STATE OF MAINE
DEPARTMENT OF LABOR
54 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0054

Janet T. Mills
GOVERNOR

Laura A. Fortman
COMMISSIONER

Testimony of Dr. Jason Moyer-Lee, Bureau of Labor Standards, Maine Department of Labor In Support 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 To the Joint Standing Committee on Labor and Housing Public Hearing, 2/6/2024

Senator Tipping, Representative Roeder, and members of the Joint Standing Committee on Labor and Housing. I am Dr. Jason Moyer-Lee, Director of Labor Standards at the Maine Department of Labor ("the Department"). I submit this testimony on behalf of the Department in support of 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.* 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.

These rules are set out in Chapter 9: Rules Governing Administrative Civil Money Penalties for Labor Law Violations. 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. Because these rules are major substantive, they are before you now.

Fines

26 M.R.S. § 42 states:

> The Director shall cause to be enforced all laws regulating the employment of minors; ...all laws regulating the payment of wages; and all laws enacted for the protection of the working classes.

With the tools currently at my disposal, I cannot effectively do that. Most employers will comply with employment laws. This may be for a variety of reasons, for example, a desire to do the right thing, to treat employees fairly, to avoid litigation, or to avoid the reputational consequences of breaking the law, among others. Other employers will not comply with employment laws, and the Bureau is tasked with addressing this issue. We cannot address the matter of noncompliance without a deterrent effect: it must be costly to break the law.

When an employer assesses the risks associated with violating employment laws, there are two key considerations: 1) the likelihood of an enforcement action against them; and 2) the financial consequences if an enforcement action is taken. The size of a fine, therefore, can play a crucial role in motivating employers to comply with the law. In addition to being common sense, this proposition is supported by substantial evidence. In a 2016 study, published in the journal *Perspectives on Politics*, Professor Daniel J. Galvin assessed the effectiveness of the deterrent effect of higher (state law) penalties for minimum wage violations, across the U.S. He found:

> ...in the contemporary era, more robust state-level regulatory regimes are strongly associated with a lower incidence of wage violations. Moreover, during the past decade, in states where new wage-theft laws dramatically increased the expected costs of violating the law, the incidence of minimum wage noncompliance saw statistically significant declines. Stronger penalties, in short, appear to be quite effective in deterring this pernicious type of wage theft.[1]

There are other factors, outside of this rulemaking, which go into the deterrent effect. For example, how often we cite violations but issue no penalty, and our ability to collect fines from employers who refuse to pay. But the level of fines plays a big role in the overall deterrent. In 2022 and 2023, on average, we collected $3.80 per violation. This low level of penalties was not offset by a high likelihood of inspection. In 2023, an employer could expect to be inspected by the Wage and Hour Division once every 269 years.

The rulemaking before the Committee attempts to modestly increase the deterrent effect by increasing the typical fine for violations, within the limits already imposed by statute. Under the current Chapter 9 rules, the penalty calculation starts with the minimum allowable penalty that a court could award under the statute, and then may increase the penalty for various reasons (e.g., gravity of the violation, history of violations, repeated violations) and may decrease the penalty for other reasons (e.g., a small employer or the good faith of the employer). This means that fines – even for serious violations – tend to be very low, and much lower than is required by statute. For example, under the current rules, a company with 99 low-paid employees could pay them all half of what they are owed, for several months in a row leading up to an investigation by the Director, and it is entirely feasible that the end result for that violation would be a penalty of only $142.50 per violation, with no requirement to pay the workers the money they are owed. Therefore, short of instituting court proceedings, this fine is the only leverage the Director would have under the current rules. Such a small fine does not provide a deterrent effect and it does not incentivize compliance with the law. In other circumstances, the current rules may lead to fines which are even lower than the minimum amount set out in statute (often $100) for fines if recovered in court. Deterrence is not the only factor in effective enforcement, but without an effective deterrent, widespread compliance becomes much more difficult to attain.

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[1] At p341.

The proposed amended rules address this deterrence deficiency by starting with the maximum $1,000 fine allowed by statute and then offering more moderate penalty reductions based on the factors set out in statute. The largest reduction available is for small employers. This keeps the effect of any penalty more proportionate and akin to a progressive tax regime, where individuals with higher income pay more in both absolute and relative terms.

Appeals

The current rules may create the perception of bias in some cases. As the current rules stand, it is the Director who oversees the appeals process; the Director either sits as the hearing officer or delegates the hearing officer role to someone else but still makes the ultimate decision on the appeal outcome. Although the Director is not involved in the detail of all cases, the Director is heavily involved in the detail of some cases and directs the overall strategy of the Bureau. If the Director is also deciding the appeals which come out of the Bureau, it may create the impression that an employer is not obtaining a fresh review of the matter, notwithstanding the administrative burden, legal complexity, and cost of the proceedings. The proposed amended rules cure this deficiency by designating the Commissioner of Labor to be in charge of the appeals process, and allowing the Commissioner to designate the appeal determination to any qualified person. This removes the appeals process one step further from the initial decision-maker and would also ensure that the appeal is being heard by someone from outside the Bureau.

Bureau Effectiveness and Accountability

The Bureau cannot adequately enforce the laws if it does so only by responding to complaints. This is because many of the workers most in need of protection are those least likely to complain, due to fear of retaliation, lack of confidence or trust in the system, language difficulties, lack of awareness of rights, or myriad other factors. To effectively enforce the laws, therefore, the Bureau must lean heavily on proactive investigations, directing investigative resources towards sectors of the economy where there are likely to be high violations and low complaints.

The Bureau must also be strategic and evidence-based when determining how to direct its resources. Directing investigation resources towards businesses which are unlikely to have many violations is normally not an efficient use of the Bureau's hyper-scarce resource.

The proposed amended rules address these matters by requiring the Director to conduct an annual study surveying the extent of labor law violations and probable violations in the state. This will allow one to compare the extent of violations and probable violations from year to year so as to measure progress. The proposed amended rules also require the Director to produce an annual report reviewing the effectiveness of the Bureau's enforcement tools, and to set out a strategy for the forthcoming year. The report is to be submitted to the Joint Standing Committee on Labor and Housing and to be made publicly available. This ensures that the Bureau's resources are allocated effectively, in an evidence-based manner, and so as to ensure maximum compliance with the law.

Thank you for your consideration of these matters. I would be happy to address any questions in the hearing, at the work session, or in writing thereafter.