



Memo:

TO: Executive Board Representatives
Council Leaders
Statewide Labor Management Chairs
Stewards [Covered Agencies]

FROM: Ken Brynien, President

DATE: June 25, 2009

RE: Mandatory Overtime Restrictions For Nurses

On July 1, 2009, the law prohibiting mandatory overtime for nurses takes effect. The N.Y.S. Department of Labor is the agency charged with enforcing this law. We have been advised that the Department of Labor intends to issue regulations that provide additional guidance on the statute as well as establish a process and form for filing complaints of violations. DOL expects this information to be available on its website, www.labor.state.ny.us, on July 1, 2009. Once available, links will also be provided from www.PEF.org. We also anticipate that the Governor's Office of Employee Relations will provide guidance on how the law is to be implemented in the covered agencies consistent with the provisions of the Collective Bargaining Agreements.

Once the DOL complaint/violation process is up and running, PEF Leaders and staff may be asked to assist nurses in preparing complaints documenting the circumstances under which they were mandated to work overtime. Not all mandates will violate the statute, and you and the nurse should review the circumstances against the materials we have provided to determine if you believe the mandate violated the law. (To assist this evaluation, we have attached copies of material on the Mandatory OT law that we have distributed previously).

In those cases where you and/or the nurse believe that a violation occurred, the nurse may file a complaint directly with DOL, or could send the complaint to PEF for us to file in conjunction with other complaints. It is important that you encourage nurses to share with PEF any complaints they have filed with DOL. This will give us the opportunity to monitor agency compliance with the law.

Once complete, the complaint form should be transmitted to:

Nancy Wolff
PEF Nurse Organizer
1168-70 Troy-Schenectady Road
PO Box 12414

Albany, NY 12212-2414

If you send the complaint form to Ms. Wolff by fax, you should thereafter mail her the original. The fax number is (518) 785-1814. Any questions may be directed to Ms. Wolff at 1-800-342-4306 ext 227.

PEF will file these complaints with DOL, and DOL will then begin its investigatory process. If any nurse has questions regarding the status of her/his individual complaint, the nurse may contact DOL directly.

Again, in the event a nurse files a complaint directly with DOL, we would ask that a copy of the complaint be sent to Ms. Wolff.

As additional information becomes available, we will post it on the PEF website.

Attachments

cc: PEF Nurses Committee
Field Directors
Field Representatives
Contract Administration
Office of General Counsel

LABOR LAW §167 – RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

No HEALTH CARE EMPLOYER shall require a NURSE to work more than that Nurse's regularly scheduled work hours.

PEF Office of General Counsel - November 2008

U1804-11/08

Mandatory overtime is prohibited, however a Nurse *may* be required to work overtime in four limited circumstances:

(1) a **Health Care Disaster** that unexpectedly increases the need for health care personnel,

OR

(2) a Federal, State, or County **Declaration of Emergency** in the county in which the Nurse is employed or in a contiguous county,

OR

(3) an **ongoing medical or surgical procedure** in which Nurse is actively engaged and whose presence is needed to ensure the health and safety of the patient,

OR

(4) a **Health Care Employer** determines there is an emergency, necessary to provide safe patient care.

Health Care Employer:
1) Both public and private employers who provide health care services in a facility licensed or operated under Article 28 of the *Public Health Law*,
2) Public employers that provide health care services operated or licensed under *Mental Hygiene Law*, the *Education Law* or the *Correction Law*.

Nurse includes RNs and LPNs who provide direct patient care.

"Regularly scheduled work hours," including pre-scheduled on-call time and time spent for the purpose of communicating shift reports regarding patient status necessary to ensure patient safety, **shall mean those hours a Nurse has agreed to work and is normally scheduled to work.** Must be consistent with the collective bargaining agreement. An employer may not use on-call time as a substitute for mandatory overtime.

Does **not** restrict a Nurse's ability to work voluntary overtime.

Section 167 is a remedial measure intended to protect the public health and the quality of patient care and does not waive or diminish the rights of any Nurse pursuant to any other law, regulation, or collective bargaining agreement.

