

# Auditor General Finds Inconsistencies in COVID-19 Business Waiver Process

BY: [ASHA PRIHAR](#) OCTOBER 6, 2020

As Pennsylvania Auditor General Eugene DePasquale nears the end of his office's audit into the business waiver program used to determine which Pennsylvania businesses could and couldn't operate at the peak of the statewide shutdown earlier this year, he shared preliminary findings of inconsistencies and changing guidance throughout the waiver-granting process.

Following the governor's closure of nonessential businesses in March to slow the spread of COVID-19, Gov. Tom Wolf's administration implemented a waiver program, which allowed businesses to apply for case-by-case exemptions to the shutdown order. The program, however, drew criticism from business owners and Republican legislators for its opaque process and inconsistent answers, prompting both a [subpoena from a Senate committee](#) and DePasquale's audit.

According to a Tuesday [update](#) from DePasquale, the audit — which remains ongoing — has so far shown inconsistent decisions, confusion among business owners and shifting guidelines in the Department of Community & Economic Development's waiver process, creating what DePasquale called "not a level playing field for businesses across Pennsylvania."

"What is clear so far in our view is that the waivers were not granted consistently," DePasquale said. "That may not be news to business owners, who've been complaining about this from the very beginning. The waiver program appears to be a subjective process, built on shifting sands of changing guidance, which led to significant confusion among business owners."

Individual businesses faced status changes without explanation, DePasquale said, as they faced requirements that he called a "moving target."

Across the notary, hair salon, pet groomer, garden center and massage therapy categories, auditors found that at least 523 businesses faced a change in response to their waiver requests: 171 initially received a "no" that later became a "yes," 151 went from "no" to "not required," 73 shifted from "yes" to "no" and 48 changed from "not required" to "no."

According to the audit update, the information provided by DCED does not include information as to why these statuses were changed. At least 101 of the 523 businesses submitted multiple applications, and many of those received different responses for each.

"The inconsistencies in the responses provided by DCED illustrate the point that sometimes it made a difference depending on who in DCED was evaluating the application of not only the business, but that particular application," DePasquale said. "Because obviously, businesses were getting different answers from multiple applications."

He did not specify exactly how many times the overarching waiver qualification guidelines changed, but noted that it was "more than once."

DePasquale noted that the most frustrating aspect of the audit has been a lack of identifiable explanations for the changes — something that he says is important to pin down in case the state ever has to undergo a similar process in the future.

“I don’t want to sit here and cast aspersions, but I do know that we’re going to continue to dig on that, and we believe strongly that there should be reasons given as to why answers change,” DePasquale said. “Because (A) the businesses are owed that, (B), if we’re going to be in this situation again, we can’t have this Keystone cops routine again.”

Lyndsay Kensinger, the Wolf Administration’s spokesperson, referred comment on the auditor general’s update to DCED.

In a statement to *The PLS Reporter*, DCED spokesperson Casey Smith wrote that DCED consulted existing guidance — including the Cybersecurity and Infrastructure Security Agency and the Department of Homeland Security — while cross-referencing industry codes to determine whether businesses were operating in life-sustaining industries or providing life-sustaining services.

The process was not static, Smith said, and guidance “was refined to ensure that businesses with life-sustaining services remained open.” A fraction of requests required correction through a quality assurance process, he added.

Reviewers made their decisions based on the information that businesses themselves submitted, and the state established a “quality review process” to make sure that the details that the businesses provided painted an accurate picture of their day-to-day operations, Smith said.

“The businesses were entrusted to provide accurate information about their operations and while the vast majority did so, unfortunately, a few misrepresented themselves,” Smith said. “And, while there were some inconsistencies noted, we worked to address any inconsistencies, and overall the process was consistent given that our commonwealth was responding to a global pandemic from a novel virus and prioritizing public health and safety.”

In total, DCED received and evaluated 42,380 waiver requests. According to Gary Miller, the press secretary for the Department of the Auditor General, 39 DCED staff and one employee from the Department of Environmental Protection were responsible for making determinations about whether to approve or deny those applications.

Forty-three additional administration employees outside of DCED — including employees from the Governor’s Office, DEP, Corrections, Agriculture and the Department of Conservation and Natural Resources, among others — had access to the waiver site so that they could answer questions and provide guidance to DCED and the waiver team.

The update noted a reliance on written justifications from the businesses themselves without the ability to completely verify the submitted information. Businesses with persuasive arguments “fared much better” than businesses from the same sector with weaker written justification statements, DePasquale’s update says.

DePasquale noted that including certain “buzzwords” in written justification statements substantially increased the likelihood that businesses would be deemed eligible for waivers. Businesses that used the term “life-sustaining” in their proposals tended to be favored in the waiver granting process, he said, even if they did not actually fit the term’s definition. The term “PPE” also increased the likelihood of selection.

It remains unclear whether any outside actors had influence on the waiver-granting process. DePasquale said the auditors have also found that legislators and lobbyists reached out to DCED on behalf of businesses with pending waiver applications, but the analysis of those communications remains ongoing.

Smith said outside influences and pressure from the governor's office played no role in the businesses that did and did not receive waivers.

As part of the investigation's next steps, auditors have requested any correspondence that may exist between the governor's office and legislators or lobbyists writing in favor of individual businesses and will review and analyze it along with the 574 pages of emails, text and other communications sent from legislators and lobbyists to DCED.

"It's important to note that this is a status update," Smith said. "The Wolf Administration will continue to cooperate with the Department of the Auditor General and DCED looks forward to reviewing and formally responding to the final report when it is issued, and is confident that any concerns expressed in this status update will be addressed appropriately."

Republicans in the state legislature — some of whom began investigating the waiver process on their own in the spring — felt validated by DePasquale's update, believing it to confirm their own criticisms of the waiver program.

"Today's update by the Auditor General confirmed what we have been saying about the Governor's waiver process for six months — it lacked clarity, consistency, common sense and transparency," said Jenn Kocher, spokesperson for the Senate Republican Caucus.

According to Kocher, the preliminary findings mirror much of what Senate Republicans have reviewed in documents they've received as part of their own investigation into the matter, which they will continue in order to understand the methods behind the waiver-granting process. They will then use the information they gather to craft legislation to "bring accountability and transparency to this process should we ever find ourselves in this situation again," Kocher said.

House Majority Leader Kerry Benninghoff (R-Centre) said the Wolf Administration's "over-broad" shutdown already hurt small businesses across the state. The waiver process, he added, "added insult to injury" by creating confusion and "stacking the deck against mom-and-pop businesses simply looking to continue to operate safely."

"The toll on lives and livelihoods from this administration's handling of COVID-19 continues to mount," Benninghoff said. "Sadly, it is becoming increasingly clear that the Wolf administration's non-transparent, go-it-alone approach to managing this virus has done severe harm to Pennsylvania."

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