

New York State Restricts Mandatory Overtime For Nurses, Requires Nurse Coverage Plans

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New York has joined the ranks of more than a dozen states in prohibiting “mandatory overtime” for nurses, except under very limited circumstances. Recently issued New York State Department of Labor emergency regulations require health care employers to develop and implement alternative staffing plans, so-called Nurse Coverage Plans, as a pre-condition to an employer’s ability to require nurses to work overtime for patient care emergencies. The new law and its regulations impose significant practical and legal restrictions on health care employers, especially those whose nurses’ terms and conditions of employment are set forth in collective bargaining agreements.

New York Labor Law § 167

New York Labor Law § 167 makes it unlawful for a health care employer¹ to require a registered nurse or a licensed practical nurse who provides direct patient care to work beyond their “regularly scheduled hours of work.” Examples of covered health care employers include hospitals, nursing homes, outpatient clinics, comprehensive rehabilitation hospitals, residential health care facilities, drug and alcohol treatment facilities, adult day health care programs, diagnostic centers and maternal health care consortia.

The new law sets an hourly limit at the nurses’ “regularly scheduled work hours,” defined as those hours a nurse has agreed to work and is normally scheduled to work, including prescheduled on-call time and time spent for the purposes of communicating shifts reports regarding patient status. The regulations further specify what is meant by “regularly scheduled work hours”: The key is that each nurse must have a “predetermined” number of hours (although for part-time nurses, the “regularly scheduled work hours” can be on a percentage of full-time basis). Labor Law § 167 makes no reference to the 40-hour threshold for overtime under the wage and hour laws, and nothing in the law prohibits an employer from

¹ Defined as an entity such as a partnership, limited liability company, or corporation, acting “directly or indirectly,” which provides “health care services” in a facility licensed or operated pursuant to § 28 of the Public Health Law, the Mental Hygiene Law, the Education Law or the Corrections Law. Labor Law § 167 applies both to licensed facilities and to agencies and other entities that provide nurses to licensed facilities.

regularly scheduling a nurse to work more than 40 hours a week. Nothing in the new law restricts voluntary overtime; however, the New York State Board of Nursing seeks to preclude nurses from voluntarily working more than 16 hours in a 24-hour period.²

A health care employer cannot require a nurse to work more than his or her regularly scheduled hours, except under the following four circumstances:

- **A Health Care Disaster**, such as a natural disaster or other type of disaster that unexpectedly increases the need for health care personnel in the county in which the nurse is employed or in a contiguous county;
- **Declaration of Emergency**, by federal, state or county officials in the county in which the nurse is employed or in a contiguous county;
- **An “Emergency Requiring Overtime to Provide Safe Patient Care,”** provided that the employer has implemented and utilized a Nurse Coverage Plan, and use of that Plan has failed to produce staffing to meet the emergency; and
- **An Ongoing Medical or Surgical Procedure**, in which the nurse is actively engaged and whose continued presence is needed to ensure the health and safety of the patient. The regulations add the requirement that the determination of whether the nurse’s continued presence is required must be made by the nursing supervisor or nurse manager supervising the nurse, and thus not by the administrator or surgeon.

Health care employers that fail to develop or properly implement Nurse Coverage Plans will not be able to rely on the patient care emergency exception to mandatory overtime. While Labor Law § 167 does not specify any ramifications for non-compliance with the law, other provisions of New York Labor Law set forth remedies available to the Attorney General, such as cease and desist orders, fines, penalties, and misdemeanor prosecutions for violation of the Labor Law.

Regulations Require Nurse Coverage Plans

While Labor Law § 167 itself does not require the creation or implementation of Nurse Coverage Plans and the law does not reference or require the promulgation of rules or regulations, on July 15, 2009, Governor Patterson signed “emergency” regulations that require health care employers to create and implement Nurse Coverage Plans by October 13, 2009, which is 90 days after the effective date of the regulations.