Nurses' refusal of overtime work

Education Law §6510-e has been amended to provide that a Nurse's refusal to work beyond the Nurse's regularly scheduled hours shall not solely constitute patient abandonment or neglect except under the four exceptions to mandatory overtime listed in Section 167.



Before requiring on-duty employee to remain, the Health Care Employer must make a good faith effort that overtime is voluntary, including, but not limited to, and to the extent such options exist:

- calling per diems,
- agency nurses,
- assigning floats,
- requesting an additional day of work from off-duty employees.

Emergency, including an unanticipated staffing emergency, is an unforeseen event that could not be prudently planned for by employer and does not regularly occur.

STATE OF NEW YORK

S. 8637

A. 11711

SENATE - ASSEMBLY

June 19, 2008

IN SENATE -- Introduced by Sens. MORAHAN, HANNON, ROBACH, BRUNO, ALESI, BONACIC, DeFRANCISCO, FLANAGAN, FUSCHILLO, GOLDEN, LANZA, LAVALLE, LEIBELL, LIBOUS, MARCELLINO, MAZIARZ, NOZZOLIO, SEWARD, SKELOS, TRUNZO -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- (at request of M. of A. Gunther, Silver, John, Nolan, Clark, Colton, Eddington, Wright, Boyland, Ortiz, Fields, Towns, Ramos, Hoyt, Gabryszak, Greene, Christensen, Dinowitz, Weisenberg, Scarborough, Hooper, Jeffries, Pheffer, Stirpe, Gottfried, Peoples, Jaffee, Titus, Perry, Englebright, Schroeder, K. Zebrowski, Brook-Krasny, Powell, Young, Alfano, Barra, Brennan, Destito, L. Diaz, Duprey, Errigo, Giglio, Heastie, Jacobs, Koon, Lifton, Lupardo, Maisel, Mayersohn, McDonough, Miller, Millman, Peralta, Rabbitt, Reilly, J. Rivera, Rosenthal, Saladino, Spano, Sweeney, Walker, Weinstein) -- read once and referred to the Committee on Labor

AN ACT to amend the labor law and the education law, in relation to limiting consecutive hours of work by nurses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The labor law is amended by adding a new section 167 to
2 read as follows:
3 § 167. Restrictions on consecutive hours of work for nurses. 1. When
4 used in this section:
5 a. "Health care employer" shall mean any individual, partnership,
6 association, corporation, limited liability company or any person or
7 group of persons acting directly or indirectly on behalf of or in the
8 interest of the employer, which provides health care services (i) in a
9 facility licensed or operated pursuant to article twenty-eight of the
10 public health law, including any facility operated by the state, a poli-
11 tical subdivision or a public corporation as defined by section sixty-
12 six of the general construction law, or (ii) in a facility operated by
13 the state, a political subdivision or a public corporation as defined by
14 section sixty-six of the general construction law, operated or licensed

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD17337-01-8

S. 8637

2

A. 11711

1 pursuant to the mental hygiene law, the education law or the correction
2 law.

3 b. "Nurse" shall mean a registered professional nurse or a licensed
4 practical nurse as defined by article one hundred thirty-nine of the
5 education law who provides direct patient care.

6 c. "Regularly scheduled work hours", including pre-scheduled on-call
7 time and the time spent for the purpose of communicating shift reports
8 regarding patient status necessary to ensure patient safety, shall mean
9 those hours a nurse has agreed to work and is normally scheduled to work
10 pursuant to the budgeted hours allocated to the nurse's position by the
11 health care employer; and if no such allocation system exists, some
12 other measure generally used by the health care employer to determine
13 when an employee is minimally supposed to work, consistent with the
14 collective bargaining agreement, if any. Nothing in this section shall
15 be construed to permit an employer to use on-call time as a substitute
16 for mandatory overtime.

17 2. a. Notwithstanding any other provision of law no health care
18 employer shall require a nurse to work more than that nurse's regularly
19 scheduled work hours, except pursuant to subdivision three of this
20 section.

21 b. Nothing in this section shall prohibit a nurse from voluntarily
22 working overtime.

