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Massachusetts Healthcare Bill Bans Mandatory Overtime for Nurses and Limits Spending to Oppose Unionization

By John Doran and Carie Torrence

On August 6, 2012, Governor Deval Patrick of Massachusetts signed into law Senate Bill 2400, "An Act improving the quality of healthcare and reducing costs through increased transparency, efficiency and innovation." The law is primarily intended as a healthcare cost containment measure and has received some fanfare for that aspect. What has received considerably less attention are two provisions of the law that apply to hospitals as employers. The first prohibits mandatory overtime for nurses. The second bans hospitals from using government funds to pay employees or labor consultants to persuade employees to support or oppose unionization.

Ban on Mandatory Overtime

The law prohibits hospitals from requiring nurses to work "mandatory overtime," which is defined as "any hours . . . beyond the predetermined and regularly scheduled number of hours that the hospital and nurse have agreed that the employee shall work." An exception is provided for "emergency situations" where "the safety of a patient requires its use and when there is no reasonable alternative." Even in the event of an emergency, however, before mandating overtime, hospitals must make a good faith effort to cover the overtime on a voluntary basis. Additionally, the law creates a Health Policy Commission that, among other things, will develop guidelines to define an "emergency situation."

The law also includes an anti-retaliation measure, which prohibits hospitals from discriminating against or terminating nurses who refuse to accept a work assignment in excess of the specified limitations. Although the law does not provide specific penalties for mandating overtime, hospitals are required to report all instances of mandatory overtime to the Department of Public Health.

Maximum Shift Lengths

The law also sets maximum shift lengths for nurses. Hospitals are prohibited from regularly scheduling a nurse to work more than 12 hours in a 24-hour period. Hospitals are further prohibited from permitting a nurse to work more than 16 consecutive hours in a 24-hour period. In the event a nurse works 16 consecutive hours, the hospital must provide that nurse with at least 8 hours of consecutive off-duty time immediately following the 16-hour shift.

Impact on Collective Bargaining Agreements

Many Massachusetts hospitals are parties to collective bargaining agreements that include clauses expressly permitting the assignment of overtime and providing procedures for such assignments. The law specifically states that it does not "limit, alter or modify the terms, conditions or provisions of a collective bargaining agreement entered into by a hospital and a labor organization." This language may permit hospitals with nurses covered by a collective bargaining agreement that includes mandatory overtime provisions to argue they are exempt from the law's requirements, although labor organizations will undoubtedly vigorously oppose such an interpretation.

History of Mandatory Overtime Bans

The Massachusetts Nurses Association/National Nurses United (MNA/NNU) has long sought both contractual and legislative bans on mandatory overtime. In fact, earlier this legislative session, the MNA/NNU introduced a separate bill banning mandatory overtime. Massachusetts now joins a number of states that have enacted similar bans, including Alaska, California, Connecticut, Illinois, Maine, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia.

Ban on Use of Government Funds to Oppose Unionization

Deep within the 349 pages of the law is a prohibition against using government funds to persuade employees to support or oppose unionization. In its entirety, this section reads:

> No hospital shall receive reimbursement or payment from any governmental unit for amounts paid to employees, as salary, or to consultants or other firms, as fees, where the primary responsibility of the employees or consultants is, either directly or indirectly, to persuade or seek to persuade the employees of the hospital to support or oppose unionization. Attorney's fees for services rendered in dealing directly with a union, in advising hospital management of its responsibilities under the National Labor Relations Act, or for services at an administrative agency or court or for services by an attorney in preparation for the agency or in court proceeding shall not be support or opposition to unionization.

This language is buried within a lengthy section of the law discussing rates paid by governmental units for healthcare services and appears out of context with the remainder of the bill. It is unclear what this provision will mean in practice. On its face, it seems fairly limited; it appears only to prohibit hospitals from seeking reimbursement or payment from the government for monies paid to an individual whose primary responsibility is persuading employees to oppose unionization (it seems unlikely a hospital would pay someone to persuade employees to support unionization). The real question is whether this prohibition will be read more broadly and prevent any hospital that receives government funds from hiring a persuader (commonly referred to as a labor consultant) when faced with a union organizing drive.

This provision is reminiscent of a law passed in California in 2000 that prohibited any entity from using state funds to "assist, promote or deter union organizing." The U.S. Chamber of Commerce challenged the law and ultimately prevailed in the U.S. Supreme Court in 2008.[1] The Supreme Court found the law infringed on an employer's free speech right to oppose unionization. The Massachusetts prohibition could face a similar fate if challenged.

What to Do Now

The law is effective November 5, 2012. Hospitals should review their overtime and scheduling practices now to determine if changes are necessary. Hospitals should also consider what involvement, if any, they may wish to have in future public hearings on these issues.

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1 *Chamber of Commerce of the United States v. Brown, 554 U.S. 60 (2008).* See John Kloosterman and Jennifer Mora, *U.S. Supreme Court Overturns California's Limitation on Employer Free Speech Rights to Resist Union Organizing,* Littler ASAP (June 26, 2008), *available at* www.littler.com/publication-press/publication/us-supreme-court-overturns-californias-limitation-employer-free-speech.

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