complaints we reviewed were sent a closure letter.

**Department of Labor and Industry**

---

Therefore, we conclude that L&I did not consistently comply with its own practice regarding closure letters.

**Going forward, L&I will need to provide further support for the Bureau of Labor Law Compliance**

*Complainants who filed Act 102-related complaints during the early years of the Act's implementation likely experienced poor customer satisfaction from L&I.*

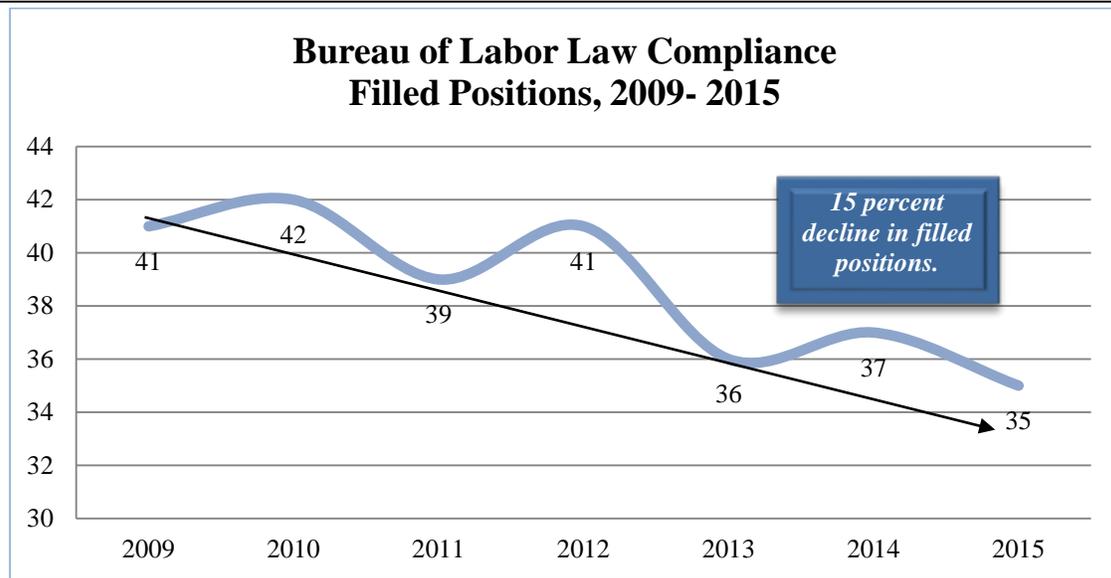
In meetings we had with L&I officials about their experiences in implementing Act 102, they acknowledged that Act 102 presented challenges to L&I. For example, the law came with no additional funding to help L&I implement the Act, and further the Act was a departure from typical labor law investigations, which focused on wage recovery.

In fact, we evidenced many of these challenges by the irregularities we found when reviewing L&I's complaint files. For example, poor record-keeping and non-compliance with internal policies and guidelines, likely lead to overall poor satisfaction for many individuals who filed Act 102-related complaints, especially in the 2010-2013 timeframe.

With the passage of new regulations, L&I should now be in a better place to implement Act 102. We caution; however, that from a historical perspective L&I will need to do better to ensure that Act 102-related complaints are resolved more quickly, and with an appropriate emphasis on ensuring the highest level of customer service to those complainants. In particular, we note that staffing shortages have been, and continue to be, a significant impediment to the L&I's ability to complete investigations timely, or in many cases, even at all.

For example, as shown on the exhibit that follows, since 2009 the number of filled positions has fallen by 15 percent from 41 to 35. More importantly, L&I's BLLC has four open investigator positions that it has been unable to fill due to budget constraints.

## Department of Labor and Industry



**Note:** 2014 data is as of December 29, 2014. 2015 data is as of March 25, 2015. All other data is as of December 31 of that year.

**Source:** Developed by Department of the Auditor General Staff from staff reports provided by the Department of Labor and Industry.

