

New Overtime Regulations for Health Care Facilities

On February 17, 2004, the new regulations governing the mandatory employee overtime restrictions imposed upon health care facilities pursuant to the New Jersey Wage and Hour Law became effective.¹ These regulations, discussed below with a review of the statute, set forth the specific rules that health care facilities must follow in order to maintain compliance, including the implementation of written policies and recordkeeping requirements.

On January 2, 2002, the legislature amended the Wage and Hour Law to prohibit health care facilities from requiring most kinds of hourly employees to work more than 40 hours per week, except under certain circumstances.² These amendments became effective on January 2, 2003 for acute care hospitals and on June 2, 2003 for all other health care facilities.

Previously, health care facilities could require their hourly employees to work overtime, and the employees' refusal to do so could be legitimate grounds for disciplinary action, up to and including discharge. Now, as amended, the statute expressly provides that this is against public policy, and the facility is prohibited from discriminating against, discharging, or taking any other adverse employment action against an employee who refuses to work overtime unless the criteria of the statute and regulations are met.

Under the statute as amended, a health care facility generally cannot require an hourly employee who is involved in direct patient care or clinical services to

work beyond a predetermined and regularly scheduled daily work shift of no more than 40 hours per week, unless there are "unforeseeable emergent circumstances" and overtime is required as a "last resort." A qualifying unforeseeable emergent circumstance is "an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery that requires immediate action," which does not include a need to fill a shift vacancy resulting from chronic short staffing.

Further, before overtime can be required as a "last resort," the facility must first "exhaust all reasonable efforts" to obtain staffing. The facility must first offer the overtime to qualified employees who have volunteered for extra work, even if they are not on site at the time overtime is needed. The facility must also seek the use of qualified per diem staff and qualified staff from a temporary agency to the extent permitted by law. Only after these efforts have been exhausted and are unsuccessful may the facility require an employee to work overtime, assuming that the criterion of an unforeseeable emergent circumstance is satisfied. Then the facility must allow the employee who is being required to work overtime with necessary time, up to a maximum of one hour, to make arrangements for the care of minor children or elderly or disabled family members.

However, actually having an unforeseeable emergent circumstance and exhausting all reasonable efforts are not sufficient. The facility must have in place, and

distribute to employees, a written policy explaining when overtime can be required, overtime procedures, employee rights, and complaint procedures. The facility must also have a staffing plan in place to provide for replacement staff when positions are vacant and when employees are sick, on vacation, or otherwise absent.

Additionally, the facility must maintain records documenting each occasion when an employee was required to work overtime, and must provide the employee who worked the mandatory overtime with a copy of the records for that particular occasion. These records must include the employee's name, job title, and work unit; the date, start time, and number of overtime hours; the employee's daily work schedule for that week; the reason why the overtime was necessary; a description of all efforts that were exhausted; and the signature of the individual who authorized the overtime. These policies, staffing plan, and documentation records must be maintained for at least 2 years.

Finally, the facility must display, in a conspicuous place, the poster entitled "New Jersey Mandatory Overtime Restrictions for Health Care Facilities," which can be obtained from Department of Labor's Office of Constituent Relations at P.O. Box 110, Trenton, New Jersey, 08625-0110.

There are some situations in which the mandatory overtime restrictions do not apply. They do not apply to physicians or to employees who are not involved in direct patient care or clinical services. They do not apply to employees who volunteer to work overtime. They do not apply to employees who assume on-call duty, as long as on-call time is not used as a substitute for mandatory overtime. They do not impair overtime provisions contained in collective bargaining agreements or other employment contracts that were already in effect on the effective dates of the amendments, but mandatory overtime restrictions in contracts entered into after the statute became effective are void. They do not apply when the employee is participating in a procedure in progress and the patient's health would be detrimentally affected if the employee left (but

they do apply if the procedure is only elective and would not ordinarily end until after the employee's shift is over). They do not apply to employees of assisted living facilities who reside in the facilities full-time and who are provided with room and board as a benefit of employment. They do not apply in the event of any declared federal, state, or municipal emergency, disaster, or other catastrophic event which substantially affects or increases the need for health care services. However, under the recordkeeping requirement, the facility must still maintain documentation of the reason why it believes mandatory overtime restrictions would not apply on a particular occasion.

The mandatory overtime restrictions under the Wage and Hour Law will be enforced by the Departments of Labor and Law & Public Safety. Employee complaints of violations must be made within two years to the Department of Labor. Violations of the mandatory overtime restrictions, including policy and recordkeeping requirements, can result in administrative penalties of up to \$500 per violation, criminal fines of up to \$1,000 per violation, and imprisonment for up to 100 days per violation. ❖

1 N.J.A.C. §§ 8:43E-3.4 and 8:43E-8.1 to -8.12.

2 N.J.S.A. §§ 34:11-56a31 to -56a38.

Peckar & Abramson Bulletin Winter 2004

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