

HR Bootcamp for Healthcare Employers

Session 2: Healthcare Staffing Crisis – Legal Issues Associated with Hiring and Staffing

December 14, 2023

Peter A. Jones and Adam P. Mastroleo



Presenters



Peter A. Jones

Member, Labor & Employment
pjones@bsk.com
O: (315) 218-8337



Adam P. Mastroleo

Member, Labor & Employment
amastroleo@bsk.com
O: (315) 218-8139

Today's Agenda

- Mandatory Overtime – Labor Law Section 167, CBA Provisions and Staffing Needs
- Clinical Staffing Plans – Where Are We?
- Avoiding Discrimination Claims in Hiring

Mandatory Overtime – Labor Law Section 167

- Originally enacted in 2009, Section 167 restricts “healthcare employers” from requiring nurses to work beyond their regularly scheduled hours, with limited exceptions
 - “Regularly Scheduled Work Hours” means those hours a nurse has agreed to work and is normally scheduled to work pursuant to the budgeted hours allocated to the nurse’s position by the healthcare employer
 - If no such allocation system exists, then some other measure generally used by the healthcare employer to determine when an employee is minimally supposed to work, consistent with the CBA, if any
 - An employer must not attempt to use on-call time as a substitute for mandatory overtime

Healthcare Employers

- The law defines healthcare employers as employers operating according to Article 28 of the Public Health Law, including hospitals, nursing homes, diagnostic treatment centers, and state-operated facilities licensed under various state laws
 - This was amended in June 2023 to include facilities operated or licensed by the Office of Child and Family Services
- “Nurse” is defined as a registered professional nurse or licensed practical nurse who provides direct patient care

Limited Exceptions

- Mandatory overtime is permissible only where the overtime is during or due to:
 - A healthcare disaster that increases the need for healthcare personnel;
 - A federal, state, or county declaration of emergency;
 - An unforeseen emergency and it is necessary to provide safe patient care that could not be prudently planned for by the employer and does not regularly occur; or
 - 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.

Mandatory Overtime During An Emergency

- The employer should always make a good faith effort to have overtime covered on a voluntary basis rather than resort to the mandatory overtime provisions
 - “Good faith effort” includes:
 - Calling per diems
 - Agency nurses
 - Assigning floats
 - Requesting an additional day of work from off-duty employees

Reporting Procedure for Mandatory Overtime Use

- On June 28, 2023, the legislature amended Section 167 and created a reporting procedure for healthcare employers who utilize the exceptions to the limitations on mandatory overtime
- Any time an employer mandates overtime under an exception, they must send an email to the Department and include:
 - The facility name
 - The type of healthcare employer the facility operates as
 - The facility address
 - A facility contact person
 - The specific exception the facility is using
 - And any of the following if applicable
 - If they have mandated OT for more than 15 days within a month – include the dates of mandatory OT, number of employees mandated and the times they were mandated
 - If they have mandated OT for more than 45 days in three consecutive months, they must also provide the reason why and provide the date they intend to stop mandating OT

Complaints

- The Department will establish an enforcement officer to oversee investigations into any complaints of violations of this section
 - The Department of Labor has appointed Jeanette Lazelle, Deputy Commissioner for Worker Protection, as Enforcement Officer
- Upon receipt of a complaint, the enforcement officer may investigate in consultation with the Department of Health and notify the employer

Penalties

- If a violation is discovered, the commissioner will issue an order to the employer directing compliance with a copy to any employee who has filed a complaint and to his/her authorized representative
- The amendment establishes monetary penalties for violations found by the Department of Labor following investigation:
 - (i) \$1,000 for the first violation,
 - (ii) \$2,000 for a second violation if within 12 months, or
 - (iii) \$3,000 for a third or subsequent violation within 12 months
- The penalty is limited to \$500 where the Department assesses a violation for failure to report mandated overtime

Poster

- Every healthcare employer must display a poster available on the DOH website in a conspicuous location accessible to employees in the workplace



KNOW YOUR RIGHTS:

Your employer cannot require you to work beyond your regularly scheduled hours unless it is due to:

- A health care disaster that increases the need for health care personnel;
- A federal, state, or county declaration of emergency;
- An unforeseen emergency and it is necessary to provide safe patient care that could not be prudently planned for by the employer and does not regularly occur; or
- 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

YOUR EMPLOYER IS REQUIRED TO:

- Have an adequate Nurse Coverage Plan and utilize it to find coverage and avoid using mandatory overtime
- Make a good faith effort to have overtime covered
- Report instances of mandated overtime to the New York State Department of Labor (NYSDOL)
- Post or provide a copy of the Nurse Coverage Plan
- Display this poster in a clearly visible location accessible to employees

If you believe that your employer required you to work overtime in violation of the law, you can file a **Mandatory Overtime Complaint**. You may file a complaint online at dol.ny.gov/mandatory-overtime-nurses or you may call **888 4-NYS-DOL** or **518-457-9000** to obtain a hard copy. Hard copies can be sent by mail or faxed to the address shown at the top of the form.

A COMPLAINT MAY BE FILED BY:

- One nurse
- A group of nurses
- The recognized collective bargaining representative of the nurses at the facility

Your employer **cannot** retaliate against you for filing a complaint or speaking to NYSDOL.