According to L&I officials, its workload continues to increase, while funding remains flat. Other labor law requirements are also straining L&I.<sup>31</sup> Since Act 102's passage, additional state mandates have been imposed on L&I. For example, the enforcement of Act 72 (The Construction Workplace Misclassification Act) has been added to L&I's workload with no additional resources. L&I will be unable to provide quality labor law protection, if it continues to stretch its resources.

Further, the BLLC has experienced relatively high turnover at its director level, which has added to the BLLC's chronic staffing shortages. During our five year audit period, there were four different directors/acting directors in charge of the BLLC. Moreover, one director undertook a substantial restructuring of the BLLC, only for most of those changes to be later abandoned or reversed by another director. Unfortunately, during this interim restructuring, Act 102-related complaint investigations were delayed.

Consequently, the BLLC often appears to be in flux, having to move resources from whichever "fire" is burning hottest. To

<sup>31</sup> According to L&I, the Apprenticeship Act statute has substantially increased the L&I's workload. We did not audit L&I's performance beyond Act 102 mandates.

**Department of Labor and Industry**

---

this point, we note that according to L&I officials, since Act 102's passage the BLLC has had to cut back on other enforcement responsibilities, such as the Wage Payment and Collection Law, in order to handle the additional workload.

While such adjustments are not uncommon in state government—and especially so under the commonwealth's tight budget constraints—we caution that until L&I resolves its chronic staffing concerns, and takes the steps necessary to ensure that it complies with applicable regulations and policies, it may continue to struggle to properly and consistently enforce Act 102.

**Recommendations**

4. L&I should develop an improved case management system that will aid BLLC in tracking and resolving Act 102-related complaints. This system should contain sufficient internal controls to ensure that all complaint details are captured to the database accurately.
5. L&I should develop improved metrics by which it can measure its performance in responding and resolving Act 102-related complaints. These metrics should be used to monitor L&I's performance in meeting regulatory requirements for timeliness.
6. L&I should improve the level of customer service provided to complainants by providing estimated timeframes for when an investigator will make an initial contact and when the complainant can expect a resolution.
7. L&I should ensure greater adherence to its internal policies and practices by ensuring that closure letters, permission to release complainant identity, and investigation reports are completed for all complaints. Further, L&I should perform periodic quality control reviews on completed investigations to ensure adherence to these minimum standards. These reviews should be conducted on a cross-regional basis.
8. L&I should ensure that its BLLC is fully staffed and has enough investigators to meet all BLLC's workload demands.
9. L&I should name a permanent director for BLLC.

## Department of Labor and Industry

**Appendix A****Objective, Scope, and Methodology**

The Department of the Auditor General conducted this performance audit in order to assess the Department of Labor and Industry's implementation of Act 102 of 2008.

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

**Objective**

---

Our audit objective was to determine how, and the adequacy by which, the Department of Labor and Industry has implemented and enforced provisions of Act 102. Our audit objective included, but was not limited to, determining if L&I has recorded, investigated, and resolved all Act 102 complaints received during the audit period.

**Scope**

---

This audit report presents information for the period of July 1, 2009, through August 31, 2014, unless otherwise indicated.

L&I management is responsible for establishing and maintaining effective internal controls to provide reasonable assurance that its department is in compliance with applicable laws, regulations, contracts, grant agreements, and administrative policies and procedures.

In conducting our audit, we obtained an understanding of L&I's internal controls, including any information system controls, as they relate to those requirements and that we considered to be significant within the context of our audit objective. For those internal controls that we determined to be significant within the context of our audit objective, we also assessed the effectiveness of the design and implementation of those controls as discussed in the *Methodology* section that

## Department of Labor and Industry

---

follows. Any deficiencies in internal controls that were identified during the conduct of our audit and determined to be significant within the context of our audit objectives are included in this report.

