Massachusetts Senate Passes Nurse Staffing Bill

On July 17, 2008, the Massachusetts Senate passed SB 2816, "An Act Relative to Patient Safety." Although it would impose significant new compliance and reporting obligations on hospitals, the Senate bill differs significantly from the bill passed earlier this year by the House of Representatives in that it does not impose mandatory patient-to-nurse staffing ratios set by the Department of Public Health.

Below is a summary of the significant provisions of the Senate bill (you can view our prior Alert on the House bill here).

Annual Staffing Plans. Hospitals would be required annually to develop written hospital-wide staffing plans for guiding the assignment of nursing staff and providing minimum nurse-to-patient staffing needs for each inpatient care unit. Such plans would be based on hospital-selected "acuity models," which would be used to adjust the staffing plan for each inpatient unit.

Hospitals would be required to file their staffing plans with the Department of Public Health (DPH), following approval of the staffing plan by the hospital's governing board. At the same time, hospitals would also have to file an audit of their compliance with the previous year's staffing plan, including a description of actions taken in response to significant departures from the plan.

Hospitals would be required to post staffing plans in conspicuous locations accessible to both staff and patients, and on DPH websites available to the public. In addition, nursing staff schedules and actual unit staffing-assignment rosters would have to be available on request at each patient care unit. Hospitals would have to maintain these rosters for five years.

DPH would maintain and advertise a toll-free telephone hotline and a website at which hospital staff or patients could report violations of a staffing plan. DPH would be empowered to issue regulations for the implementation of investigations of such complaints.

Hospital Nursing Care Committees. Hospitals would be required to establish "nursing care committees" that would advise the hospital concerning the selection of appropriate acuity models and recommend staffing plans. Committee members must be hospital employees, and at least half of the members must be registered nurses providing direct patient care.

Restriction on Hours Worked. The Act would prohibit hospitals from requiring or permitting nurses to work more than 12 hours in any given shift or more than 16 hours in any 24 hour period. Nurses could not be subject to discipline or dismissal for refusing to work in excess of these specified hours. Hospitals would also be required to give any nurse who works 12 consecutive hours in a shift at least 8 hours rest after that shift.

Restriction on Mandatory Overtime. The Act would also prohibit the use of mandatory overtime "for the purposes of complying with this section"—although it is unclear whether "this section" is a reference to the annual-staffing-plan requirements or to the restriction-on-hours-worked requirement or to both—with an exception for a "federal or state government declared public emergency, or a facility-wide emergency." It would not, however, otherwise prohibit the use

of voluntary or mandatory overtime. Moreover, the Act states that "[N]othing in this section shall be construed to limit, alter or modify the terms, conditions or provisions of a collective bargaining agreement." It is unclear under these provisions precisely when mandatory overtime would be proscribed and when it would be permitted, *i.e.*, when mandatory overtime would be considered to be used "for the purposes of complying" with the relevant requirements (prohibited) and when mandatory overtime would be used for other purposes (apparently allowed). It is also unclear if these provisions would apply to hospitals that have collective bargaining agreements that permit mandatory overtime under limitations that are less restrictive than those in the Act.

Enforcement Authority. DPH would have the authority to impose fines of up to $1,000 per day in the event a hospital fails to timely file its staffing plan.

DPH would also be given the authority to conduct informal inquiries and formal investigations to determine whether there are patterns of failure to comply with staffing plans. DPH would be empowered to impose corrective measures, which may include (a) official notice of failure to comply, (b) imposition of additional reporting and monitoring requirements, (c) imposition of fines of not more than $3,000 for each finding of noncompliance, and (d) closing of the particular unit. Hospitals would be able to appeal any measure or fine imposed by DPH to the Division of Administrative Law Appeals, and enforcement would be suspended pending a decision by the Division.

Additional Reporting Requirements. As part of their quality improvement programs, hospitals would be required quarterly to collect, monitor and evaluate patient care data using evidence-based performance measures developed by DPH.

Patient Outcome Report Cards and Benchmarks. DPH would use the patient care information reported by hospitals to develop patient outcome report cards, as well as minimum benchmarks for patient care performance. DPH would have authority to require hospitals that fail to meet these benchmarks to implement remedial plans to improve patient care. Such a remedial plan could include specific nurse-to-patient staffing limits.

Like the House bill, the Senate bill also contains a vaguely-worded requirement that the implementation of a staffing plan for RNs "shall not result in the understaffing or reductions in staffing levels of the health care workforce." Such a vaguely-worded provision might be used by nurses' unions and others in support of regulatory and enforcement efforts intended to impose particular staffing requirements for such other personnel.

The Senate bill does not include specific dates for the implementation of the various requirements it imposes. However, hospitals would likely be required to file their first written staffing plan within two weeks of the beginning of their next fiscal year following final passage of this bill.

The bill will now go back to the House. If the House does not accept the Senate's version of the bill, the bill may be referred to a conference committee consisting of three members from each legislative branch. If a compromise is reached, then the bill would be sent back to both legislative branches for their approval.

We will continue to provide updates on this important legislation. If you have any questions concerning either HB 4714 or SB 2816, please contact any member of Ropes & Gray's Labor & Employment Department.