Massachusetts Health Care Cost Bill Includes Restrictions on Mandatory Overtime For Nurses and the Use of Government Funds to Persuade Employees to Support or Oppose Unionization

On July 31, 2012, the Massachusetts House and Senate approved Senate Bill 2400, "An Act improving the quality of health care and reducing costs through increased transparency, efficiency and innovation" (the "Bill"). Among numerous other provisions, the legislation significantly restricts the ability of hospitals to require nurses to work overtime, and limits the use of government funds to persuade hospital employees to support or oppose unionization. The Bill has been sent to Governor Deval Patrick for signature; Governor Patrick has publicly indicated his intent to sign the Bill into law.

Mandatory Overtime

The Bill would prohibit mandatory overtime for hospital nurses other than in the case of "an emergency situation where the safety of the patient requires its use and when there is no reasonable alternative." Hospitals would be required to report all instances of mandatory overtime, together with the circumstances requiring its use, to the Department of Public Health, and these reports would become public documents.

The Bill defines "mandatory overtime" as "any hours worked by a nurse in a hospital setting to deliver patient care, beyond the predetermined and regularly scheduled number of hours that the hospital and the nurse have agreed that the employee shall work," and further specifies that such "predetermined and regularly scheduled number of hours" may not exceed 12 hours in any 24 hour period. "Emergency situation" is not defined, and the Bill contemplates that a newly established health policy commission will develop guidelines and procedures to determine what constitutes an emergency situation. The interpretation of the term "reasonable alternative" will also be crucial in determining the reach of this prohibition, as will the Bill's requirement that "[m]andatory overtime shall not be used as a practice for providing appropriate staffing for the level of patient care required." The Bill does not contain any *de minimis* exception to allow, for example, the holding over of a nurse for a brief period beyond the end of a shift in order to complete a procedure begun hours earlier.

The Bill would also prohibit a nurse from being permitted to work more than 16 consecutive hours in a 24 hour period and would require that a nurse who works 16 consecutive hours be given at least eight consecutive hours of off-duty time immediately following the working period. The Bill would prohibit any discrimination, dismissal or other employment decision based on a nurse's refusal to accept work in excess of the limitations on mandatory overtime.

Finally, the Bill provides that it shall not be construed to "limit, alter or modify terms, conditions or provisions of a collective bargaining agreement entered into by a hospital and a labor organization." Hospitals which have entered into collective bargaining agreements providing, for example, that the hospital shall have "the right to require reasonable overtime" (a common formulation in a management rights clause) or that contain detailed mandatory overtime procedures may be able to argue that they are exempt from some or all of the Bill's restrictions, though this will likely be a hotly contested point.

Use of Government Funds to Support or Oppose Unionization

The Bill would prohibit hospitals from receiving reimbursement or payment from any governmental unit for amounts paid to employees, consultants or other firms to persuade or seek to persuade employees of the hospital to support or oppose unionization. Notably, the Bill limits this prohibition to instances where "*the*

primary responsibility of the employees or consultants is, either directly or indirectly, to persuade or seek to persuade the employees of the hospital to support or oppose unionization" (emphasis added). Although we anticipate that further guidance may be issued on this point by funding agencies, the language of the Bill suggests coverage of a fairly narrow category of service providers, that is, those whose *primary responsibility* is to persuade employees on union organizing issues. Moreover, the Bill specifically excludes attorney's fees paid by hospitals for services rendered in dealing directly with a union, advising hospital management of its responsibilities under the National Labor Relations Act, or appearing before, or preparing for an appearance before, an administrative agency or court.

All of the provisions described above are expected to take effect 90 days following the date the Bill is signed into law.

For more information concerning this Bill, please contact any attorney in Ropes & Gray's labor & employment department.

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