

PENNSYLVANIA'S NEW LAW PROHIBITS MANDATORY OVERTIME FOR NURSES

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On October 9, 2008, Governor Rendell signed the Prohibition on Excessive Overtime in Health Care Act (H.B. 834), which prohibits health care facilities from requiring nurses and certain other employees to work mandatory, unscheduled overtime. The Act, which takes effect on July 1, 2009, will dramatically affect health care facilities operating within Pennsylvania, many of which rely on mandatory overtime as a staffing tool.

COVERAGE

On the employer side, the Act broadly covers all nonprofit and for-profit "health care facilities" operating in Pennsylvania. The Act defines "health care facilities" as any facility providing clinically related health services, regardless of whether the facility is privately owned or government run. Among the many types of facilities expressly covered by the Act are general and special hospitals, rehabilitation centers, hospices, surgical facilities, long-term care nursing facilities, radiation treatment cancer centers, and "mental retardation facilities." Exceptions to the Act's coverage include primary care doctors' offices and religious treatment facilities rendering services exclusively to clergy or religious professionals.

The Act covers employees involved in direct patient care activities or clinical care services who receive an hourly wage or are classified as nonsupervisory employees under a collective bargaining agreement. Nurses placed through a personnel agency are also included. Those personnel expressly exempted from the Act include doctors, physician assistants, dentists, and employees involved in environmental services, clerical, maintenance, food service, and any other employee not involved in direct patient care.

PROHIBITIONS

The Act prohibits health care facilities from requiring employees to work in excess of an agreed to, predetermined, and regularly scheduled daily shift. Notably, this does not

mean that employers are prohibited from requiring work in excess of 40 hours in a week, or 8 hours in a day, so long as the shift is agreed upon ahead of time and part of the employee's regular schedule. Employers are also prohibited from retaliating against employees who refuse to accept overtime, and cannot terminate, dismiss, discharge, or discipline employees for doing so. Penalties include fines from \$100 to \$1,000 for each violation and an administrative order to comply with the Act.

The Act does not prevent employees from working overtime which they agree to accept or preclude health care facilities from hiring part-time or per diem employees. Further, employers may require overtime when a patient care procedure is already in progress, and the absence of the employee could have an adverse effect on the patient.

EXCEPTIONS

The Act's prohibitions do not apply during certain "unforeseeable emergent circumstances," which are narrowly defined to include only: (1) an unforeseeable declared national, state, or municipal emergency, (2) a highly unusual or extraordinary event which is unpredictable or unavoidable and which substantially affects the need for health care services (includes acts of terrorism, natural disasters, and widespread disease outbreaks), and (3) unexpected absences discovered at or before the commencement of a shift which could not be planned for, and which would significantly affect patient safety.

When an unforeseeable emergent circumstance occurs, the assignment of mandatory overtime must be used as a last resort and the health care facility must have exhausted reasonable efforts to obtain other staffing. Before employees can be forced to work overtime, the facility must provide up to one hour to arrange for child care or for the care of an elderly or disabled relative.

Significantly, chronic short staffing is specifically excluded from the Act's definition of an unforeseeable emergent circumstance.

PRACTICAL CONSIDERATIONS

The Act is certain to have a dramatic impact on health care facilities, which will no longer be able to rely on mandatory overtime to fill staffing needs on a routine basis. The impact of the Act may be greatest for facilities which do not have 24-hour staffing, such as outpatient units or other ambulatory care facilities. These facilities, in particular, will need to develop policies and procedures to address staffing needs

which extend beyond regularly scheduled hours. In addition, all health care facilities in Pennsylvania will need to review their procedures governing unscheduled absences, including notice requirements for employees and documentation of efforts to fill unexpected vacancies prior to requiring employees to work overtime.

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