

CLIENT ALERTS

EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
Suite 420
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037-1175
202.861.0900

EBGLAW.COM

HOSPITAL'S NEED FOR PROPER STAFFING OVERRIDES

ARBITRATOR'S DECISION.

On September 7, 2005, the United States District Court for the District of Massachusetts, in *Salem Hosp. v. AFSCME Council 93*, D. Mass., No. 03-12650-RGS, 9/7/05, held that an arbitrator's decision on nurse staffing levels, was "palpably faulty" as it created a work rule that neither party had negotiated.

Background

Salem Hospital ("Salem") required registered nurses in the post-anesthesia unit to be on-call Monday through Sunday, seven days per week to be able to address, as required, critical patient care needs. The RN's were provided individual schedules as to which days they would specifically be on-call. An RN filed a grievance with the American Federation of State, County and Municipal Employees Council 93 ("Council 93"), which represented the RN's at Salem Hospital. The grievance claimed that Salem violated the collective bargaining agreement alleging the post-anesthesia RN's were only to be on-call Tuesday through Saturday. Section 8.12 of the collective bargaining agreement at issue states "All Post Anesthesia Care Unit nurses (PACU), on a rotating basis, will share on-call from 12:30 a.m. to 6:30 a.m., Tuesday through Saturday."

The grievance was denied at every level and Council 93 filed a request for arbitration. Focusing on the omission of the days Sunday and Monday in Section 8.12, the arbitrator ruled that the collective bargaining agreement "specifically states that the only time nurses can be assigned to on-call is weekday nights." The arbitrator ordered Salem to cease and desist from assigning RN's in the post-anesthesia unit to on-call duty on Sundays and Mondays.

Salem challenged the arbitrator's decision in the U.S. District Court for the District of Massachusetts before Judge Richard G. Sterns. The standard practice of the District Courts is to defer to an arbitrator's decision. On the rare occasion that a District Court Judge is of the opinion that the arbitrator exceeded his authority, the Judge will take the unusual step of vacating the decision. The Judge must find that the arbitrator's award does not find its essence in the agreement between the

CLIENT ALERTS

parties but that the arbitrator wrote a new provision into the CBA which is beyond the arbitrator's authority. The mere fact that the Judge does not agree with the decision of the arbitrator is not sufficient for the decision to be vacated.

Judge Sterns relied on the agreement between the parties that the hospital would not have to rely solely on volunteers or the most junior nurses to be on-call Sunday and Monday. Based on the understanding that the post-anesthesia unit nurses would have to be on call seven days per week, the Court focused on the portion of Section 8.12 that states that "on a rotating basis" the nurses will be on call Tuesday through Saturday. Judge Sterns held that the intent of the parties was to rotate the on-call duty during the weekdays and not limit on-call duty only to the weekdays. Judge Sterns found that the arbitrator created a new work rule that neither party had bargained when the arbitrator inserted the word "only" in the Section 8.12. Judge Sterns held that the nurses shall be on-call Tuesday through Saturday on a rotating basis but that Salem may assign on-call duty to nurses Sunday and Monday. In vacating the arbitrator's decision the Court granted summary judgment for Salem.

This decision is important to hospitals and other healthcare providers who must be able to assure adequate levels of staffing to provide quality care at all times. As patient census varies and cannot be predicted in advance, the ability to maintain nurses and other employees in on-call status is critical to meeting the need to staff busy periods adequately. It also points out the need for carefully drafted provisions in a collective bargaining agreement where employees are represented by a union.

* * * *

Please feel free to contact **Frank C. Morris, Jr.** or **Christopher M. McHale** in the firm's **Washington** office at 202/861-0900 if you have questions or comments about this Alert or other labor, employment or whistleblower issues. Mr. Morris's e-mail address is fmorris@ebglaw.com and Mr. McHale's e-mail address is cmchale@ebglaw.com.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

© 2005 Epstein Becker & Green, P.C.