23 3. The limitations provided for in this section shall not apply in the
24 case of:

25 a. a health care disaster, such as a natural or other type of disaster
26 that increases the need for health care personnel, unexpectedly affect-
27 ing the county in which the nurse is employed or in a contiguous county;

28 or

29 b. a federal, state or county declaration of emergency in effect in
30 the county in which the nurse is employed or in a contiguous county; or

31 c. where a health care employer determines there is an emergency,
32 necessary to provide safe patient care, in which case the health care
33 provider shall, before requiring an on-duty employee to remain, make a
34 good faith effort to have overtime covered on a voluntary basis, includ-
35 ing, but not limited to, calling per diems, agency nurses, assigning
36 floats, or requesting an additional day of work from off-duty employees,
37 to the extent such staffing options exist. For the purposes of this
38 paragraph, "emergency", including an unanticipated staffing emergency,
39 is defined as an unforeseen event that could not be prudently planned
40 for by an employer and does not regularly occur; or

41 d. an ongoing medical or surgical procedure in which the nurse is
42 actively engaged and whose continued presence through the completion of
43 the procedure is needed to ensure the health and safety of the patient.

44 4. The provisions of this section are intended as a remedial measure
45 to protect the public health and the quality of patient care, and shall
46 not be construed to diminish or waive any rights of any nurse pursuant
47 to any other law, regulation, or collective bargaining agreement.

48 § 2. The education law is amended by adding a new section 6510-e to
49 read as follows:

50 § 6510-e. Nurses' refusal of overtime work. The refusal of a licensed
51 practical nurse or a registered professional nurse to work beyond said
52 nurse's regularly scheduled hours of work shall not solely constitute
53 patient abandonment or neglect except under the circumstances provided
54 for under subdivision three of section one hundred sixty-seven of the
55 labor law.

56 § 3. This act shall take effect July 1, 2009.



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

October 28, 2008

Mr. Shaun Flynn
Director, Governmental Affairs
New York State Nurses Association
11 Cornell Road
Latham, New York 12110-1499

Re: Request for Opinion
Nurses' Overtime (Labor Law §167)
RO-08-0128

Dear Mr. Flynn:

This letter is written in response to yours of October 7, 2008 in which you ask for an interpretation of Labor Law §167(3)(c). You state that an employer of which you are aware "informed employees that when a nurse calls in, this qualifies as an 'unanticipated staffing emergency' and so mandatory overtime is allowable." Please be advised that this Department does not agree with this employer's interpretation of law.

Labor Law §167(3)(c) states that the general prohibition against mandatory overtime for nurses does not apply to cases in which "a health care employer determines that there is an emergency, necessary to provide safe patient care." This statute defines the term "emergency" as "an unforeseen event that could not be prudently planned for by an employer and does not regularly occur." In the event of such an emergency, the employer may mandate overtime, but only after making "a good faith effort to have overtime covered on a voluntary basis, including but not limited to calling per diems, agency nurses, assigned floats, or requesting an additional day of work from off-duty employees."

The Department of Labor agrees with your assertion that certain events may be foreseen, regularly occur and can be prudently planned for, and therefore do not qualify as emergencies, to wit: regular/routine sick calls, vacation, breaks during shifts, holidays, bereavement and leaves of absence. Although many of these events may not regularly occur to individuals, they do to a nursing staff as a whole. For example, while it is not possible to predict that an individual nurse will take sick leave on a particular day, it is possible to estimate the total number of sick days that will be taken by all nurses on a staff over the course of a week, month or year. This total number of sick days, therefore, will regularly occur and may be prudently planned for. It is possible, therefore, for an employer to anticipate, and make a good faith effort to cover, these sick days.

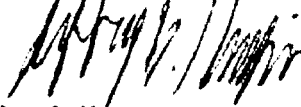
In short, the Department of Labor considers none of the events listed in your letter to be "unforeseen events," but rather ones for which employers are required to prudently plan under the terms of the new statute.

