

Management Alert

Illinois Nurse Staffing by Patient Acuity Act Requires Illinois Hospitals to Implement Written Staffing Plans

On August 24, 2007, Governor Rod Blagojevich signed into law Senate Bill 867, the Nurse Staffing by Patient Acuity Act ("Act"), which takes effect January 1, 2008. The Act amends the Illinois Hospital Licensing Act to require each licensed Illinois hospital to implement a "written staffing plan" that aligns patient care needs with registered nursing expertise. The Act was sponsored by Democratic Senators Carol Ronen, Emil Jones Jr. and James T. Meeks, and strongly supported by both the Illinois Nurses Association and the Illinois Hospital Association. It passed both the Illinois House and Senate this past May by unanimous vote.

The new Act requires hospitals to create a written hospital-wide staffing plan. The plan must take specific factors into consideration, including but not limited to the following: patient acuity, the complexity of patient care, the volume of patient admissions, discharges and transfers, the need for ongoing patient assessment, specialized equipment and technology, and the skill mix of personnel providing or supporting direct patient care. The Act, however, does not impose rigid minimum nurse-to-patient staffing ratios as was done in California and as was proposed by Illinois Senate Bill 2270 in 2006.

The Act requires hospitals to have one or more "nursing care committees," at least 50 percent of which is comprised of registered professional nurses who provide direct patient care. Each hospital must

develop and implement its staffing plan based on the recommendations of the nursing care committees. The staffing plan is a "guide," which establishes minimum levels of direct patient care for each inpatient care unit. The nursing care committee is responsible for providing input and feedback on the selection, implementation and evaluation of minimum staffing levels, acuity models and written staffing plans. The Act also provides that every hospital must identify an "acuity model" for adjusting the staffing plan for each in-patient care unit. The written staffing plan must be posted in a conspicuous and accessible location for both patients and direct care staff, as required under the Hospital Report Card Act.

The Act raises some significant interpretation and implementation issues. Further, there may be questions regarding the legality of the nursing care committees under the National Labor Relations Act (NLRA).

Interpretation issues exist based on internal inconsistencies and ambiguities in the Act. For example, although one section of the Act states that "every hospital shall implement a written hospital-wide staffing plan, *recommended* by a nursing care committee or committees," a subsequent section provides that a nursing care committee's *recommendations* "must be given significant regard and weight in the hospital's adoption and implementation of a written staffing plan." These two sections create confusion regarding

whether the committee's *recommendations* are binding or advisory. This ambiguity may be resolved through regulations issued by the Illinois Department of Public Health. The Act also does not address how a deadlock on the nursing care committee should be resolved.

Furthermore, the interplay between the Act and the NLRA has yet to be determined. It would appear that the role and function of the nursing care committee, if not carefully limited, could give rise to liability under the NLRA, which makes it unlawful for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it..." In a series of decisions in the early 1990s, the National Labor Relations Board (NLRB) reiterated the broad definition of a "labor organization" under the NLRA. A "labor organization" includes "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning . . . conditions of work."

The NLRB has likewise broadly construed what constitutes "dealing." "Dealing" is less than "bargaining." According to the NLRB, "dealing" only involves a "bilateral process," which means a "pattern or practice" in which a group of employees, over time, makes proposals to management, and management then responds to these proposals by "acceptance or rejection by word or deed." Compromise and agreement are not required. Since the Act requires nurses employed by Illinois hospitals to participate in a nursing care committee for the purpose of proposing conditions of work to management in the form of nurse-to-patient staffing ratios, it would appear that such a committee may be a "labor organization" under the NLRA. If so, a hospital could then be in violation of the NLRA if it dominates or interferes with the formation or administration of the nursing care committee, or contributes financial or other support to it.

The determination of whether a hospital's nursing care committee is illegal under the NLRA is significant. Unions engaged in organizing campaigns often attempt to portray a targeted employer as a labor law violator. It is possible that unions could file unfair labor practice charges against a hospital alleging violations of the NLRA and then issue press releases branding the hospital as an unethical employer that mistreats its employees. Such adverse public relations campaigns are frequently designed to encourage support for the union. Hospitals will need to "walk a tightrope" in order to achieve the advantage of receiving nursing input without running afoul of the NLRA.

Another open question is what penalties will be imposed if a hospital cannot or does not comply with its written staffing plan. The Act states that a plan is to be used for "guiding the assignment of patient care nursing staff based on multiple nurse and patient considerations that yield minimum staffing levels for in-patient care units". However, the Act fails to specify the remedy for noncompliance. Presumably the Illinois Department of Public Health, the state agency responsible for hospital licensure, will enforce compliance with the Act according to the provisions of the Hospital Licensing Act.

Hospital administrators would be well served to consult experienced labor or health care counsel when creating a nursing care committee as required by the Act. Periodic audits of the committee's activities would be prudent as the NLRB is in a state of political flux that is likely to continue until after the 2008 presidential election.

Please contact the Seyfarth Shaw labor or health care attorney with whom you work if you would like more information about the Nurse Staffing by Patient Acuity Act, or any Seyfarth attorney on our website www.seyfarth.com.

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