

A new Part 177 is added to 12 N.Y.C.R.R. to read as follows:

PART 177

RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

(Statutory authority: Labor Law §167)

Sec.

177.1 Application

177.2 Definitions

177.3 Mandatory Overtime Prohibition

177.4 Nurse Coverage Plans

177.5 Report of Violations

177.6 Conflicts with Law and Regulation; Collective Bargaining Rights Not Diminished

177.7 Waiver of Rights Prohibited

§ 177.1 Application.

This part shall apply to the hours of work required for nurses, as defined in Section 167 of the Labor Law, by health care employers, also defined in such law.

§ 177.2 Definitions.

(a) "Emergency" shall mean an unforeseen event that could not be prudently planned for by a health care employer and does not regularly occur, including an unanticipated staffing emergency.

(b) "Health care disaster" shall mean 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, as more fully explained in section 177.3 of this Part.

(c) "Health care employer" shall mean any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services (i) in a

facility licensed or operated pursuant to article twenty-eight of the public health law, including any facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, or (ii) in a facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, operated or licensed pursuant to the mental hygiene law, the education law or the correction law.

Examples of a health care facility include, but are not limited to, hospitals, nursing homes, outpatient clinics, comprehensive rehabilitation hospitals, residential health care facilities, residential drug and alcohol treatment facilities, adult day health care programs, diagnostic centers, and maternal health care consortia.

(d) "Nurse" shall mean a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the education law who provides direct patient care, regardless of whether such nurse is employed full-time, part-time, or on a per diem basis. Nurses who provide services to a health care employer through contracts with third party staffing providers such as nurse registries, temporary employment agencies, and the like, or who are engaged to perform services for health care employers as independent contractors shall also be subject to this Part.

(e) "On call" shall mean when an employee is required to be ready to perform work functions and required to remain on the employer's premises or within a proximate distance, so close thereto that s/he cannot use the time effectively for his or her own purposes. An employee who is not required to remain on the employer's premises or within a proximate distance thereto but is merely required to leave information, at his or her home or with the health care employer, where he or she may be reached is not working on call.

(f) "Overtime" shall mean work hours over and above the nurse's regularly scheduled work hours. Determinations as to what constitutes overtime hours for purposes of this part shall not limit the nurse's receipt of overtime wages to which the nurse is otherwise entitled.

(g) "Patient care emergency" shall mean a situation which is unforeseen and could not be prudently planned for, which requires

nurse overtime in order to provide safe patient care as more fully explained in section 177.3 of this Part.

(h) "Regularly scheduled work hours" shall mean the predetermined number of hours a nurse has agreed to work and is normally scheduled to work pursuant to the budgeted hours allocated to the nurse's position by the health care employer.

(1) For purposes of this rule, "the budgeted hours allocated to the nurses position" shall be the hours reflected in the employer's full-time employee (FTE) levels for the unit in which the nurse is employed.

(2) If no such allocation system exists, regularly scheduled work hours shall be determined by some other measure generally used by the health care employer to determine when an employee is minimally supposed to work.

(3) The term regularly scheduled work hours shall be interpreted in a manner that is consistent with the collective bargaining agreement and statutes or regulations governing the hours of work, if any.

(4) Regularly scheduled work hours shall include pre-scheduled on-call time subject to the exceptions set forth in section 177.3(b)(1) of this Part and the time spent for the purpose of communicating shift reports regarding patient status necessary to ensure patient safety.

(5) For a part-time nurse, regularly scheduled work hours mean those hours a part-time nurse is regularly scheduled to work pursuant to the employer's budgeted hours allocated. If advance scheduling is not used for part-time nurses, the percentage of full-time equivalent, which shall be established by the health care employer (e.g. a 50% part-time employee), shall serve as the regularly scheduled work hours for a part-time nurse.

(6) For per diem, privately contracted, or employment agency nurses, the employment contract and the hours provided therein shall serve as the basis for determining the nurse's regularly scheduled work hours.

§ 177.3 Mandatory Overtime Prohibition

(a) Notwithstanding any other provision of law, a health care employer shall not require a nurse to work overtime. On-call time shall be considered time spent working for purposes of determining whether a health care employer has required a nurse to work overtime.

(b) The following exceptions shall apply to the prohibition against mandatory overtime for nurses:

(1) Health Care Disaster. The prohibition against mandatory overtime shall not apply in the case of a health care disaster, such as a natural or other type of disaster unexpectedly affecting the county in which the nurse is employed or in a contiguous county that increases the need for health care personnel or requires the maintenance of the existing on-duty personnel to maintain staffing levels necessary to provide adequate health care coverage. A determination that a health care disaster exists shall be made by the health care employer and shall be reasonable under the circumstances. Examples of health care disasters within the meaning of this Part include, but are not limited to, unforeseen events involving multiple serious injuries (e.g. fires, auto accidents, a building collapse), chemical spills or releases, a widespread outbreak of an illness requiring hospitalization for many individuals in the community served by the health care employer, or the occurrence of a riot, disturbance, or other serious event within an institution that increases the level of nursing care needed.

