Response to Public Comments on Rules Governing Administrative Civil Money Penalties

Maine Department of Labor, Bureau of Labor Standards

January 2024

Contents

1. Introduction

Section 53 of Title 26 MRS, which enables the Bureau of Labor Standards to assess a forfeiture against employers for violations of certain labor laws, (materially) states:

> The director shall adopt rules to govern the administration of the civil money forfeiture provisions. The rules must include a right of appeal by the employer and a range of monetary assessments with consideration given to the size of the employer's business, the good faith of the employer, the gravity of the violation and the history of previous violations. The rules adopted pursuant to this section are major substantive rules pursuant to Title 5, chapter 375, subchapter II-A.

In November of 2023, the Bureau proposed amendments to simplify and increase the effectiveness of the administrative civil money penalties, to modify the appeal process to remove the possible perception of bias, and to ensure that Bureau resources are allocated in a more effective and accountable manner.

Procedural Timeline

Date	**Step**
November 22, 2023	Notice of proposed rulemaking and hearing date published in newspapers
November 28, 2023	Notice of proposed rulemaking and hearing date sent to interested parties
December 11, 2023	Public hearing held on proposed rulemaking
December 27, 2023	End of comment period on proposed rulemaking

2. General Comments

In total, the following five people submitted comments on behalf of their organizations:

Person/City	**Representing**
Linda Caprara/Winthrop	Maine State Chamber of Commerce
Arthur Phillips	Maine Center for Economic Policy (MECEP)
Curtis Picard/Augusta	Retail Association of Maine
David R. Clough	National Federation of Independent Business (NFIB)
Adam Goode	Maine AFL-CIO

Adam Goode, of the Maine AFL-CIO, was the only person to attend the public hearing. His comments at the hearing were informal; he made clear the Bureau should rely on the AFL-CIO's written comments for the purpose of this process.

The Maine AFL-CIO expressed its strong support for the intent of the proposed rules.

The Maine Center for Economic Policy (MECEP) also supported the proposed rules.

The Maine State Chamber of Commerce commented that it had "some serious concerns" with the proposed rules.

Response: the Bureau makes no changes in response to these general comments.

3. Process-Related Comments

3.1 Notice Period

The Retail Association of Maine submitted that the Bureau's notice of proposed rulemaking was not in conformity with the requirements of the Maine Administrative Procedures Act (MAPA), specifically 5 MRS § 8053(5). The comment went on to say that the Association understood that the rule was sent out on November 28, the public hearing was scheduled for December 11, this fell short of the 17-24 day notice requirement, and as such, the Bureau should re-open the rulemaking process.

Response: The notice of the proposed rulemaking was published in the newspapers on November 22nd. The hearing was on December 11th. The notice was therefore published 19 days in advance of the hearing. As such, 5 MRS § 8053(5) was complied with and the Bureau will not be reopening the process.

3.2 Involvement of the Legislature

The Retail Association of Maine commented that these proposed rules constitute significant change more akin to legislation, and as such should be submitted to the Legislature.

Response: Pursuant to 26 MRS § 53, these rules are major substantive. This means that, pursuant to 5 MRS § 8072, the rules will be submitted to the Legislature for review. The Bureau makes no change.

4. Comments on Section II: Definitions

4.1 Grave Violation

The Maine AFL-CIO commented that it supported the definition of "Grave Violation" in the proposed rules as a way of capturing certain types of violations that cause harm.

Response: The Bureau makes no change.

4.2 Proactive Enforcement

"Proactive enforcement" is defined in Section I(F) as "investigations, inspections, and enforcement actions which are initiated at the direction of the Director, rather than in reaction to a complaint." The Maine AFL-CIO commented that the definition should include scenarios where a worker in one location of a business complains and the Bureau additionally investigates other locations of the business in response.

