Pennsylvania Issues Regulations Under Excessive Overtime in Health Care Act

By Ruth E. Granfors and Amy L. Groff

On July 19, 2014, the Pennsylvania Department of Labor and Industry published new regulations to implement certain provisions of the Prohibition of Excessive Overtime in Health Care Act, 43 P.S. §§ 932.1 to 932.6 (the "Act").1 The Act restricts most health care facilities from requiring covered employees to work more than their regular shifts except in very limited circumstances. The regulations, which took effect immediately, implement and clarify provisions relating to employee complaints, employer recordkeeping, investigations, and penalties under the Act.

Overview of the Act's Requirements

By way of background, the Act has been in effect since July 2009, and applies to health care facilities that provide clinically related health services. Covered employees, subject to the Act's protections, are those who provide direct patient care or clinical care services and who receive hourly wages or are classified as nonsupervisory employees for collective bargaining purposes. Such individuals who are employed through a personnel agency that contracts with a health care facility are also subject to the Act's protections. Physicians, physician assistants, dentists, and workers involved in non-clinical services, such as clerical, environmental, maintenance, or food service, are specifically excluded from the definition of employees protected under the Act.

The Act prohibits employers from requiring covered employees to work more than an agreed to, predetermined, and regularly scheduled daily shift. Employers can mandate additional hours for unforeseeable emergent circumstances, but must make reasonable efforts to obtain other staffing before doing so, and they can mandate additional hours to complete a patient care procedure already in progress if the employee's absence could have an adverse effect on the patient. If an employee is mandated to work more than 12 consecutive hours under these circumstances, or if an employee volunteers to work more than 12 consecutive hours for any reason, he or she is entitled to at least 10 consecutive hours of time off immediately following that work. The employee may voluntarily waive this entitlement to time off, but cannot be disciplined for insisting upon it. The Act prohibits retaliation against employees for refusing to work in excess of its limitations, and it provides for the Department of Labor and Industry (the "Department") to hold hearings, issue administrative fines, and order corrective action relating to its provisions. The Department's Bureau of Labor Law Compliance (the "Bureau") enforces the Act and has been doing so for five years without administrative regulations that were specifically tailored to the Act.

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1 The regulations are published at 44 Pa. B. 4483 (July 19, 2014).
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New Regulations to the Act

The regulations provide additional details and guidance relating to enforcement of the Act, including provisions relating to complaints, employer recordkeeping, investigative procedures, and assessment of penalties. See 34 Pa. Code §§ 225.1 to 225.10. Specifically, the regulations allow employees to file complaints with the Bureau within 60 days of the alleged violation and require that the written, signed complaints contain certain basic information. The Bureau must begin an investigation within 60 days of its receipt of the complaint. After completion of the investigation, the Bureau must provide written notice to the complainant and the employer. The regulations also impose recordkeeping requirements under which employers must keep records of circumstances in which employees were required to work more than their predetermined, regularly scheduled shifts or more than 40 hours in a week, and must maintain those records for at least three years.

If a violation of the Act is found, fines can range from $100 to $1,000 per violation. The regulations set forth the following factors to be used in determining the amount to assess: (1) size of the business, (2) history of previous violations, (3) remedial efforts to prevent future violations, (4) degree of cooperation from the employer during the investigation, and (5) length of the mandated overtime and other factors concerning the severity of the violation. The regulations allow employers to request a reduction in the amount of the fine, and they establish the manner and 10-day time period in which that request must be made. In addition to these fines, the Department may order payment of restitution to employees (if an employer takes adverse employment action in retaliation against an employee) and directives for compliance, including changes to policies and procedures and steps to remedy any retaliatory employment action.

If an employer contests an administrative decision and would like a hearing, it may request a hearing within 30 days of the mailing date of the decision. The regulations set forth the procedures for hearings and refer, in large part, to Pennsylvania’s General Rules of Administrative Practice and Procedure. Hearings are subject to de novo review, and the Bureau bears the burden of proving its case (both the violation and the appropriateness of the proposed penalty) by a preponderance of the evidence. The regulations also set forth procedures for interested parties, such as unions, trade associations, patients, other employees, or competitors, to seek intervention. Finally, an aggrieved party or intervenor may appeal to Commonwealth Court pursuant to the standard provisions for direct appeals from government agencies.

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