

## [ By-Lined Article ]

### Suggestions for Health Care Facilities to Limit Legal Risks Under Act 102

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*Author's note: This article should not be construed as legal advice or as pertaining to any specific factual situations. Health care facilities are encouraged to consult with their legal counsel on Act 102 compliance.*

It's 2:30 p.m. — 30 minutes before the first shift finishes up for the day — and suddenly there is an unexpected influx of patients into the emergency room. The nurse manager reviews her staffing for the second shift and realizes she is going to be short-staffed. Can she require one of her RNs to stay?

The answer since July 1 is probably no. That's when Pennsylvania's new law prohibiting mandatory overtime for health care workers took effect. Under the new law, covered health care facilities are prohibited from requiring covered employees to work in excess of their agreed to, predetermined and regularly scheduled daily work shift, except as permitted by the act.

While we are still awaiting regulations from the Pennsylvania Department of Labor and Industry, employees have been asking about the new law. If they were not aware of it before, they are being educated by organized labor. The Service Employees International Union has published an eight-page guide to the act.

Health care facilities that are covered under the act need to act quickly to come into compliance. Nonunionized facilities may face organizing campaigns based at least in part on the act, and the employee relations repercussions are significant in all facilities. Not to mention there are significant monetary penalties for noncompliance — up to \$1,000 per violation.

So what should health care facilities be doing to come into compliance? The following are a few suggestions.

#### Determine whether your organization must comply

The act applies to health care facilities that provide clinically related health services (whether public or private and whether nonprofit or for-profit). The list of such entities in the act is lengthy and includes not only hospitals but also hospices, ambulatory surgical facilities, long-term care facilities, certain cancer treatment centers, inpatient drug and alcohol treatment facilities and facilities run by certain agencies of the commonwealth of Pennsylvania.

The act contains three specific exclusions, two of which are religious in nature. The third exclusion is for offices used primarily for private or group practice by a health care practitioner. While this exclusion is written broadly, it is not clear whether an otherwise exempt private or group practice would lose its exemption if it is governed under a hospital's license, although the practice itself may be established as a separate entity. Private or group practices in this situation should consider this issue in conjunction with their legal counsel.

## Develop a policy

For covered health care facilities, serious consideration should be given to the development of a comprehensive human resources policy addressed to Act 102 compliance. Such a policy gives health care facilities an opportunity to communicate clearly both to covered employees and to the supervisors who manage them what the expectations are with respect to Act 102 and to describe the protocols that have been established to ensure compliance. While every policy will differ, the following are some issues to consider when drafting an Act 102 policy:

- What will the policy be called? While the act's title prohibits "excessive overtime," the word "overtime" is generally used to refer to pay at a higher rate — one-and-a-half times a non-exempt employee's regular rate — for working more than 40 hours in a work week. The act does not address an employee's rate of pay for working more than his or her agreed to, predetermined and regularly scheduled daily work shift, but using the word "overtime" in the policy may suggest that it does, particularly if the policy does not clarify this issue.
- Which departments and employees within those department are covered by the policy? The act covers employees involved in direct patient care activities or clinical care services, which are defined as diagnostic, treatment or rehabilitative services, which means that certain departments probably will not have any covered employees — *e.g.*, food service, maintenance, clerical, etc. Among the employees who are involved in direct patient care or clinical care services, the act covers only those who are paid on an hourly basis or are defined as non-supervisory for collective bargaining purposes. Employees who are both salaried and are supervisory for collective bargaining purposes are not covered. Whether an employee is considered supervisory for collective bargaining purposes is different than whether an employee is exempt for wage and hour purposes, and for some positions like nurse managers and head nurses this requires significant analysis. Facilities should consult with their legal counsel to determine which direct patient care and clinical care services employees are and are not covered by the act. The act also specifically excludes physicians and physician assistants; it does not exclude nurse practitioners.
- When can covered employees be required to work additional hours? The act permits health care facilities to require covered employees to work in excess of their agreed to, predetermined and regularly scheduled daily work shift when it is necessary to complete a patient care procedure already in progress if the employee's absence could have an adverse effect on the patient. The act also permits additional work time to be mandated in the event of unforeseeable emergent circumstances so long as certain prerequisites have been satisfied. Unforeseeable emergent circumstances are narrowly defined and include only: an unforeseeable declared national, state or local emergency; a highly unusual or extraordinary event that is unpredictable or unavoidable and which substantially affects the provision of or increases the need for health care services (*e.g.*, terrorist acts, national disasters and pandemics); and unexpected absences, discovered at or before the start of a scheduled shift, which could not prudently be planned for by an employer and which would significantly affect patient safety. It is important to note that unforeseeable emergent circumstances do not include short-staffing due to routine call outs that can be planned for, and they also do not include a high patient census or unusually high patient demands; facilities are expected to keep these possibilities in mind when staffing their covered employees.
- What procedures must supervisors follow before requiring a covered employee to work additional hours? Before additional work time may be mandated for unforeseeable emergent circumstances, the mandated employee must be given at least one hour to arrange for care for a minor child or an elderly or disabled family member. In addition, the added work time can be mandated only as a last resort and after reasonable efforts have been made to obtain other staffing. According to the act, such reasonable efforts are attempts by a facility to: seek volunteers from among those who are working at the time of the unforeseeable emergent circumstance; contact all qualified staff who have made themselves available to work extra time; seek the use of per diem staff; and seek the use of temporary agency personnel (if permitted by law). When

developing the policy, the facility should work with each department's supervisors to determine what reasonable efforts will be expected and how compliance will be accomplished. It may be necessary, for example, to create rosters of staff who can be called upon to work additional hours during certain shifts and on certain days, as needed. The act does not prohibit employees from volunteering to work in excess of their regularly scheduled shift, but such decisions must be truly voluntary.

- What should an employee do if he or she believes there has been a violation of the policy? All policies should clearly state that covered employees may not be required to work additional hours in violation of the policy, should contain a procedure for employees to follow to complain about policy violations, should make clear that employees who violate the policy will be subject to discipline and should prohibit retaliation against any employee who complains about a policy violation or who participates in the facility's investigation into such a complaint.

## Develop documentation

To ensure that their policies are being followed and to protect themselves in the event of claims, facilities may wish to create a form that must be completed when covered employees work hours in excess of their agreed to, predetermined and regularly scheduled daily work shift.

Whether this form is completed only when extra work hours are mandated or whether it is also completed when the extra hours are worked voluntarily is something the facility will want to decide in consultation with its legal counsel.

There is no special format that the form must take. Ideally, the form would include a section for the supervisor to complete and another section for the employee to complete.

In the supervisor section, the supervisor would address why the additional hours were worked and, if the additional hours were mandated because of unforeseeable emergent circumstances, what reasonable efforts were made to find others who could work instead.

In the employee section, the employee would certify the additional hours that were worked. If the additional hours were mandated because of unforeseeable emergent circumstances, the employee might be asked to acknowledge that he or she had been given an hour to arrange for childcare/eldercare or that he or she had waived this right. If the extra hours (whether voluntary or involuntary) caused an employee to work more than 12 consecutive hours, then the employee might be asked whether he or she wished to waive his or her right to have the following 10 hours off, since such off-duty time is required by the act, unless it is waived.

Such documentation will also allow the facility to perform routine audits against their timekeeping records to ensure that all excess hours worked by covered staff are accounted for.

## Train employees regarding compliance

Supervisors must be educated regarding their employer's Act 102 policy and what the health care facility expects of them with respect to the policy. They also must be educated regarding the process for mandating additional work time under the health care facility's policy and completion of required paperwork.

Training covered employees regarding the health care facility's Act 102 policy gives the health care facility an opportunity to convey its commitment to compliance with the act. It also allows the health care facility to educate covered employees regarding what prerequisites must be satisfied before additional work time can be mandated and the paperwork that must be completed when a covered employee works in excess of his or her agreed to, predetermined and regularly scheduled work shift.

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