Response: The Bureau believes the proposed definition already encompasses this scenario; if the Director initiates an investigation which concerns a worker who has not made a complaint, it is "proactive". However, for the sake of further clarity, the Bureau responds to this comment by adding the following additional sentence to the definition:

> This includes expanding the scope of a complaint-based investigation to include potential violations by the same employer against other employees, whether at the same business location or otherwise.

4.3 Willful Violation

The Maine AFL-CIO commented that it supported the deletion of the category of "willful" violations, as the proposed rules still cover intentional or reckless violations.

Response: The Bureau makes no change.

5. Comments on Section III: Penalty Calculation

The Maine Center for Economic Policy (MECEP) expressed broad support for the Bureau's approach to Section III: Penalty Calculation.

Response: no change.

The Maine AFL-CIO objected to the use of the term "multiplier" to describe reductions in penalties.

Response: The Bureau understands how the word "multiplier" may appear to be a misnomer when the end result is the reduction of a fine. However, we decline to eliminate that term. The use of the term multiplier in this context is technically accurate. Further, the existing version of the rules use the term "multiplier" to indicate changes in a penalty assessment, whether the change increases or decreases the penalty. Employers and the Bureau are accustomed to this use of the word.

However, we agree it is important to clarify that all of the multipliers result in a reduction in the penalties. As such, we have replaced the term "adjustments" and "adjusted" with "reductions" and "reduced". We have also deleted the multiplier of 1.0 for businesses with over 100 employees because a multiplier of 1.0 results in no reduction (or increase) to the penalty.

5.1 Size of the Employer

Section II(A)(1) of the proposed rules provides for penalty reductions based on the size of the employer (as measured by the number of employees). The current version of rules also provide for penalty reductions based on employer size. Whereas the current rules provide for five employer size categories, the proposed new rules provide for only three categories. Under the proposed new rules, most employer categories would receive a greater reduction than under the current rules. To see the comparison, we reproduce the table that National Federation of Independent Business (NFIB) included in its comment:

Employer Size	**Current**	***Proposed***
1-10	.667	.600
11-20	.667	.800
21-50	.850	.800
51-100	.950	.800
Over 100	1.000	1.000

In its comment, the NFIB objected to the proposed changes on the basis that an employer with 11 employees is in a materially different situation than an employer with 100 employees. The NFIB urged the Bureau to retain the employer size criteria in the existing rules.

Response: After careful consideration, the Bureau agrees with the NFIB. While the proposed rules attempted to simplify the calculation by reducing the number of employer size categories, we agree that the typical employer with 11 employees is in a significantly different position to the typical employer with 100 employees. The proposed rules will return to the existing employer size categories in the current rules.

5.2 Good Faith

The Maine State Chamber of Commerce commented that the proposed good faith criteria create a higher threshold for employers to satisfy and that the current rules place the onus on the Bureau to establish that an employer does not qualify for the reduction.

Response: The proposed criteria creates a higher threshold but the Bureau finds that this is needed. The current version of the rules do not place the burden on the Bureau to establish an employer does not qualify for a reduction. The Bureau makes no changes in response to this comment.

The Maine State Chamber of Commerce commented that the proposed criteria under Section II(4)(i) is overly broad, fails to consider the reasonableness of the Director's requests, leaves employers with no recourse, depends on the Director's judgment rather than that of a neutral authority, and may be impossible to satisfy due to lack of time or amount of disclosure.

Response: The Bureau has thoroughly considered these comments and makes no change as a result. The criteria already specifically refers to the reasonableness of the Director's requests and commenter's concern about a request being impossible to satisfy is covered by both the "reasonable" and "lawful" requirements of the request.

The Chamber also makes a number of comments on (iv), concerning an employer's apology to the worker whose rights have been violated, including the concern that an apology may expose employers to greater liability, that violations may occur due to no fault of the employer, and that requiring an apology violates employers' First Amendment rights.

The National Federation of Independent Business (NFIB) submitted comments objecting to the good faith criteria for largely the same reasons as the Chamber. The NFIB further comments that

directing a small employer to follow this criteria is inappropriate in the absence of a clear authorization in statute.

