

# UPDATE

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## MEMBERS OF THE LABOR AND EMPLOYMENT GROUP

GINO J. BENEDETTI  
CO-CHAIR  
GBENEDETTI@DILWORTHLAW.COM

MARJORIE M. OBOD  
CO-CHAIR  
MOBOD@DILWORTHLAW.COM

KATHARINE V. HARTMAN  
KHARTMAN@DILWORTHLAW.COM

JAY E. KAGAN  
JKAGAN@DILWORTHLAW.COM

ERIC B. MEYER  
EMEYER@DILWORTHLAW.COM

HOLLY R. ROGERS  
HROGERS@DILWORTHLAW.COM

JENNIFER PLATZKERE SNYDER  
JSNYDER@DILWORTHLAW.COM

MATTHEW I. WHITEHORN  
MWHITEHORN@DILWORTHLAW.COM

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1500 Market Street  
Suite 3500E  
Philadelphia PA 19102-2101  
P: 215.575.7000  
F: 215.575.7200

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## PENNSYLVANIA HEALTH CARE FACILITIES: BAN ON MANDATORY OVERTIME EFFECTIVE TODAY

A new Pennsylvania law goes into effect today prohibiting covered Pennsylvania health care facilities from requiring certain employees to work overtime.

Following intense lobbying by health care workers, the Pennsylvania Prohibition of Excessive Overtime in Health Care Act (the “Act”) was signed into law by Governor Rendell on October 9, 2008. The Act becomes effective today, July 1, 2009, and prohibits covered health care facilities from requiring certain employees to work in excess of an agreed to, predetermined, and regularly scheduled daily work shift. An exception to the ban on mandatory overtime may apply if there is an unforeseeable emergent circumstance or if an employee must complete a patient care procedure already in progress.

### Coverage Under the Act

The Act impacts private sector, non-profit, and state and local government health care facilities (office based practices and facilities operated by religious organizations where care is solely based upon prayer are exempt).

The overtime restrictions apply to employees who are either involved in direct patient care or clinical care services<sup>1</sup>, who receive an hourly wage, or who are classified as nonsupervisory for collective bargaining purposes. This means that nurses and technicians are generally covered by the Act. Physicians and certain other health care workers (such as physician assistants and dentists) are specifically excluded from the scope of the Act.

### Exceptions to the Act

Mandatory overtime may be required by the health care facility if overtime is needed to complete an on-going patient care procedure already in progress and the employee’s absence could have an adverse effect on the patient, or due to an unforeseeable emergent circumstance. Unforeseeable emergent circumstances include<sup>2</sup>:

- a declared national, state, or municipal emergency;
- a highly unusual or extraordinary event which is unpredictable or unavoidable and which substantially affects the provision of needed health care services or increases the need for health care services (including acts of terrorism, natural disasters, and widespread disease outbreaks); and
- an unexpected employee absence, discovered at or before the commencement of a scheduled shift, for which an employer could not prudently plan, and which would significantly affect patient safety.

Under the circumstances outlined above, an employee may be assigned additional hours after the employer has exhausted reasonable efforts<sup>3</sup> to obtain other staffing and after providing the employee up to one hour to arrange for the care of the employee’s minor child or elderly or disabled family member. Any employee required to work more than 12 consecutive hours under the Act’s exception for unforeseeable emergent circumstances or who volunteers to work this amount of time is entitled to receive 10 consecutive hours of off-duty time immediately after the worked overtime, although the employee may waive this entitlement.

### Retaliation Forbidden

Additionally, the new law prohibits employers from retaliating against an employee for refusing to work an unscheduled, agreed to shift, unless there is an unforeseeable emergent circumstance or overtime is needed to complete an on-going patient care procedure already in progress and the employee’s absence could have an adverse effect on the patient.

## The Act's Impact

The new law offers very little flexibility to health care employers. While employees may work more than an eight hour shift if the shift is agreed to and regularly scheduled, and while employees may freely agree to work any overtime, the new law will likely prove burdensome to health care employers providing critical care to patients in the face of an ongoing nurse shortage. Additionally, while the law does not prohibit overtime for hours spent 'on-call,' employers may not use on-call time to circumvent the ban on mandatory overtime.

Single violations of the Act or any regulations promulgated in accordance with the Act may result in administrative fines of between \$100 and \$1,000.

In order to avoid running afoul of the new law, covered healthcare facilities should consider taking the following steps:

- Reviewing current employee policies (particularly policies pertaining to voluntary and mandatory overtime and employee absences) to ensure compliance with the Act;
- Determining which of your employees are covered by the Act;
- Entering into written agreed-upon, predetermined and regularly scheduled work shifts with your employees; and
- Eliminating staffing shortages by filing vacancies and utilizing on-call staffing

If you have questions concerning the applicability of the Act to your business, please contact any member of Dilworth Paxson's Labor and Employment Group.

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<sup>1</sup> Clinical care services include diagnostic, treatment, or rehabilitative services provided in a health care facility including: radiology and diagnostic imaging such as magnetic resonance imaging and positron resonance emission tomography radiation therapy, phlebotomy, electrocardiogram, electroencephalography, and laboratory medical services.

<sup>2</sup> Chronic short staffing is not an unforeseeable emergent circumstance.

<sup>3</sup> The Act states that a health care facility engages in reasonable efforts when it does the following:

- seeks persons who volunteer to work extra time from all available qualified staff who are working at the time of the unforeseeable emergent circumstance
- contacts all qualified employees who have made themselves available to work extra time
- seeks the use of *per diem* staff
- seeks personnel from a contracted temporary agency when use of this staff is permitted by law or regulation