
PENNSYLVANIA DEPARTMENT OF THE AUDITOR GENERAL

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Auditor General DeFoor: DCED Waiver Process for COVID Business Shutdown Flawed; Urges Transparency, Accountability Reforms

HARRISBURG – Auditor General Timothy L. DeFoor today released a performance audit criticizing the Wolf Administration’s waiver process for businesses that asked to remain open early in the COVID-19 pandemic.

“This audit revealed a flawed process that provided inconsistent answers to business owners and caused confusion,” DeFoor said. “While the pandemic certainly presented some unique challenges, the process was hastily assembled on the fly, unevenly administered and should be reformed before anything like it is ever used again.”

On March 19, 2020, Gov. Tom Wolf ordered Pennsylvania businesses that were not categorized as “life-sustaining” to close to help slow the spread of COVID-19. Businesses could ask to remain open by applying for a waiver from the Department of Community and Economic Development (DCED).

Numerous business owners and legislators complained that the waiver process lacked transparency, moved too slowly and provided inconsistent or changing answers, which prompted the Department of the Auditor General to conduct an audit.

“Our audit specifically focused on how the waiver process was developed and run,” DeFoor said. “Our goal is to make sure that the state provides a playing field that is as level as possible, recognizing that businesses are critical to Pennsylvania’s economic health.”

Changing Guidance, Confusion

Auditor General DeFoor said that from the beginning of the shutdown, many businesses were confused about whether they were classified as “life-sustaining” according to the state’s official guidance. About one-third of the 42,380 total waiver applications came from businesses that were notified that a waiver was not even required for them to remain in operation.

DeFoor said the administration’s guidance for determining whether a business was life-sustaining, first issued on March 19, subsequently changed nine more times between March 21 and May 28, 2020. A “frequently-asked questions” document intended to guide businesses was revised 14 times.

“While these changes were somewhat understandable in light of the evolving circumstances, they certainly contributed to the confusion felt by the business community,” DeFoor said.

The audit said that the state’s guidance on what constituted a life-sustaining business was more restrictive than a federal advisory issued at around the same time. Pennsylvania was one of at least 13 states that developed their own guidance.

Inconsistent Answers, Delays

Auditors reviewed 150 of the waiver applications received by DCED. The applications were judgmentally selected among requests that received a changed response and across certain industries.

Auditors said the final responses issued to 103 of the waiver requests they reviewed appeared reasonable, but questioned the responses issued to 45 of the applications.

“The results of some of these questionable responses had real-life negative consequences to businesses that should have been able to operate but instead were notified that they had to close,” DeFoor said.

Auditors also reviewed the response timeframe for 148 of the 150 sampled applications. They found initial decisions were issued for those applications within a range of one to 28 days, with an average of 5.7 days. It appears the other two applications were not issued a response.

“When the future of your business may be hanging by a thread, waiting even just a few days for an answer can feel like an eternity,” DeFoor added. “The delays were stressful -- not only for business owners but for their employees and families as well.”

Other issues with the waiver application and review processes identified by the performance audit included:

- DCED posted five different versions of the waiver application online between March 20 and April 3, the date that the waiver application period closed. Only the final version included a section requiring business owners to attest that they were presenting accurate information.
- Waiver applications processed early in the program were reviewed differently than those processed later in the waiver program, with some later applications receiving multiple levels of review including by legal counsel.
- Businesses that included key words (such as healthcare workers) on their applications often resulted in favorable, but questionable, responses. Additionally, some business owners argued that their businesses were personally life-sustaining rather than explain how their businesses provided life-sustaining products or services to customers.
- Waiver application databases did not retain the identity of all individuals that reviewed an application, along with all decisions made, only retaining the last decision made.
- Waiver application databases were not designed to require reviewers to document the justification for decisions made on an application.
- The wording of the waiver decision responses emailed to businesses by DCED lacked clarity and could have led to confusion for businesses as to what, if any, business operations they could continue to perform.

Outside Influence

The audit also explored whether outside influence – such as involvement by lobbyists or legislators – had an impact on the waiver process. Because there was no formal process to appeal a waiver denial by DCED, numerous business owners reached out to legislators or trade groups for help.

While such outside involvement does not appear to have had an undue influence on the type of response issued to businesses, the audit notes it is possible that applications may have been evaluated and a response or corrected response issued sooner as a result of outside influence than would have occurred through the regular review process.

“Getting prompt answers shouldn’t depend on whether you have the ‘right’ connections in Harrisburg,” DeFoor said.

Findings & Key Recommendations

The audit's five findings and related key recommendations (portions paraphrased) are as follows:

Finding 1 – Pennsylvania's business closure order was more restrictive than federal guidelines which resulted in more business closings.

Key recommendation: The Governor's Office should reevaluate its process for determining life-sustaining and non-life-sustaining industry groups, in consultation with the federal government, the General Assembly, other state agencies and stakeholder groups.

Finding 2 – The guidance available to businesses and used by DCED to determine whether or not businesses are life-sustaining continued to evolve throughout the waiver program.

Key recommendations: If a waiver program is ever needed again, state officials should attempt to limit the number of changes made to the operating guidance being used and also consider identifying/highlighting any necessary changes made in each version of guidance for clarity and ease of use.

Finding 3 – Deficiencies related to the development of the waiver program resulted in a lack of accountability and transparency.

Key recommendations: If a waiver program is ever needed again, state officials should ensure that the waiver application includes detailed instructions and a section for the applicant to attest to the accuracy of the information they provided. Steps should also be taken to ensure the information entered in the database during the review process cannot be overwritten and contains full justification for decisions made, as well as the dates for each step in the process.

Finding 4 – Questionable decisions by DCED for certain waiver requests potentially resulted in detrimental effects for businesses and an unnecessarily increased risk to public health.

Key recommendations: If a waiver program is ever needed again, all decisions should be reviewed and approved by a second reviewer prior to responses being issued. A monitoring process should be created to ensure that all responses to businesses are accurate and clear. Also, a planning tool should be developed that includes the guidance reviewers should use when evaluating applications; documents necessary steps of the review process; and a requirement to retain support for decisions made.

Finding 5 – Responses to businesses were inconsistent among businesses within the same industry.

Key recommendations: If a waiver program is ever needed again, officials should ensure that the review process includes a detailed evaluation of decisions made for businesses within the same industries in order to ensure consistency. Also, whenever there is a change in guidance, all applications previously processed for that industry are immediately and carefully reviewed to determine if a corrected response is necessary and, if so, send corrections to the businesses affected in a timely manner.

The Department of the Auditor General announced in late April 2020 that it would audit the DCED waiver process, a review that continued after Auditor General DeFoor took office in January 2021.

Auditor General DeFoor thanked DCED and administration officials for cooperating with the audit team, noting that the agency's responses are included in the final audit report.

Review the [DCED waiver performance audit](#) and learn more about the Department of the Auditor General online at www.paauditor.gov.

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