Response: After careful consideration of the comments, the Bureau finds that the good faith criteria in the proposed rules are not the only criteria which could usefully demonstrate an employer's good faith. Although the Bureau believes that recognizing one's unlawful behavior and taking meaningful action to ensure it does not occur again, are essential elements of good faith, the Bureau also believes that there may be circumstances where a public notice is more appropriate than an individual apology. Therefore, we modify the fourth element of the criteria to state:

> The employer demonstrates remorse for its actions, including **by posting a notice in the workplace, in a location visible to workers, stating that the employer was found by the Bureau to be in violation of the law, stating which statutes it violated, and explaining any changes that were made pursuant to paragraph iii. The notice must remain in place for a period of not less than 90 days.**

6. Comments on Section IV: Appeals

6.1 Notice of Penalty Assessment and Right to Appeal

Section III(A) of the proposed rules set out how the Bureau must notify an employer of a Notice of Penalty Assessment, as well as how an employer must notify the Commissioner of its intent to appeal said assessment. The AFL-CIO commented that it would like to see additional language to make the service of notice more formal.

Response: While the Bureau believes a certain amount of formality is required when sending notice to an employer, both the current rules and the proposed rules allow the Bureau to use its discretion, within certain limits, on how best to communicate. We believe this discretion is more conducive to efficient and effective operations. As such we make no change.

6.2 Conduct of Hearing on Appeal to the Commissioner

Section III(B) of the proposed rules sets out the requirements for the appeals process.

The AFL-CIO commented: "we would add a Zoom and video conference option adjacent to the telephonic option for the pre-hearing conference."

Response: The Bureau makes the following change:

> The Hearing Officer may call upon the parties to appear telephonically **or by remote video** for a pre-hearing conference to identify issues, witnesses, exhibits and such other matters that may aid in the conduct of the hearing.

The AFL-CIO commented that they would want to allow for workers, and not just employers, to be represented by counsel.

Response: Neither the current rules nor the proposed rules limit the right of any party to an appeal to be represented by counsel. The Bureau finds, however, that further clarification as to the rights of represented parties is worthwhile. The Bureau makes the following change:

> The Hearing Officer may sequester witnesses, except a representative of the employer, the Director of the Bureau, and the Director of the Division of Wage and Hour. A~~n employer~~ party who is represented by counsel may have a representative in addition to counsel present throughout the hearing. The parties may agree not to sequester witnesses.

7. Comments on Section V: Annual Evaluation of Enforcement Effectiveness

Section V of the proposed rules requires the Director of Labor Standards to conduct an annual study on the extent of confirmed and probable labor law violations in the state, set out a strategy for enforcement for the year to come, and assess the effectiveness of the enforcement regime and the previous year's strategy.

The Maine State Chamber of Commerce characterized proactive enforcement action as "policing policy rather than responding to a report of a violation." It referred to the 40% target as "an arbitrary standard" and "an unnecessary mandate". The Maine Center for Economic Policy (MECEP), on the other hand, endorsed the strategy of shifting enforcement resources away from a complaint-based model and towards a proactive model.

The AFL-CIO struck a similar tone, stating it supported the adoption of a target of at least 40% of resources allocated to proactive enforcement.

Response: The role of the Bureau of Labor Standards is to ensure compliance with Maine's employment laws. Causing the laws to be enforced solely through responding to complaints is highly ineffective, for there will be businesses and industries where there are a high number of violations but where no worker has complained. A worker may choose not to complain out of fear of retaliation or a lack of knowledge of their rights, for example. A proactive investigation of a workplace with 50 violations but no complaints, is a more effective method of enforcement

than a responsive investigation of a handful of complaints from otherwise compliant employers. It is also more faithful to the statute's mandate.