### Methodology

---

To address our audit objectives, we performed the following procedures:

- Interviewed L&I officials and staff responsible for enforcing Act 102, including the Acting Director of the BLLC, the BLLC Administrative Officer, a Labor Law Investigator, and L&I's counsel for Act 102-related matters.
- Obtained and reviewed Act 102 of 2008 and Chapter 225 regulations to determine L&I's responsibilities related to enforcing Act 102, including investigating allegations of excessive overtime in healthcare, and issuing penalties and/or administrative orders for Act 102 violations.
- Obtained and reviewed L&I's internal policies related to Act 102. These policies included, but were not limited to, the following:
  - *Record Retention Policy*
  - *Complaint/Investigation Guidance*
  - *Act 102 Policy and Procedure for Investigators*
- Conducted extensive evaluation of the complaint data stored in L&I's complaint database in an attempt to determine the completeness and accuracy of the information as well as its usefulness to L&I as a management tool.
- Selected 55 of 1,246 Act 102 complaint files and reviewed corresponding documentation in order to assess the effectiveness of L&I's complaint handling process, as well as the controls related to that process, between July 1, 2009, and August 31, 2014.

**Department of Labor and Industry**

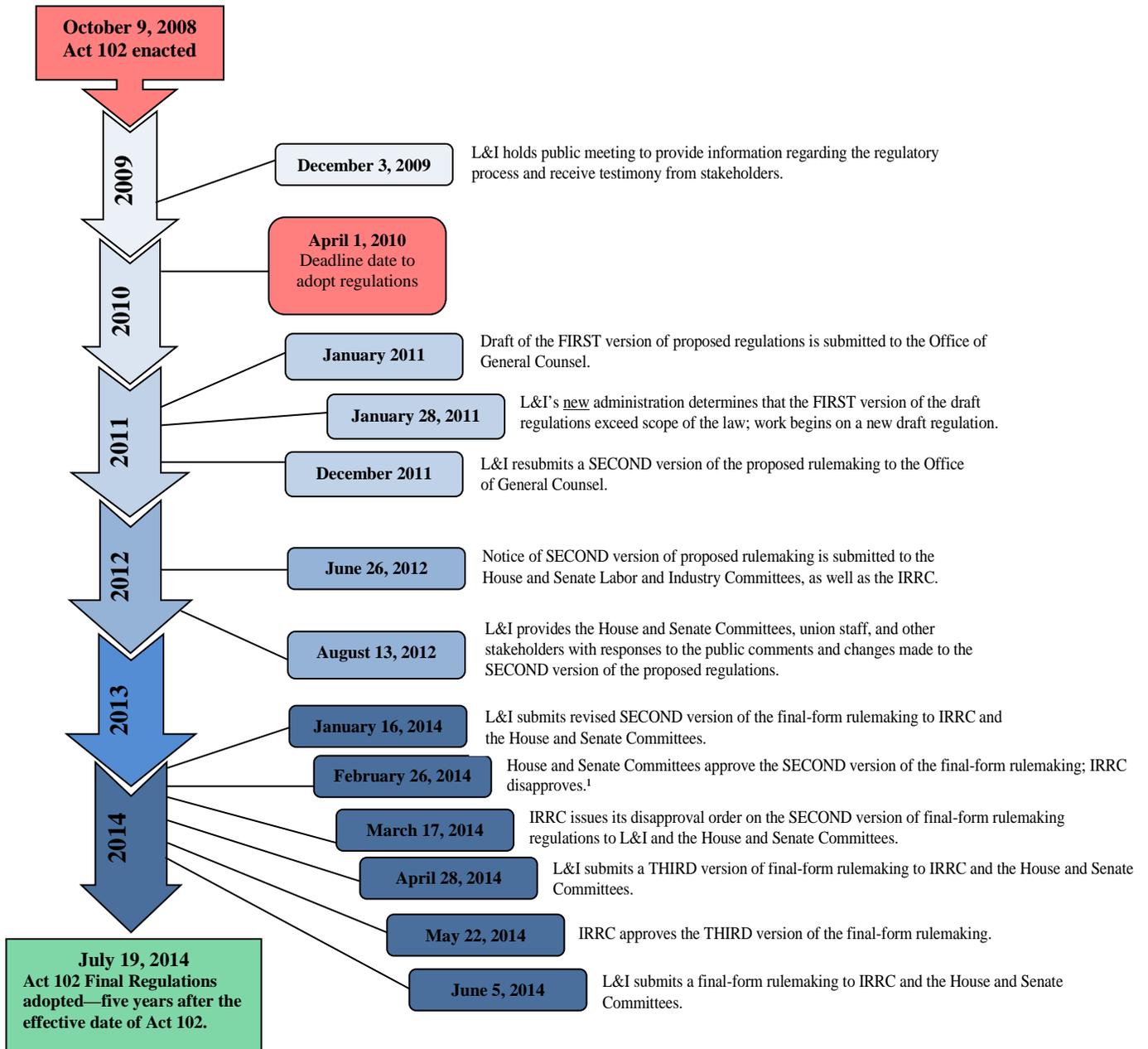
---

- Reviewed L&I's website to evaluate the extent to which L&I posts information pertaining to Act 102.
- Reviewed information from surrounding states with similar prohibitions on mandatory overtime in healthcare to compare investigative processes.
- Obtained training records pertaining to Act 102 to determine the preparedness of L&I's investigative staff.
- Researched best management practices for complaint handling to assist us in accessing L&I's complaint handling process.
- Reviewed historical information prepared by L&I regarding the promulgating of required Act 102 regulations to determine the extent to which L&I complied with legal mandates under Act 102.
- Toured the BLLC's central office, located in Harrisburg, to obtain an understanding of how hard copy complaint files are maintained.
- Conducted the following procedures, in order to assess data integrity and reliability of L&I's Act 102 complaint database:
  - Interviewed L&I officials with knowledge about the database and data.