On August 5, 2009, the New York State Department of Labor published comments to the emergency regulations in the New York State Register. According to the Department of Labor, the emergency regulations were promulgated pursuant to § 21 of the New York Labor Law (which gives the Commissioner of Labor broad powers to issue regulations governing any section of the Labor Law that the Commissioner finds necessary and proper) because § 167 does not provide sufficient detail with regard to what is expected of employers so as to avoid mandatory overtime except in emergency situations. According to the Department of Labor, the regulations are intended to address this statutory gap by requiring employers to

² Nurses who work more than 16 hours in a 24-hour period may be subject to a charge of unprofessional conduct for willful disregard of patient safety by the New York State Board of Nursing. See: <http://www.op.nysed.gov/>

develop a Nurse Coverage Plan. The stated “emergency” for the implementation of the regulations without the normal notice and comment period provided under the New York State Administrative Procedure Act is the “preservation of public health, public safety and general welfare.”

The regulations require health care employers to have written Nurse Coverage Plans in effect by no later than October 13, 2009. Plans must identify and describe the alternative staffing methods a health care employer will use to ensure adequate staffing other than the use of mandatory overtime. The Plan must also be readily available to nursing staff, collective bargaining representatives and state officials.

The regulations provide that Nurse Coverage Plans should take into account typical patterns of staff absenteeism due to illness, bereavement and other “similar factors” as well as the facility’s typical levels and types of patients. The Plans must identify as many alternative staffing methods as needed to ensure adequate staffing without using mandatory overtime. The regulations list some alternative staffing mechanisms, such as contracts with per diem nurses, contracts with nurse registries and employment agencies, arrangements for assignments for nursing floats, requesting an additional day of work from off-duty nurses and developing and posting a list of nurses seeking voluntary overtime. The facility is required to document all steps it took under the Plan to seek alternatives before it can mandate overtime.

Upon completion of a Nurse Coverage Plan, each employer must make it available to all of its nursing staff by conspicuously posting the Plan in a physical location accessible to nursing staff or through other means such as intranet posting. The regulations further require the health care employer to provide any collective bargaining representative of the nurses at the facility with a copy of the Plan and to provide a copy to the New York State Department of Labor upon request.

The regulations specify that they do not diminish or waive any rights of any nurse pursuant to any law, regulation or collective bargaining agreement. Indeed, the regulations specifically provide that nurses may not waive their rights.

A complaint can be filed by a nurse, a group of nurses or a collective bargaining representative of the nurses electronically through the New York State Department of Labor Web site.

Employers who have collective bargaining agreements that allow employers to assign mandatory “overtime” will have to consider the impact of the regulations on their right to assign overtime, the use of volunteers, and whether the circumstances for mandating overtime fall within one of the limited exceptions to the new regulations. Although Labor Law § 167 impinges on federal rights established under existing collective bargaining agreements, the new regulations are drafted as a remedial statute to protect public health and patient safety in an effort to save the law from labor law preemption.

In addition to imposing requirements on “health care employers,” the new law also amends § 6510 of the Education Law by adding a new § 6510-e, which provides that “the refusal of a ... nurse to work beyond said nurse’s regularly scheduled hours of work shall not solely constitute patient abandonment or neglect except under circumstances provided under subdivision three of section one hundred sixty-seven of the labor law.” This provision will

undoubtedly be raised as a defense to any discipline of nurses who refuse to work beyond their regularly scheduled hours in circumstances that could be considered patient abandonment prior to the amendment.

Conclusion

We suggest that health care employers promptly comply with Labor Law § 167 by developing and publishing Nurse Coverage Plans. Health care employers should review their nurse staffing levels in accordance with the new regulatory requirements to ensure adequate staffing to cover routine absences and time off, since mandatory overtime can no longer be used to cover such absences. Health care employers should also review their alternative staffing arrangements, and if needed, supplement voluntary overtime and call in of additional staff with arrangements with per diem or staffing agencies. In addition, the overtime provisions of any applicable collective bargaining agreements should be reviewed to ensure that the Nurse Coverage Plan does not violate these provisions.

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