



New York State Department of Labor

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

October 28, 2008

[REDACTED]

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

Dear [REDACTED]:

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.

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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:jc

cc: Carmine Ruberto