

Testimony of Jake Lachance

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Before the Joint Standing Committee on Labor and Housing

In Opposition to LD 2184 "Resolve, Regarding Legislative Review of Chapter 9: Rules Governing Administrative Civil Money Penalties for Labor Law Violations, a Major Substantive Rule of the Department of Labor, Bureau of Labor Standards"

Sen. Tipping, Rep. Roeder, and members of the Joint Standing Committee on Labor and Housing, my name is Jake Lachance, and I am a Government Relations Specialist for the Maine State Chamber of Commerce, which advocates for over 5,000 large and small businesses across the State of Maine. I am here to give testimony in opposition to LD 2184 "Resolve, Regarding Legislative Review of Chapter 9: Rules Governing Administrative Civil Money Penalties for Labor Law Violations, a Major Substantive Rule of the Department of Labor, Bureau of Labor Standards".

The Maine State Chamber of Commerce has many concerns with the rule-making process that was conducted in relation to Chapter 9. First and foremost, the Chamber still has concerns regarding issues that were brought forth in the comment portion on the rulemaking process, as only one of our multiple concerns was addressed. We thank the department for the sole change that was made and recognize the balancing act that needs to be done during the consideration process. But concerns revolving around, including but not limited to increased cost to employers, a shift in burden when it comes to "good faith" standards, and the seemingly arbitrary quota set forth by having 40% of enforcement resources allocated to proactive enforcement was not adequately addressed in this process. I have included our comments as an addendum to this testimony for the committee to review. The proposed changes in rule would be more appropriately considered through standalone pieces of legislation. These have potentially far-reaching implications that deserve further scrutiny than the rulemaking process. Additionally, I will talk about the challenges the current business community feels, and the difficulties that new business ventures will have to hurdle because of this, and similar legislation being addressed today.

Throughout the country, and specifically here in the State of Maine, many different policy areas have progressed and developed ways to make things easier and more accessible. In many instances, these reforms have led to people getting second, third, and sometimes fourth chances to forge their own path in society. As many of you in this committee already know, I saw this firsthand in my career in law enforcement and was able to see the benefits of the increased focus on mental health, substance abuse, and people experiencing homelessness were given a helping hand to get things back on track.

A similar cause with those same merits is the new legislation that the Chamber testified in support of just last week regarding an Office of New Americans. These incredible individuals are able to get a new start in this beautiful state, and the Chamber and many other stakeholders in Maine's economy are counting on them to bolster the workforce, bring new and fresh ideas to the world of R & D, and to be the next wave of entrepreneurs in this state. The reality is, all of the bills that are being heard today not only increase cost and burdens for existing businesses, but create hurdles for the New American's that will be attempting to pave their own way.

One of the clauses within the Chapter 9 rule-making document is as follows:

"When measuring the effectiveness of the enforcement regime, the Director shall consider in particular whether the fines and civil forfeitures provide enough of a deterrent effect to induce compliance with the law. The Director shall also consider the Bureau's strategy for the past year and assess which aspects of the strategy could be improved so as to generate further compliance."

What I am asking of this committee is to merely give the business community the same consideration as we have so many other populations in our state. These decisions affect all businesses, big and small, old and new. We must continue to work together to make sure that both employer and employee thoughts are brought to the table and transparency only increases, not the opposite. The paragraph that I quoted does not help bolster the economy but handcuffs the ability of any member of society to succeed and live the American dream. The Chamber urges the committee to oppose this legislation.

We are submitting these comments on behalf of the members of the Maine State Chamber of Commerce. We have some serious concerns with the proposed rulemaking on Chapter 9, Governing the Administration of Civil Monetary Penalties.

With respect to labor law violations, the good faith definition has been significantly modified that creates a higher threshold for employers to qualify for this penalty reduction. Previously, the department had to demonstrate that the employer did not meet the good faith definition. We believe that the existing definition fairly established a process to meet this standard and the proposed definition should be rejected.

Specifically, the proposed definition of "good faith" hinges on the employer's ability to meet "all of the Director's requests for information and records." See proposed section 4(i). This is overly broad and fails to consider the reasonableness of these requests. Employers have no recourse. Also, the request and failure to comply rests on the judgement of the Director rather than a neutral authority. We also have concerns as to whether the employer will be able to meet/provide copies of all documents requested due to the sheer volume of documents and time it may entail.

Also, the proposed definition mandates that employers demonstrate "remorse" by providing a written apology to prove "good faith." However, there is no protection for employers who have "apologized" in any subsequent litigation. Under this language, "apologies" can and will potentially be held against an employer. We feel this will result in a slew of class action lawsuits which employers will ultimately be responsible to defend. Moreover, what if a violation was the result of an error through no fault of the employer such as payroll mistake by a third-party payroll provider? How does mandating a written apology serve any purpose in that situation? Lastly, mandating an apology to demonstrate "good faith" is an unconstitutional regulation of private speech. The United States Supreme Court "has long held that the government may not compel the speech of private actors." have long held that the Free Speech Clause of the Constitution "restricts government regulation of private speech." See *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 413-15, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *Wooley v. Maynard*, 430 U.S. 705, 714-15, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). In fact, "the First Amendment guarantees private actors the right not to be associated with speech with which they disagree." *National A-1 Advertising v. Network Solutions*, 121 F. Supp. 2d 156, 165 (D.N.H. 2000). An employer *may* choose to apologize, and the Director can certainly take that apology into account when determining a penalty. However, the Department cannot force an employer to apologize as the current proposed rule does.

Second, the proposed rule also mandates that the Department spend no less than 40% of its resources towards enforcement action, shifting activities to policing policy rather than responding to a report of a violation. We believe this is an arbitrary standard and is an unnecessary mandate for a Department to choose to optimize resources in the discretion of the Department.

In addition, we have concerns with this new section of the regulation that requires the Director by April 1st of each year, to do an annual evaluation of enforcement effectiveness. The Director would be required to report back to the Joint Standing Committee on Labor and Housing on the extent to which

labor laws have been violated and probable violations. This report will also be made public. We are concerned that this report may unnecessarily politicize enforcement action. It is also not clear whether employers will be identified in this report and would recommend 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

These are our comments on the proposed rulemaking. If you have any questions, please contact me at 207-458-2133.

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