  - Performed detailed sequence tests of complaint identification numbers to analyze whether we received all complaints in the Act 102 database for the audit period.
  - Traced a selection of data to source documents and vice-versa, where available.

Based on the above, we concluded that L&I's Act 102 database could only be relied upon for determining the total population of Act 102 complaints that L&I received and for selecting complaints to conduct our file review.

Department of Labor and Industry

**Appendix B Act 102 Implementation Timeline**



<sup>1</sup> In response to the IRRC disapproval order, L&I revised several sections of the final-form rulemaking. Revisions included provisions such as requiring L&I to commence the investigation of all complaints within 60 days of receipt. The revisions also included a requirement that health care facilities and employers establish a record-keeping system for circumstances when employees are required to work overtime. Under this requirement, records must be kept for a period of three years.

**Department of Labor and Industry**

**Appendix C**

**Audit Response from the  
Department of Labor and Industry**

*O*n the following pages we present the Department of Labor and Industry’s (L&I) full response to our audit report. Overall, L&I agreed with the audit report’s findings, and it stated that they are “dedicated to ensuring the enforcement of Act 102 and its regulations so that health care workers are protected from working dangerously long shifts.” Further, L&I pledges to move forward with implementing the audit recommendations made in this report.

L&I also cited in its response that our report,

“...will provide guidance to our Bureau of Labor Law Compliance in terms of procedures, documentation, and accountability, not only for Act 102, but for other laws enforced by the Bureau.”

To that end, we did not audit other labor laws enforced by L&I, but we agree with L&I that many of our recommendations may transcend to other responsibilities within the Bureau of Labor Law Compliance, and thereby improve its efficiency and effectiveness. We are pleased with L&I’s willingness to do better for all of Pennsylvania’s hard-working citizens.

Because L&I is in agreement with the audit report’s findings and recommendations and pledges to move forward with implementation, we offer no rebuttal.

