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Labor & Employment Alert
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New Massachusetts Health Care Reform Legislation Has Some Surprises For Hospital Employers

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On August 6, 2012, Governor Patrick signed into law "An Act improving the quality of health care and reducing costs through increased transparency, efficiency and innovation" as Chapter 224 of the Acts of 2012. The stated aim of this legislation is to help moderate increases in consumer and business insurance premiums, as health care costs have increased by 6-7% annually in Massachusetts, while the state economy has only grown by 3.7%.

However, the new law contains some surprises for hospital employers, such as banning so-called "mandatory overtime" for nurses except in emergencies, restrictions on nurses' shift durations, restrictions on physician contracts, and restrictions on government reimbursement for hospital employees or consultants whose primary responsibility is to persuade hospital employees to support or oppose unionization. This law becomes effective 90 days after its passage.

Nurses

Mandatory Overtime:

Hospitals cannot require nurses to work "mandatory overtime" "except in the case of an emergency situation where the safety of the patient requires its use and when there is no reasonable alternative." The newly established Health Policy Commission has the responsibility to develop guidelines and procedures to determine what constitutes an emergency. These provisions could have significant operational, financial, and recordkeeping implications for hospitals.

Even in emergency situations, the law provides that the hospital shall make a good faith effort to have overtime covered on a voluntary basis before requiring mandatory overtime. The law also provides that mandatory overtime "shall not be used as a practice for providing appropriate staffing for the level of patient care required."

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"Mandatory overtime" is when a nurse works "any hours…in a hospital setting to deliver patient care, beyond the predetermined and regularly scheduled number of hours." This definition is unclear and the use of words "mandatory" and "overtime" is confusing. However, it appears to mean that any hours a nurse works beyond his or her predetermined schedule, whether voluntary or involuntary, falls under the "mandatory overtime" restrictions.

This type of "overtime" should not be confused with Fair Labor Standards Act overtime for time-and-one-half over 40 hours in a week, nor should it be confused with collectively bargained requirements of time-and-one-half pay for over 8, 10 or 12 hours in a day. The "mandatory overtime" in this statute is not necessarily time-and-one-half pay. All it appears to mean is that any time worked beyond the nurse's regularly scheduled hours is "mandatory overtime" subject to the statute, regardless of whether the pay is straight pay or time-and-one-half."

Nurse Schedule Restrictions:

The predetermined regular schedule cannot require the nurse to work more than 12 hours in any 24 hour period. Even with overtime, a nurse cannot be allowed to work more than 16 hours in a 24 hour period. If a nurse does work 16 consecutive hours, the hospital must give him or her 8 consecutive hours of off-duty time immediately following the worked overtime.

Hospitals must report all instances of mandatory overtime and the circumstances requiring it to the Department of Public Health. These reports will be public documents.

No Discrimination/Retaliation For Refusing Mandatory Overtime:

The law also provides that the refusal of a nurse to accept work in excess of the limitations in the new law shall not be grounds for discrimination, dismissal, discharge, or any other employment decision, although the law does not specify any penalties for violations.

Savings Clause For Collective Bargaining Agreements:

Lastly, these terms do not "limit, alter or modify terms, conditions or provisions of a collective bargaining agreement entered into by a hospital and a labor organization." This appears to mean that contrary terms in a union contract would prevail over the terms of the statute, but one can reasonable expect nursing unions to take a different view. It also may be that this section of the law could be preempted by federal law if challenged.

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Doctors

Hospitals cannot enter into a contract for employment or partnership with a licensed physician that would prevent or limit that physician from testifying in any suit or administrative proceeding, including for medical malpractice. Outside of hospitals, physicians may not enter into contracts for partnerships, employment or any other professional relationships, which would prohibit them from testifying in administrative or judicial proceedings.

"Persuader" Activities

The legislation also provides that hospitals cannot receive reimbursement from the Commonwealth or its subdivisions for an amount paid to employees or consultants whose primary responsibility is to persuade the employees of a hospital to support or oppose unionization. The statute does not define the term "primary responsibility" and the scope of the law appears to be somewhat uncertain. However, it does specifically exempt from its scope payments to counsel to deal directly with a union, to advise hospital management of its responsibilities under federal labor law, or to represent a hospital in court or in administrative litigation.

This provision of the law is very similar to a California statute that was struck down by the Supreme Court in 2008, on the basis that it interfered with employer's federal free speech right to oppose unionization – it is possible that, if challenged, this provision could suffer the same fate.

Personal Care Attendants (PCAs)

Under the new law, PCAs are considered public and state employees for the purpose of labor relations, and for union, insurance and employee benefit payroll deductions. The PCA quality home care workforce council is the employer solely for the purposes of these payroll deductions and labor relations matters.

PCAs cannot engage in or encourage strikes, stoppages, slowdowns or withholding of services. PCAs can have a statewide unit of all PCAs, but the showing of interest required to request a union election is 10% of the bargaining unit.

This section of the law mirrors prior controversial legislation which covered home health aides, legislation which similarly deemed home health aides state employees for purposes of negotiating a collective bargaining contract with the state.

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Other Miscellaneous Provisions:

-for malpractice actions, the cap on charitable liability damages has been raised from $20,000 to $100,000;

-wellness program tax credits;

-an apology or expression of sympathy is inadmissible in a malpractice action.

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If you have any questions or concerns with regard to the implementation of the Act, please contact Geoffrey Wermuth, Katherine Hesse or the attorney assigned to your account.

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