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CLIENT ALERT

**DOL Issues Emergency Regulations and FAQ for
Law Prohibiting Mandatory Overtime by New York Nurses**

On July 1, 2009, legislation (N.Y. Lab. Law § 167) that prohibits health care institutions from requiring registered nurses and licensed practical nurses to work over their regularly scheduled work hours went into effect. (Please see our August 19, 2008 Client Alert available at: http://www.putneylaw.com/cu_081908.html; and June 23, 2009 Client Alert at: http://www.putneylaw.com/cu_062309b.html). The New York State Department of Labor (DOL) recently issued Emergency Regulations stipulating the limited conditions under which health care employers may mandate nurses to work overtime, and issued a Frequently Asked Questions (FAQ) document addressing specific requirements of the law.

You will recall that this legislation defines overtime not as hours worked above forty (40) in a given work week (as is the case for the Fair Labor Standards Act or the overtime pay provisions of New York law) but as hours worked above the “predetermined... regularly scheduled...hours a nurse has agreed to work.” Section 177.2(h) of the Emergency Regulations describes proper methods for calculating regularly scheduled work hours, and includes in the definition both pre-scheduled on-call time and time spent communicating shift reports. Significantly, if on-call time is not prescheduled, a nurse cannot be mandated to be on call to cover an open shift unless one of the narrow exceptions applies.

To ensure adequate staffing of health care facilities, each employer is required to institute a “Nurse Coverage Plan” (the “Plan”) that must be prepared by September 29, 2009. The Plan is formulated by considering typical patterns of absenteeism, patient load, and staffing methods that are alternatives to mandatory overtime. The Plan’s purpose is to more accurately determine the number of hours employers should schedule nurses to work in order to prevent situations that, in the past, would have required mandatory overtime. The Plan must be posted and/or made readily available to

employees as well as collective bargaining representatives and, upon request, to the Commissioner of Labor or his/her designee.

According to the DOL, there are four types of staffing emergencies that will trigger an exemption from the ban on mandatory overtime. These are (i) a health care disaster, (ii) a government declared state of emergency, (iii) a patient care emergency and (iv) an ongoing surgical/medical procedure in which the nurse is involved if the nurse's premature departure will endanger the patient's health and safety. A health care disaster is an unexpected event (natural or otherwise) that, as the employer reasonably determines, increases the level of required nursing care (e.g. events with multiple serious injuries, chemical spills/releases, illness outbreaks requiring mass hospitalization). A patient care emergency is an unforeseen situation, which could not have been prudently planned for, that requires the nurse's continued presence to ensure patient safety.

Even under situations that would generally entitle an employer to an exemption, the employer must first attempt to cover the increased staffing needs through volunteers or other implementation of the Plan, and must document these attempts.

Note that a health care employer cannot substitute employees' waivers of these protections for compliance; indeed, seeking a waiver constitutes a violation of the law.

Employees who believe that they have been unlawfully required to work overtime may file a "Mandatory Overtime Complaint" form. Complaints may be filed by individual nurses, groups of nurses, or their collective bargaining representative, though a separate complaint form must be filed for each individual. The DOL's Division of Labor Standards will conduct an investigation in response to a complaint during which it will contact the health care employer. If the claim is determined to be valid, the DOL will send a violation notice to the employer asking it to "cease and desist from the use of mandatory overtime." A violation of N.Y. Labor Law § 167 subjects employers to fines and may be prosecuted as a misdemeanor.

Links to the DOL Emergency Regulations and FAQ may be found at: http://www.labor.state.ny.us/workerprotection/laborstandards/workers_rights/Mandatory_OT_home.shtm. If you should have any questions regarding these regulations specifically or N.Y Lab Law § 167 in general, please contact us.

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