Department of Labor and Industry



April 7, 2015

The Honorable Eugene DePasquale  
Auditor General  
Commonwealth of Pennsylvania  
Department of Auditor General  
Finance Building, Room 229  
Harrisburg, PA 17120

**RE: Performance Audit – Department of Labor & Industry,  
Implementation and Enforcement of Act 102**

Dear Auditor General DePasquale:

Please consider this letter as the Department of Labor and Industry's (Department) final response to the draft performance audit report for the Prohibition of Excessive Overtime in Healthcare Act (Act 102).

The Department first wishes to thank your agency, not only for the opportunity to comment on the draft report, but for your staff's patience, professionalism, and numerous courtesies extended over the course of this audit. We also are grateful for your department's concern for the workers protected by Act 102.

On the whole, we believe the recommendations in the draft report are sound. The Department will strive to implement them within our budgetary constraints. We also expect that the audit report will provide guidance to our Bureau of Labor Law Compliance (BLLC) in terms of procedures, documentation, and accountability, not only for Act 102, but for other laws enforced by the Bureau.

We offer the following comments to the draft report for your consideration.

**Finding One: The Department of Labor and Industry was more than four years late in promulgating Act 102 regulations.**

Act 102 directed the Department to promulgate regulations in 18 months. While the Department admittedly missed that deadline, it is probably unrealistic for regulations to be promulgated in 18 months for a new law where there is no consensus among the major stakeholders. The regulatory process itself is complex and lengthy, requiring approvals from the Governor's Office, Office of Budget, Office of General Counsel, and Office of Attorney General; publication in the *Pennsylvania Bulletin* as proposed rulemaking for public comment; an opportunity for comment by legislative standing committees and the Independent Regulatory

**Department of Labor and Industry**

---

**RE: Performance Audit – Department of Labor & Industry,  
Implementation and Enforcement of Act 102**

April 7, 2015

Page 2

Review Commission (IRRC); final rulemaking; and the ability of the legislature to pass a resolution blocking final approval. Regardless, the Department regrets that it was more than four years late in promulgating regulations, and will take steps to promulgate regulations in a more timely fashion in the future.

The Department believes footnote 22 on page 11 refers to a case that was dropped because employees expressed unwillingness to testify or did not return phone calls inquiring about their willingness to testify. In this sense, the draft report fails to adequately capture that the assessment and payment of penalties by healthcare facilities is not automatic under Act 102. If the violations are contested, there must be a hearing, and affected employees may be required to testify for the BLLC to prove the underlying violations. In the Department's experience, this has been a problem with Act 102 enforcement, as employees making complaints are often reluctant to testify against their employers if the investigation moves forward to a hearing.

Lastly, the comparisons to other states' regulations on pages 11 – 13 may not be appropriate to the extent that other states' procedures for adopting regulations, the social and/or political climates, and the levels of stakeholder consensus may be different than those in Pennsylvania. Nonetheless, we agree with the recommendation that the Department review similar Act 102 laws and regulations in other states and identify areas where Pennsylvania's regulations could be more effective and efficient.

**Finding One: Recommendations.**

In response to the report's recommendations, the Department will strive to meet its mandated duties within the timeframe allotted by statute. The Department is fully dedicated to ensuring the enforcement of Act 102 and its regulations so that health care workers are protected from working dangerously long shifts.

The Department agrees that it needs to identify areas where the current regulations are deficient and ineffective. In fact, the Department will be forming an Act 102 working group to explore other states' laws and regulations, reexamine the previous draft regulations, study trends in the complaints filed, and listen to the information presented by stakeholders. It is anticipated that working group will develop regulatory alterations or recommend statutory changes to the Governor's Office or General Assembly.

