

## [ Alerts and Updates ]

### **Pennsylvania Passes Prohibition of Excessive Overtime in Health Care Act**

**April 16, 2009**

On July 9, 2009, Pennsylvania's new legislation prohibiting so-called mandatory overtime in certain healthcare workplaces will become effective. The Prohibition of Excessive Overtime in Health Care Act, known as Act 102 of 2008, limits overtime work for certain employees of covered healthcare facilities. A covered healthcare facility is defined to include all profit and non-profit hospitals, hospices, ambulatory surgical facilities, long-term care nursing facilities, certain cancer treatment centers, and inpatient drug and alcohol treatment facilities. Covered healthcare facilities do not include an office used primarily for private or group practice by a healthcare practitioner.

Under Act 102 of 2008, all covered healthcare facilities "may not require an employee to work in excess of an agreed to, predetermined and regularly scheduled daily work shift." The Act does not apply to all employees of a healthcare facility, but only to employees who receive an hourly wage or are classified as non-supervisory for collective bargaining purposes and who are involved in direct patient care activities or clinical care services. The following job classifications are specifically excluded from the Act's protections: physician; physician assistant; dentist; or worker involved in environmental services, clerical, maintenance, food service or any other job not involved in direct patient care and clinical care services. Although the Act does not define covered job occupations, these occupations are likely to include nurses, technicians, technologists, certified nursing assistants and phlebotomists.

The Act does not otherwise explicitly impose on healthcare facilities a duty to agree in writing with its employee on a "predetermined and regularly scheduled daily work shift," but it indicates that there must at least be an oral agreement. Furthermore, even if not required, covered healthcare facilities may want to have a written agreement, created at the commencement of the employment relationship, setting forth the agreed "regularly scheduled daily work shift" to potentially avoid a dispute with the employee regarding his or her daily work shift.

As indicated, the Act prohibits an employer from requiring an employee "to work in excess of an agreed to, predetermined and regularly scheduled daily work shift." It does not set forth a maximum number of hours above which an employee may not work in a day. To the contrary, the Act states that it shall not be construed to "prevent an employee from working an agreed to, predetermined and regularly scheduled daily work shift that is greater than eight hours."

An employer is forbidden from taking adverse employment actions against an employee who refuses to "accept work in excess of the limitations" set forth in the Act. Accordingly, employees may not be punished for refusing to work beyond their regular daily shift.

The Act contains three exceptions. The first exception states that employees may be required to work hours beyond their regularly scheduled daily work shift if there is an unforeseeable "emergent circumstance" and (1) the assignment of additional hours is used as a last resort; (2) the healthcare facility has exhausted all required "reasonable efforts" to obtain other staffing; and (3) the healthcare facility provides up to one hour to arrange for the care of the employee's minor child or elderly or disabled family member. An "emergent circumstance" is defined to be: (1) an unforeseeable declared national, state or municipal emergency; (2) a highly unusual or extraordinary event which is unpredictable or unavoidable and which substantially affects the provision of needed health care services, such as acts of terrorism, natural disasters or a widespread disease outbreak; or (3) unexpected absences, discovered at or before the commencement of a scheduled shift, which could not be prudently planned for by an employer, and which would significantly affect patient safety.

The second exception arises when an employee is required to work overtime to complete a patient care procedure already in progress if the absence of the employee could have an adverse effect on the patient. Under these circumstances, therefore, an employee could be required to remain at work beyond the "regularly scheduled daily work shift."

Finally, the Act's prohibition does not cover "on-call" time as defined by the Act; however, on-call time may not be used as a substitute for mandatory overtime or as a means of circumventing the intent of the legislation.

Under the Act, a covered employee who works more than 12 consecutive hours is entitled to a minimum of 10 consecutive hours of off-duty time immediately after the worked "overtime."

The Pennsylvania Department of Labor and Industry may fine a healthcare facility that violates the Act, or any regulation issued under the Act, between \$100 to \$1,000 for each violation. The department may also order a healthcare facility to take an action that it deems necessary to correct a violation of the Act.

### **For Further Information**

If you have any questions about this Alert or would like more information, please contact any member of the Employment & Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.