



# Health Care Law Information Memo

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Electronic Dispatch

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## NURSE COVERAGE PLANS MANDATED BY NEW DEPARTMENT OF LABOR REGULATIONS

The New York State Department of Labor (“DOL”) recently issued the awaited Regulations pertaining to new Labor Law §167, restricting mandatory overtime for nurses. Labor Law §167 was the subject of our October 2008 Information Memo.

Although not mentioned in the new Labor Law §167, the DOL’s recently promulgated Regulations require health care employers to establish written Nurse Coverage Plans. (Health care employer is defined as a facility licensed or operated pursuant to Article 28 of the Public Health Law). The Regulations provide that a health care employer must implement a Nurse Coverage Plan within 90 days of the Regulations’ July 15, 2009 effective date. Consequently, a covered health care employer must have a written Nurse Coverage Plan in place no later than October 13, 2009. Significantly, the Regulations state that the failure to properly develop or implement a Nurse Coverage Plan will preclude a health care employer from requiring a nurse to work beyond his or her scheduled hours due to a patient care emergency.

As detailed in our October 2008 Information Memo, new Labor Law §167 provides that a health care employer may not require a nurse (defined as RNs and LPNs) to work more than his or her “regularly scheduled work hours” unless one of the following exceptions exists:

- A health care disaster, such as a natural or other type of disaster that increases the need for health care personnel, unexpectedly affecting the county in which the nurse is employed or in a contiguous county;
- A federal, state, or county declaration of emergency in effect in the county in which the nurse is employed or in a contiguous county;
- An ongoing medical or surgical procedure in which the nurse is actively engaged and whose continued presence through the completion of the procedure is needed to ensure the health and safety of the patient; or
- Where a health care provider determines that there is a patient care emergency making overtime necessary to provide safe patient care.

According to the DOL’s Regulations, a patient care emergency will not qualify for an exception to the restriction on nurse overtime if it was caused by the employer’s failure to develop or properly and fully implement a Nurse Coverage Plan as required by the Regulations. The Regulations provide that before requiring a nurse to work beyond his or her scheduled hours due to a patient care emergency, a health care employer must document attempts to secure nurse coverage utilizing all methods set forth in its Nurse Coverage Plan. Further, the Regulations state that a patient care emergency cannot be established if the particular circumstance is the result of routine nurse staffing needs due to typical staffing patterns, typical levels of absenteeism, and time off typically approved by the employer for vacation, holidays, sick leave, and personal leave, **unless** a Nurse Coverage Plan meeting the requirements of the Regulations is in place, has been fully implemented and utilized, and has failed to produce staffing to meet the particular patient care emergency.

The DOL’s Regulations provide that a facility’s Nurse Coverage Plan should take into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors, and should reflect the facility’s typical staffing levels and types of patients served. Specifically, the Plan must identify and describe as many alternative staffing methods as are available to the facility to ensure adequate staffing through means other than use of mandatory overtime, including use of per diem nurses, contracts

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with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development of a list of nurses seeking voluntary overtime. The Regulations also expressly state that the Plan shall require documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency and to seek alternative staffing through the methods identified in the Plan. The Plan must be readily available to nursing staff through distribution, posting, or other means that will ensure availability (e.g., posting on the facility's Intranet site). Additionally, the Plan must be provided to any collective bargaining representative representing nurses at the facility and, upon request, must be provided to the Commissioner of Labor.

If you have any questions or wish to discuss options for appropriate courses of action, please contact:

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