**Finding Two: The Department of Labor and Industry failed to implement adequate procedures to ensure that all Act 102-related complaints were recorded, investigated, and resolved.**

The Department agrees with the report's finding. The lack of regulations and scarce resources for a dwindling workforce created the perfect storm for inadequate Act 102 enforcement. Recently, the BLLC has adopted new procedures utilizing the approved regulations as a framework. This internal process provides for better case-tracking and case-management, guidance for investigators conducting investigations, notice to parties involved in an Act 102 claim, and uniformity in case resolution. The central office will now handle the

Department of Labor and Industry

---

**RE: Performance Audit – Department of Labor & Industry,  
Implementation and Enforcement of Act 102**  
April 7, 2015

Page 3

initial complaints and notices, and after an investigation, will send out the closure letters to the complainants and facilities.

We offer one comment in this section. On page 15, the finding about different naming conventions for healthcare facilities in BLLC's database may have been a product of complainants using different names in their complaints and/or hospitals operating subsidiaries under slightly different names. The BLLC will try to be more proactive in catching these inconsistencies with this new process.

**Finding Two: Recommendations.**

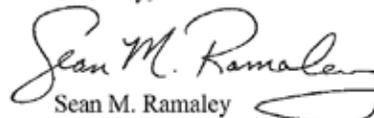
The Department agrees that the BLLC should have an improved case management system. The BLLC needs the ability to accurately track its complaints, as well as to develop metrics to evaluate the BLLC's performance in responding to and resolving Act 102 complaints. The BLLC is working towards the development of a new database for improved case-management of all its laws. The BLLC will continue to aggressively pursue this project within the Bureau's financial constraints.

The recommendation to provide the complainant with the anticipated resolution time is well taken. The regulations now provide some timeframes that may aid in that process. However, it may be difficult to project an estimated timeframe for resolving a complaint at the outset of an investigation, since the investigation may be affected by variables, such as whether the complaint is later consolidated with other complaints involving the same healthcare facility; if the employer contests and requests a hearing on the violations; or possibly staffing constraints at the BLLC. Regardless, the BLLC will try to adopt this recommendation.

The Department agrees with the need for a permanent Director. It should be pointed out that the Director who undertook a substantial restructuring at the BLLC resigned after only seven months, and many of his proposals were not workable. Therefore, it was necessary for his successor to reverse many of his changes. Naming a permanent BLLC Director is a priority. It is anticipated that once that occurs, many of the report's other recommendations will be naturally corrected, such as ensuring adherence to internal policies and staffing the BLLC as fully as possible within our budgetary constraints.

In closing, we take the report's recommendations seriously, are anxious to move forward with their implementation, and look forward to the resulting improvement of BLLC's operations.

Sincerely,



Sean M. Ramaley  
Acting Deputy Secretary for Safety  
and Labor-Management Relations

Cc: Stephen Fickes, MPA

Department of Labor and Industry

**Appendix D**

**Audit Distribution List**

Upon its release, this report was distributed to the following Commonwealth officials:

**The Honorable Tom W. Wolf**  
Governor

**The Honorable Randy Albright**  
Secretary of the Budget  
Office of the Budget

**The Honorable Sharon Minnich**  
Secretary of Administration  
Office of Administration

**The Honorable Christopher Craig**  
Acting State Treasurer  
Treasury Department

**The Honorable Kathleen G. Kane**  
Attorney General  
Office of the Attorney General

**The Honorable Kathy Manderino**  
Acting Secretary  
Department of Labor and Industry

**The Honorable Lisa Baker**  
Majority Chair  
Senate Labor and Industry Committee

**The Honorable Christine M.  
Tartaglione**  
Minority Chair  
Senate Labor and Industry Committee

**The Honorable Mauree Gingrich**  
Majority Chair  
House Labor and Industry Committee

**The Honorable Marc J. Gergely**  
Democratic Chair  
House Labor and Industry Committee

---

*This report is a matter of public record and is available online at [www.PaAuditor.gov](http://www.PaAuditor.gov). Media questions about the report can be directed to the Pennsylvania Department of the Auditor General, Office of Communications, 231 Finance Building, Harrisburg, PA 17120; via email to: [news@PaAuditor.gov](mailto:news@PaAuditor.gov).*