



Testimony of Nate Cloutier

Before the Joint Standing Committee on Labor and Housing
February 6, 2024

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"

Senator Tipping, Representative Roeder, and distinguished members of the Committee Labor and Housing: My name is Nate Cloutier, and I am here today on behalf of HospitalityMaine representing more than 1,300 restaurant and lodging operators of all sizes across the state. HospitalityMaine opposes 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."*

Our concerns and opposition to this legislation are based on the same premise with our opposition to LD 372, *"An Act to Increase Enforcement and Accountability for Wage and Hour Violations."* There are components of the proposed rule that perpetuate the presumption of bad actors by employers. In a time when we should be finding innovative ways to attract new, and retain existing business, we're instead addressing ways to further alienate employers, a large majority of whom operate in very good faith:

Beyond the policy implications, we have procedural concerns of using rulemaking for consequential policy changes. It would seem more appropriate to separate the different components of the rule into pieces of stand-alone legislation. If the Department is sure enough that the proposed rules are fair and reasonable then there should be no issue with addressing each of the changes on their own merit individually in future legislation. Previous Legislatures generally have a good precedent of not using rulemaking opportunities as mechanisms for policy changes that subvert the traditional legislative process. The rulemaking processes and notifications are not as streamlined as traditional public hearing and work session notices. In the year-end, holiday season, I even overlooked the opportunity to provide initial comment, and I consider myself to be well versed in navigating the legislative process.

In looking at comments from other organizations, our concerns are the same as those raised by the Maine State Chamber of Commerce, National Federation of Independent Business, and the Retail Association of Maine.

GOOD FAITH DEFINITION

- The deviation from the existing definition of "good faith" has been significantly modified creating a higher threshold for employers to qualify for penalty reduction. Appropriately, the onus currently rests with the Department to demonstrate that the employer did not meet the good faith definition.
- In order to meet the definition of good faith by the Department, employers would have to meet "all of the Director's requests for information and records." This gives very broad and unclear

authority to the Department while putting employers in limbo of what might be required of them. My experience with the Department is that they themselves have operated in good faith when working with employers and workers under the existing structure. As proposed, this gives no recourse to employers to question the reasonableness or feasibility of the requests. This is a dramatic shift from the fairer balance that exists under current law.

REMORSE IMPLICATIONS

- The change in definition would mandate that employers demonstrate “remorse” by providing a written apology to prove “good faith”. This is a very odd deviation and one that would open employers to potential subsequent legal liabilities. We view this as an opportunity for some to launch a plethora of lawsuits against employers. Regardless of any judicial disposition, there are financial and reputational consequences for employers who will be required to defend themselves and their business. As referenced by the Department in the “Maine Department of Labor Wage and Hour Complaints and Violations in 2022” report, the issues brought before the Department are by and large not nefarious. Mandating a written apology seems needless and would only create angst between employers, the Department, and workers. We anticipate that there would be legal challenges regarding the regulation of speech in the workplace to this degree.

DEPARTMENT RESOURCES

- It seems odd that the Department would handcuff itself through rule to spending no less than 40% of its resources towards enforcement action. Has the Department had issues battling itself regarding resource allocation? This will inherently shift activity to policing policies and not responding to reports of violations. Additionally, the signal this sends to employers may be of more significance than the benefits the Department purports this would generate. This deviation seems unnecessary with potentially ill-fated financial consequences for the Department should it over commit or unforeseen circumstances arise.

PENALTY ADJUSTMENT CALCULATION

- The rule proposes to penalize employers with 11-50 employees the same as those with 51-100. While those numbers seem close on a scale of infinite figures, the day-to-day operations and available resources could not be more different. While the rule change could seem insignificant from a department perspective, it will have implications that greatly expand the number of employers impacted by tens of thousands.

Creating new, arbitrary, or ambiguous employment standards for employers will undoubtedly increase the number of violations assessed by the Department and will increase state revenue. That result will not necessarily be indicative of good Department oversight. Instead, it will indicate that the Department has successfully added new layers to bureaucracy that jeopardizes business standing and that it has found a way to generate more revenue.

We urge you to please vote ought not to pass on LD 2184. These are not changes that would need to be effective in the near future for the Department to effectively to its job. Thank you, and I would be happy to answer any questions you may have.