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# Michigan Center for Rural Health Critical Access Hospital Conference

## Health Law Update

November 10, 2023

# Agenda

- Safe Patient Care Act
- Rural Emergency Hospitals
- Labor Law Developments- Severance Agreements
- Labor Law Developments- Restrictive Covenants

# Safe Patient Care Act

# Safe Patient Care Act - Overview

- The Safe Patient Care Act is a series of 6 proposed bills.
- Analogous bills were introduced in both the House of Representatives and the Senate as follows:
  1. Establish limits to nurse-to-patient staffing ratios (House Bill 4550, Senate Bill 334);
  2. End mandatory RN overtime (House Bill 4551, Senate Bill 335); and
  3. Require hospitals to publicly disclose their nurse-to patient ratios (House Bill 4551, Senate Bill 335).

# Safe Patient Care Act – Staffing Ratios

- Limits on the number of patients per nurse by unit (example: maximum of four patients per RN on a medical-surgical floor).
- Hospital must post information about the law and inform people on how to report violations.
- State would run a toll-free hotline to receive complaints.
- Additional time would be provided for rural hospitals to comply.
- Sponsors
  - Sen. Sylvia Santana – D-Detroit (SB 334)
  - Rep. Stephanie Young – D-Detroit (HB 4550)

# Safe Patient Care Act – Overtime

- Nurses can't be ordered to work more hours than scheduled.
- RNs can still volunteer for overtime, if any is needed, if they know they can provide safe care.
- RNs must have 8 continuous hours off after a shift of 12 hours or more, to rest.
- Nurses are protected from discipline, firing or losing their license if they refuse unplanned extended shifts.
- The limits will be suspended during bona fide emergencies or when a nurse is in the middle of a critical patient procedure.
- Sponsors
  - Sen. Stephanie Chang – D-Detroit (SB 335)
  - Rep. Betsy Coffia – D-Traverse City (HB 4551)

# Safe Patient Care Act – Disclosure

- Hospitals must disclose to the public their actual RN-to-patient ratios.
- Records must be maintained for a minimum of 3 years.
- Records to include 1) the number of patients in each unit and 2) the identity and hours of each direct care RN assigned to each patient in each unit for each shift.
- Sponsors
  - Sen. Jeremy Moss – D-Southfield (SB 336)
  - Rep. Carrie Rheingans – D-Ann Arbor (HB 4552)

# Safe Patient Care Act - Status

- House Bills (as of 10/30/2023)
  - 4550 – Referred to Committee on Health Policy on 5/11/2023
  - 4551 – Referred to Committee on Health Policy on 5/11/2023
  - 4552 – Referred to Committee on Health Policy on 5/11/2023
- Senate Bills (as of 10/30/2023)
  - 334 – Referred to Committee on Regulatory Affairs on 5/11/2023
  - 335 – Referred to Committee on Regulatory Affairs on 5/11/2023
  - 336 – Referred to Committee on Regulatory Affairs on 5/11/2023

# Rural Emergency Hospitals

# Rural Emergency Hospitals (REHs) - Overview

- Eligible hospitals
  - CAHs or Rural PPS Hospitals with 50 or fewer beds
  - In existence as of 12/27/20 (not available for closed or new hospitals)
  - First available on January 1, 2023
- Services
  - No inpatient services
  - Average patient length of stay under 24 hours
  - Emergency (Critical Access Hospital (CAH) equivalent standards) and observation services
  - Other medical and health services on outpatient basis as specified by HHS

# Rural Emergency Hospitals (REHs) - Requirements

- An REH must:
  - Have a transfer agreement in place with a Level I or II trauma center; and
  - Maintain a staffed emergency department, including staffing 24 hours a day, seven days a week by a physician, nurse practitioner, clinical nurse specialist, or physician assistant; and
  - Meet CAH-equivalent Conditions of Participation (CoPs) for emergency services; and
  - Meet applicable state licensing requirements.

# Rural Emergency Hospitals (REHs) - Conversion Process

- 11/9/22 CMS Issued Transmittal 11694 adding Section 10.2.1.8.1 to Program Integrity Manual Chapter 10
  - PPS converting to CAH or other changes in provider or supplier type – normally requires termination with reenrollment, including a survey for providers and certified suppliers
  - Designates REHs as "limited categorical risk" for MAC screening levels in 855 enrollment process
  - CMS will allow CAH/PPS to convert to REH via 855A change-of-information (CHOI) filing
    - NOT an initial-enrollment filing – no filing fee
    - CMS will treat as a "conversion," not a termination and reenrollment
  - Not clear yet how this will be implemented for billing, etc.
- DO OVER? Can elect to convert back to status prior to REH (CAH or PPS)
  - Via procedures to be established by CMS (No issue for PPS, but could be for necessary provider CAHs - nothing in regulations, yet.)