For more information, visit dol.ny.gov/mandatory-overtime-nurses

WE ARE YOUR DOL
Department of Labor

Legal Challenges

- Complaints to State
- Arbitration
- Impact on Lawsuits

Public Health Law § 2805-t

- In June 2021, the New York State Legislature enacted Section 2805-t of the Public Health Law requiring all hospitals in the State to form and convene a clinical staffing committee that creates and implements clinical staffing plans for patient care units

Clinical Staffing Committee

- Each general hospital must have a clinical staffing committee comprised of:
 - At least one-half registered nurses, licensed practical nurses, and ancillary members of the frontline team currently providing or supporting direct patient care (e.g., patient care technicians, certified nursing assistants, other non-licensed staff assisting with nursing or clerical tasks, and unit clerks); and
 - Up to one-half of the members shall be selected by the general hospital administration and shall include (but not limited to) the:
 - Chief Financial Officer (CFO)
 - Chief Nursing Officer
 - Patient Care Unit Directors or Managers or Designees

Primary Responsibilities – Annual Clinical Staffing Plan

- One primary responsibility of the clinical staffing committee is to develop and oversee the implementation of an annual clinical staffing plan
- A clinical staffing plan includes specific staffing for each patient care unit and work shift and shall be based on the needs of patients. This includes:
 - Specific guidelines or ratios, matrices or grids indicating how many patients are assigned to each registered nurse;
 - The number of nurses and ancillary staff to be present on each unit and shift.
- The clinical staffing plan shall be used as the primary component of the general hospital staffing budget.

Nursing Quality Indicators

- The hospital must make information regarding nurse staffing and patient outcomes (as specified by the commissioner) available to the public
- The information shall include the following at a minimum:
 - The number of registered nurses providing direct care and the ratio of patients per registered nurse, full-time equivalent, providing direct care;
 - The number of licensed practice nurses providing direct care;
 - The number of unlicensed personnel utilized to provide direct patient care, including adjustment for case mix and acuity;
 - Incidence of adverse patient care;
 - Methods used for determining and adjusting staffing levels and patient care needs and the facility's compliance with these methods;
 - Data regarding complaints filed with any state or federal regulatory agency or an accrediting agency and data regarding investigations and findings as a result of those complaints, degree of compliance with acceptable standards, and the findings of scheduled inspection visits.

Compliance

- The staffing plan should comply with all federal and state laws and regulations
- It is not meant to diminish other standards contained in state or federal law and regulations or the terms of an applicable collective bargaining agreement (CBA)
- Semiannual review of the staffing plan against patient needs and known evidence-based staffing information, including the nursing sensitive quality indicators collected by the general hospital.

Implementing the Plan

- Each hospital must submit its adopted clinical staffing plan annually on July 1st
 - The plan must include the written explanation from the CEO and written proposals from the two parties regarding elements that the committee did not agree on;
 - The plan must include data, from at least the previous year, on the:
 - frequency and duration of variations from the adopted clinical staffing plan,
 - the number of complaints relating to the clinical staffing plan and their disposition,
 - descriptions of unresolved complaints.

Implementing the Plan (cont'd)

- The department shall post the plan on the website no later than 7/31, annually
- If the adopted plan is amended, the amended plan should be submitted to the department within 30 days of adoption
- The hospital must implement the clinical staffing plan annually, beginning January 1st
- Each hospital must post, in a publicly conspicuous area on each patient care unit, the clinical staffing plan for that unit, the actual daily staffing for that shift on that unit, and the relevant clinical staffing.

Complaints & Investigations

- The clinical staffing committee must develop a process to examine, respond to, and track data submitted with the clinical staffing plan
- The clinical staffing committee may by consensus determine that a complaint is resolved or dismissed
- A hospital shall not retaliate or engage in any form of intimidation for an employee's participation in a clinical staffing committee or for raising a concern/complaint
- The Department will also investigate potential violations and outstanding complaints

Violations & Penalties

- If the Department finds a violation, it shall require the hospital to submit a corrective plan of action within 45 days of the presentation of the Department's findings to the hospital
- The Department may impose a civil penalty which may also be posted on the Department's website

Staffing Challenges

- CBA provisions
- Arbitration activity
- Complaints under the CSP's
- Lawsuits alleging violation of standards

Avoiding Discrimination Claims in Hiring

- It is illegal for an employer to discriminate against a job applicant because of his/her age, race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information

Avoiding Discrimination Claims in Hiring

- Job Analysis (pre-advertisement)
 - Analyze duties, functions and competencies relevant to the position
 - Create objective, job-related qualification standards related to those duties
 - What are the “essential functions” of the position?
 - Identify what education or other experience will be required

Avoiding Discrimination Claims in Hiring

- Employment Application/Interview Issues
 - In general, information obtained and requested through the pre-employment process should be limited to what is essential for determining if a person is qualified for the position.
 - Employers are prohibited from making pre-offer inquiries about disability
 - Inquiries regarding other protected characteristics should be generally avoided unless there is a legitimate business need for the information.
 - Even if not prohibited, inquiries regarding protected characteristics may be used as evidence of an employer's intent to discriminate

Avoiding Discrimination Claims in Hiring

- Employment Application/Interview Issues
 - Questions to Avoid:
 - Questions about salary history
 - Questions about an applicant's place of birth or immigration status (although you can ask if an individual is eligible to work in the United States)
 - Questions about marital or family status, or childcare
 - Questions about disabilities or medications currently taken
 - Questions about family medical conditions

Avoiding Discrimination Claims in Hiring

- Employment Application/Interview Issues
 - EEOC recommended questions to avoid:
 - Questions about race, religion or ethnicity
 - Questions about age, unless used to verify that applicants meet age-related legal requirements
 - Questions about pregnancy or plans to start a family

[New York State Bar Association - Lay-Person's Guide to Interviews](#)

Avoiding Discrimination Claims in Hiring

- Candidate Evaluation
 - Utilize a Uniform Process
 - Application/Resume review
 - Structured Interview
 - Trained Interviewees
 - Careful Notes
 - Contemporaneous scoring/evaluation
 - Standardized form
 - Procedure for getting to an offer