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Considerations for Health Care Employers Operating in Pennsylvania

By Marvin L. Weinberg

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Introduction

Companies engaged in the health care industry – whether they provide direct patient care, develop information technology or research new drugs or medical devices, among a range of other services – are subject to complex regulatory and business risks. In addition, there are a number of employment law concerns specific to employers in the health care industry. Staving off the risks associated with these concerns can help prevent disputes and costly litigation.



Fox Rothschild's Labor & Employment Department has prepared this guide to serve as a resource for health care employers in Pennsylvania. This guide outlines some of the common employment issues faced by companies that provide health care-related services.

Background Checks

In Pennsylvania, health care facilities that provide services to children or elderly individuals must request criminal background checks from prospective job applicants. The Older Adults Protective Services Act requires criminal history records for all individuals applying for direct care positions or positions that provide unsupervised access to living quarters in long-term nursing facilities, personal care homes or older adult daily living centers. The Child Protective Services Law now requires criminal and child abuse history checks for all individuals applying for jobs that involve a "significant likelihood of regular contact with young children," including hospital personnel and mental health professionals.

Mandatory Overtime

Pennsylvania law now prohibits mandatory overtime for some hourly employees at health care facilities. Since July 1, 2009, health care facilities, including public and private hospitals, rehabilitation centers, nursing homes, cancer treatment centers and inpatient drug and alcohol facilities, cannot force employees working directly in patient or clinical care to work beyond a regularly scheduled shift.



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Employees can still, however, *voluntarily agree* to work overtime. Mandatory overtime is permitted only in the event of an unforeseeable national, state or municipal emergency or a highly unpredictable and unusual event, such as an act of terrorism or a natural disaster. Notably, there are no overtime restrictions on physicians, physician assistants, dentists or employees in environmental, clerical, maintenance or food services positions.

Personnel Files

Pennsylvania law grants employees the right to inspect, but not remove, certain records in their personnel files. That said, employers may regulate these inspections. For example, an employer can require that a records inspection take place during regular business hours, during an employee's free time and in the presence of the employer's agent. Additionally, an employer can limit an employee to one inspection per calendar year. Finally, an employer can demand that an employee submit a written inspection request and provide his or her reason for examining the records.



National Labor Relations Act § 8(g) and Non-Solicitation

A labor organization violates the National Labor Relations Act if it strikes, pickets or engages in other concerted refusals to work at a health care institution without providing the institution 10 days written notice of its intentions. It is unclear whether an organization must strike or picket on the exact day it indicates in its notice of intent. Some courts provide unions with a 72 hour window to commence their concerted activity. Recently, however, courts have begun to reject this extension and require organizations to submit a new 10-day notice if they intend to delay their activities.

A health care institution may prohibit its employees from conducting union activities in areas of its facility in which such activity would adversely affect patient care. For example, employees can generally be prohibited from engaging in union activities in operating rooms and patient care lounges. Conversely, employees may engage in union activities in or around the cafeteria or gift



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shop – unless the facility can demonstrate that the unionized activity is somehow disruptive to patient care. Employers that have a valid no-solicitation, no-distribution policy may also limit employee solicitation during non-working time.

Where reasonable, alternative means of communication exist, a health care institution may prohibit non-employee union organizers from soliciting on its property. However, if a health care facility adopts a no-solicitation policy, the policy must apply to all non-employee groups and it must be enforced in a nondiscriminatory manner. For example, a health care institution may not ban solicitation by union organizers in its lobby or parking lot but permit solicitation by a charitable organization in those same areas.



Employment-at-Will

In Pennsylvania, it is generally difficult to rebut the employment-at-will presumption. Contracts that explicitly limit employment to a definite term and/or expressly state that an employee can be fired only for just cause are Pennsylvania's only steadfast exceptions to the at-will doctrine. Pennsylvania sometimes recognizes an exception where an employee is discharged for reasons contrary to public policy expressed in state or federal statutes, constitutions, case law or regulations. For example, an employee cannot be fired for doing something that the law requires (i.e., refusing to commit an illegal act or reporting for jury duty) or specifically permits (i.e., filing a workers' compensation claim).

For more information, please contact:

Marvin L. Weinberg 215.299.2836 mweinberg@foxrothschild.com

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