# Rural Emergency Hospitals (REHs) – Pros & Cons

- Pros/Cons:
  - Monthly facility payment (based on average CAH benefit in 2019 over PPS)
    - CMS calculates CAH benefit > PPS in 2019 = $4,404,308,465
    - Number of CAHs in 2019 = 1,368
    - 12 months/year = **$268,294/ month or $3,219,528/year for calendar year 2023**
    - 2024 and beyond updated by market basket
  - CMS Proposed Rules do not address 340B for REHs
    - HRSA, not CMS, area of authority
    - Likely to require statutory amendments to 340B law

A tracker of participating hospitals published by the Cecil G. Sheps Center for Health Services Research is available at: https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-emergency-hospitals/

# Labor Law Developments- Severance Agreements

# NLRA Refresher

- Applies to all private employers, union and non-union
- Enforced by the NLRB
- Protected rights for employees
- Supervisors not covered
- Union elections
- Duty to bargain
- Unfair labor practices

# Are Your Severance Agreements Unlawful?

- February 2023 NLRB Decision:*
  - Offering severance agreements with provisions that restrict employees' exercise of NLRA rights is unlawful
  - Focused on broad scope of:
    1. Confidentiality provision
    2. Non-disparagement provision

* McLaren Macomb and Local 40 RN Staff Council, Of, OPEIU, AFL-CIO. Case 07-CA-263041

# Section 7 Rights

- Section 7 of NLRA gives non-supervisory employees the right:

  "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

# NLRA "Supervisors"

- Someone with authority to:

  "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action."

- Query: Are physicians' "supervisors" under the NLRA?

# Not All Provisions Unlawful

- NLRB Decision noted the non-disparagement clause at issue:
  - was "not even limited to matters regarding past employment with the Respondent;"
  - contained an unlimited timeframe; and
  - covered individuals and entities broader that the employer, itself (e.g., parents and affiliated entities and their representatives)
- This would have "chilling effect" where former employees would be less likely to express complaints about the employer to unions, former co-workers of NLRB investigators

# Not All Provisions Unlawful

- NLRB Decision noted the confidentiality clause at issue was overly broad because its prohibition against disclosure to "any third person" would stop a former employee:
  - "from disclosing even the existence of an unlawful provision contained in the agreement"; and
  - "would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent's use of the severance agreement".

# The NLRB Said:

- "Because the agreement conditioned the receipt of severance benefits on the employees' acceptance of those unlawful provisions," the mere proffer of the agreement to the employees was unlawful.
- Perhaps not the end of story: Decision has been appealed to 6th Circuit Court of Appeals.

# NLRB General Counsel Memo

- Memorandum GC 23-05 (March 22, 2023)
- The “Bad” – Decision applies retroactively
- The “Good” – Implies that whole contract not voided if contains unlawful clause
- Non-disparagement clauses – “maliciously untrue” standard
- Confidentiality clauses – “financial terms of agreement”

# Practical Takeaways

- When drafting severance agreements:
  - Consider whether the decision applies to your entity;
  - Consider whether the decision applies to this particular employee; and
  - Assess whether confidentiality and non-disparagement provisions are even necessary.
    - If yes, take time to identify your specific concerns, and…
      - Tailor the provisions to those specific concerns;
      - Include a disclaimer regarding the employee's Section 7 rights;
      - Consider using previously NLRB "blessed" clauses.

# Labor Law Developments- Restrictive Covenants

# Non-Compete Clauses

- "A non-compete clause is a contractual term between an employer and a worker that typically blocks the worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the worker's employment ends." **FTC Proposed Non-Compete Clause Rule.**

- "An agreement that protects the employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business." **MCL 445.774a(1).**

# FTC's Proposed Ban on Worker Non-Competes Clauses

- Proposed rule announced 1/4/2023.
- FTC's Proposed Rule would ban employers from imposing non-compete clauses on workers.

"Employer" + "Worker" (natural person) +

"Non-compete clause" (post-employment) =

**Unfair method of competition** (per the FTC)

- Not applicable to other restrictive covenants clauses (e.g., non-disclosure, and non-solicitation) unless such clauses are "unusually broad" so that they function as a non-compete clause.

# Scope of FTC's Proposed Ban on Non-Compete Clauses

- FTC Restriction—Employers are prohibited from attempting to enter into or maintain a post-employment non-compete clause with a worker
  - "Worker" = **a natural person**, and may include employee, independent contractor, intern, extern, volunteer, apprentice, or anyone who works for an employer (whether paid or unpaid)
- Existing non-compete clauses? Must be rescinded (with formal communication).
- "De facto non-compete clause" example—If you end employment and service any of our clients within the next 5 years, then, you owe us i) 100% of fees we received in last 12 months + ii) 100% of fees that you receive in the next 12 months
- Exception for Sale of business—"If I own 25% or more of my company and I sell the business, the purchaser can bind me to a non-competition clause."

# Comments & Timing of FTC Proposed Ban on Non-Compete Clauses

- Comments were due April 19, 2023 (revised deadline)
  - **26,813** comments received!!!