Setting targets, striving to achieve them, and then evaluating whether the target was achieved, and if not, why not, is a reasonable manner of implementing policy. The 40% minimum is a target, it does not create a legally enforceable obligation to ensure that 40% of resources are indeed allocated to proactive enforcement in any one year. It is also a minimum. As the Bureau shifts its resources towards more proactive enforcement, and as this induces broader compliance with the state's employment laws, it may result in fewer complaints and the Bureau may wish to set a target higher than 40%. As such, the Bureau does not accept the characterization of the target as "arbitrary" or "unnecessary". The Bureau makes no changes in response to these comments.

The Chamber also expressed concern that the annual report "may unnecessarily politicize enforcement action." Further, the Chamber stated it was unclear whether individual employers would be identified in the report, and they recommended that "if any report be released that it focus on improvements in future practices to assist employers and employees in meeting the state's labor laws."

Response: Individual employers will not be named in the report unless the report is referring to final agency action against said employers. Statue already mandates this course of action: see 26 MRS § 3. The Bureau makes no changes.

The AFL-CIO expressed concern about revealing the enforcement strategy to the public.

Response: The Bureau applies a combination of a methods to achieve compliance: it provides information, guidance, and training to employers about their legal obligations, it issues citations and imposes civil money penalties, and it institutes proceedings in court to recover civil money penalties and wages, among other things. The role of the Bureau is not to punish employers for the sake of it or to purposely catch them off-guard. Assessing a civil money penalty is a means to an end, not an end in itself. If a public report forecasts that a particular industry will be a focus of enforcement action for the Bureau in a given year, and this induces that industry to review its practices, correct any ongoing violations, and make workers whole, then that is a success. If the Bureau is satisfied that violations have been addressed in a particular sector, it may adapt its enforcement strategy and move on to another high-violation sector. The Bureau makes no changes.

Both MECEP and the AFL-CIO comment on the matter of partnering with external organizations. The AFL-CIO asked for further clarity on which organizations could partner with the Director under Section V(3) and wanted to ensure that only organizations that supported workers, or were academic or think tanks, be included. MECEP made a similar comment.

Response: For this study to serve its intended purpose, it is essential that its methodology be credible. It must also avoid any appearance of bias.

In addition to avoiding any appearance of bias, the study must also be *effective*.

For the above reasons, the Bureau acknowledges the concerns raised by the commenters. The Bureau believes that there already are some safeguards in the proposed rules as drafted. However, to further define the scope of these paragraphs in order to make these proposed rules more effective in achieving their purpose, the Bureau makes the following changes:

1. The Director may ~~draw on external expertise, and may~~ partner with external **individuals and/or** organizations **with relevant expertise,** for the purposes of developing a methodology to study the level of labor law violations and probable violations. The methodology shall be academically rigorous and aim to provide an overview of which types of violations and probable violations are occurring, in which economic sectors, and in which geographic areas. The study shall be capable of replication such that the first year provides a baseline against which subsequent years' studies can be compared.
2. The Director may partner with external organizations in administering the **study if the Director reasonably believes that the organizations meet the following criteria:**
    a. **They possess relevant academic expertise or are likely to facilitate broader or more thorough participation of workers in the study; and**
    b. **Their involvement will not bias the results of the study towards a predetermined outcome.**

The AFL-CIO commented that newly emerging industries and types of violations as well as the gravity of the violations, should all be included as criteria in Section V(5):

Response: The Bureau declines to add in a specific reference to emerging industries or forms of violations. If the study of probable violations establishes that one or more emerging industries should be prioritized, they will be included. But in the absence of that data, the Bureau declines to add a specific reference.

We do however agree with the inclusion of criteria emphasizing the gravity of the violations. The Bureau makes the following changes to subparagraph (c):

Which workers are most vulnerable and in need of protection, for instance because of low pay, speaking English as a second language, multiple forms of discrimination, the inability to exercise a private right of action due to mandatory arbitration clauses, dependency on an employer for housing, transportation, or visa status, ~~or~~ the use of subcontracting or misclassification**, or the gravity of the violations to which they have been subjected, among others**.