Please be advised that the Department of Labor is in the process of determining whether it is necessary to establish guidelines for the interpretation of Labor Law §167; in lieu of such guidelines, opinion letters such as this will provide guidance to interested parties with regard to the scope and interpretation of the statute.

This opinion is based on the information provided in your letter of October 7, 2008. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel



By: Jeffrey G. Shapiro
Associate Attorney

JGS:je

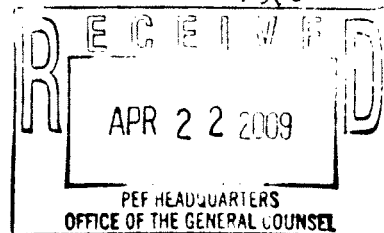
cc: Carmine Ruberto



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

April 17, 2009

William P. Seamon, General Counsel
New York State Public Employees Federation
1168-70 Troy-Schenectady Road
P.O. Box 12414
Albany, New York 12212-2414



Re: Request for Opinion
Nurses' Overtime/Labor Law §167
R0-08-0161

Dear Mr. Seamon:

This letter is written in response to yours of December 12, 2008 in which you pose various questions regarding this Department's interpretation of Labor Law §167. I apologize for the delay in responding.

In the second paragraph of your letter, you ask whether the opinion expressed in this Department's previous opinion letter of October 28, 2008 regarding the definition of the term "emergency" is applicable to nurses working in public sector health care facilities. Labor Law §167(2)(a) states that, with certain exceptions defined in that statute, "no health care employer shall require a nurse to work more than that nurse's regularly scheduled work hours." The term "health care employer" is defined in Labor Law §167(1)(a). Included in such definition is "a facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law." Accordingly, it is this Department's opinion that all provisions of Labor Law §167, including but not limited to the definition of "emergency" therein, are applicable to public sector health care facilities. Please be aware that the Department will be issuing regulations that will further clarify the issue of what constitutes an emergency within the meaning of the statute.

In the third paragraph of your letter, you ask numerous questions regarding the term "good faith effort" as used in Labor Law §167(3)(c) and the manner in which the Department of Labor will interpret and enforce this provision. As mentioned above, we are in the process of developing draft regulations and/or guidance documents to assist with compliance and enforcement of its requirements. We will consider the various issues you raise as we develop a first draft of these regulations and you will, of course, have further opportunities to provide input into the rulemaking along with other interested parties on this and other topics as we move forward.

Phone: (518) 457-3665 Fax: (518) 457-1164
W. Averell Harriman State Office Campus, Bldg. 12, Room 508, Albany, NY 12240

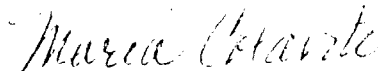
In the fourth paragraph of your letter, you ask your final question, to wit: whether a job announcement that would require a nurse to work a forty-eight hour weekly schedule, which includes a pre-scheduled eight hour overtime shift, would contravene the statutory intent of §167 and, if not, would this pre-scheduled overtime shift be considered "regularly scheduled work hours," so that a nurse who is hired under these conditions will be held to have waived statutory protections against mandatory overtime?

In answering this question it is important to note that in addition to defining the term "regularly scheduled work hours," Labor Law §167 also affirms that its provisions shall not be construed to diminish or waive any rights of a nurse pursuant to any other law, regulation, or collective bargaining agreement.

New York State Civil Service Law §134 provides that the basic workweek for state employees shall not be more than forty hours. This definition of the basic workweek is reaffirmed in the rules contained in the Civil Service Attendance and Leave Manual (Sec. 20.1) which also references Article 32 of the PEF Collective Bargaining Agreement. Given the express language found in §167 prohibiting diminishment or waiver of the rights of nurses otherwise set forth in law or collective bargaining agreement, we would consider a regularly scheduled workweek for a nurse employed in a facility covered by the Civil Service Law and rules and the PEF collective bargaining agreement to be no more than forty (40) hours.

This opinion is based on the information provided in your letter of December 12, 2008. A different opinion might result if the circumstances outlined in your letter changed, if the facts provided were not accurate, or if any other relevant fact was not provided.

Sincerely,



Maria Colavito
Counsel