- Final Rule ~~2023/4~~ 2024/5?
  - Effective date is 60 days post Final rule announcement
  - Compliance enforcement begins 180 days post Final rule announcement

# MI House Bill 4399

- Introduced on 4/13/2023 and was referred to the House's Labor Committee
- Prohibiting employers from obtaining non-compete agreement with employee or applicant unless:

  (a) applicant provided written notice of the non-compete requirement;

  (b) employer disclosed in writing before hiring the terms of the non-compete agreement; and

  (c) posting of the legislation's requirement in a conspicuous place at the workplace.
- Cannot request or obtain a noncompete agreement from an employee or applicant who is a low wage employee.
  - Low wage employee = a minor; employee who receives annual wages from employer at a rate less than 138% of the last published federal poverty line for a family of 3 (2023: $34,307)

# MI House Bill 4399

- In action to enforce or to void or limit enforcement of non-compete agreement, employer bears the burden to prove that terms are reasonable.
- If court voids or limits the non-compete agreement, then court will award to employee (a) actual costs of actions, including attorney fees; and (b) all lost income.
- A violation of Michigan House Bill 4399 would result in an employer to pay a civil fine of not more than $5,000.

# NLRB General Counsel Memo

- Memorandum GC 23-08 (May 30, 2023)
  - In July 2022, the NLRB entered into memoranda of understanding with both the FTC and the U.S. Department of Justice's Antitrust Division, addressing an interagency approach or information sharing and referrals to other agencies.
- Supervisors not covered under the NLRA
- "Except in limited circumstances, I believe that the proffer, maintenance, and enforcement of such agreements* violate Section 8(a)(1) of the [NLRA]."

  *Such agreements = employment contracts or severance agreements

# NLRB General Counsel Memo

According to the GC, the noncompete provisions interfere or restrain the following five types of protected activity:

1. Threatening to resign as a tactic to secure better working conditions;
2. Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;
3. Concertedly seeking or accepting other employment with a local competitor to obtain better working conditions;
4. Soliciting their co-workers to go work for a local competitor; and
5. Seeking employment for the specific reason to engage in protected concerted activity with other workers at an employer's workplace.

# NLRB General Counsel Memo

- Not a legitimate business interest: A "desire to avoid competition from a former employee."
- Retaining employees or protecting special investments in training employees also "unlikely" to justify a non-compete provision because:
  1. the U.S. law generally protects employee mobility; and
  2. Such interests may be protected through less restrictive means (e.g., longevity bonus).

# NLRB General Counsel Memo

- "[N]ot all non-compete agreements necessarily violate the NLRA."
- For example, the following may not violate the Act --
  - Provisions that clearly restrict only individuals' managerial ownership interests in a competing business;
  - Independent-contractor relationships; or
  - Circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances.

# Practical Takeaways

- No official rule or position from the FTC and the NLRB yet
- When drafting employment agreements or severance agreements:
  - Assess whether a non-compete provision should be included for the specific employee.
  - Don’t apply the boilerplate “one size fits all” non-compete provision.
  - If including a non-compete clause, identify the special circumstances or legitimate interest for incorporating said provision.

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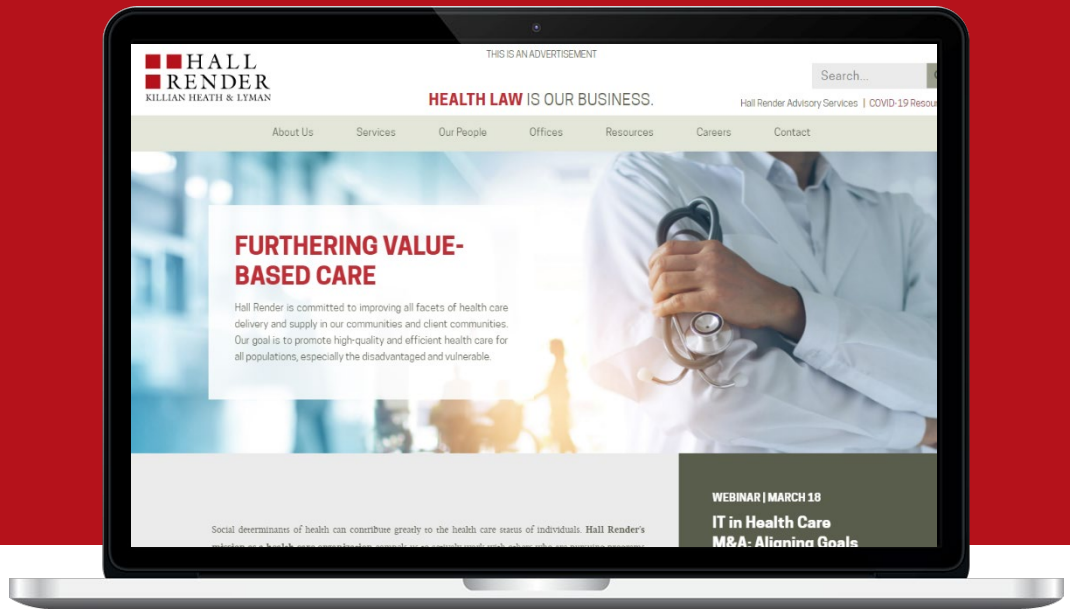
# Questions?

For more information on these topics visit hallrender.com.

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