(2) Government Declaration of Emergency. The prohibition against mandatory overtime shall not apply in the case of a federal, state or county declaration of emergency in effect pursuant to New York Executive Law Article 2-B or applicable federal law in the county in which the nurse is employed or in a contiguous county.

(3) Patient Care Emergency. The prohibition against mandatory overtime shall not apply in the case of a patient care emergency, which shall mean a situation that is unforeseen and could not be prudently planned for and, as determined by the health care employer, that requires the continued presence of the nurse to provide safe patient care, subject to the following limitations:

(i) Before requiring an on-duty nurse to work beyond his or her regularly scheduled work hours to address a patient

care emergency, the health care employer shall make a good faith effort to have overtime covered on a voluntary basis or to otherwise secure nurse coverage by utilizing all methods set forth in its Nurse Coverage Plan required pursuant to Section 177.4 of this Part. The health care employer shall document attempts to secure nurse coverage through use of phone logs or other records appropriate to this purpose.

(ii) A patient care emergency cannot be established in a particular circumstance if that 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 which meets the requirements of §177.4 is in place, has been fully implemented and utilized, and has failed to produce staffing to meet the particular patient care emergency. Nothing in this provision shall be construed to limit an employer's right to deny discretionary time off (e.g., vacation time, personal time, etc.) where the employer is contractually or otherwise legally permitted to do so.

(iii) A patient care emergency will not qualify for an exception to the provisions of this rule if it was caused by the health care employer's failure to develop or properly and fully implement a Nurse Coverage Plan as required under Section 177.4 of this Part.

(4) Ongoing Medical or Surgical Procedure. The prohibition against mandatory overtime shall not apply in the case of 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. Determinations with regard to whether the nurse's continued active engagement in the procedure is necessary shall be made by the nursing supervisor or nurse manager supervising such nurse.

(c) Nothing in this Part shall prohibit a nurse from voluntarily working overtime. A nurse may signify his or her willingness to work overtime by either: a) agreeing to work a particular day or shift as requested, b) agreeing to be placed on an on-call roster, or

c) agreeing to prescheduled on-call time pursuant to a collective bargaining agreement or other written contract or agreement to work.

(d) No employer may use on-call time as a substitute for mandatory overtime.

§ 177.4 Nurse Coverage Plans

(a) Every health care employer shall implement a Nurse Coverage Plan, taking into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors. Such plan should also reflect the health care employer's typical levels and types of patients served by the health care facility.

(b) The Plan shall identify and describe as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of mandatory overtime including contracts with per diem nurses, contracts 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 and posting of a list of nurses seeking voluntary overtime.

(c) The Plan shall require documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency and seek alternative staffing through the methods identified in subdivision (b) of this section.

(d) The Plan shall be in writing and upon completion of such plan, it shall:

(i) be made readily available to all nursing staff through distribution to nursing staff, conspicuously posting the Plan in a physical location accessible to nursing staff, or through other means that will ensure availability to nursing staff, e.g. posting on the employer's intranet site or its functional equivalent.

(ii) be provided to any collective bargaining representative representing nurses at the health care facility.

(iii) be provided to the Commissioner of Labor, or his or her designee, upon request.

(e) Nothing herein shall be read to establish the Nurse Coverage Plans required herein as standards to be used in assessing the health care employer's compliance with any other obligation or requirement, including facility accreditation.

(f) All such Plans shall be prepared within ninety (90) days of the effective date of this Part or, for health care employers who are not operating covered facilities within ninety (90) days of the effective date of this Part, prior to the time they commence operations.

§ 177.5 Report of Violations

The Department shall establish a procedure under which a complaint may be filed under this Part, and shall develop forms for this process and post such on its website.

§ 177.6 Conflicts with Law and Regulation; Collective Bargaining Rights Not Diminished

The provisions of this Part shall not be construed to diminish or waive any rights of any nurse pursuant to any other law, regulation, or collective bargaining agreement.

§ 177.7 Waiver of Rights Prohibited

A health care employer covered by this Part may not utilize employee waivers of the protections afforded under Labor Law §167 or this Part as an alternative to compliance with such law or regulation. A health care employer who seeks such a waiver from a nurse in its employ shall be considered to have violated this Part.