



State of Wisconsin
2009 - 2010 LEGISLATURE

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**SENATE SUBSTITUTE AMENDMENT 1,
TO 2009 SENATE BILL 108**

September 9, 2009 – Offered by Senator ROBSON.

1 **AN ACT** *to amend* 111.322 (2m) (a) and 111.322 (2m) (b); *to repeal and recreate*
2 111.322 (2m) (a) and 111.322 (2m) (b); and *to create* 106.54 (8), 111.91 (2) (t) and
3 146.999 of the statutes; **relating to:** mandatory overtime hours and on-call
4 time worked by health care workers and providing penalties.

Analysis by the Legislative Reference Bureau

Under current law, subject to certain exceptions, an employer must pay an employee who receives an hourly wage one and one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours per week. Current law, however, subject to certain exceptions for child labor, does not prohibit an employer from requiring an employee to work in excess of 40 hours per week.

This substitute amendment prohibits a health care facility from requiring an employee of the health care facility, or an employee of a temporary help agency or professional employer organization placed with the health care facility, who is involved in providing direct health care services for patients, residents, or clients or in providing clinical or laboratory services and who is paid an hourly wage or is classified as a nonsupervisory employee for collective bargaining purposes (health care worker) to work for more than a regularly scheduled daily work shift that has been determined and agreed to before the performance of the work (overtime) or to be on on-call time, which the substitute amendment defines as time during which a health care worker is required to be ready to report to work on short notice if the

need arises, in lieu of working overtime or as a means of circumventing the prohibition under the substitute amendment against mandatory overtime. The substitute amendment also prohibits a health care facility from using mandatory overtime as a means of filling vacancies in staffing. The prohibitions under the substitute amendment do not apply when a health care worker consents to working overtime or to being on on-call time, when a health care worker's continued presence through the completion of an ongoing medical or surgical procedure is essential to the health and safety of a patient, or when an unforeseeable emergency occurs and the health care facility first exhausts all other options before requiring a health care worker to work overtime or to be on on-call time. The substitute amendment defines an "unforeseeable emergency" as a major disaster or emergency declared by the president of the United States; a state of emergency, including a state of emergency related to public health, declared by the governor or by the governing body of a county, city, village, or town; or any other unanticipated or unavoidable incident that substantially affects or increases the need for health care workers. The substitute amendment specifies, however, that "unforeseeable emergency" does not include a situation in which a health care facility has inadequate staff due to chronic short staffing or other foreseeable causes.

A health care worker who is discharged or discriminated against for refusing to work overtime or to be on on-call time in violation of the substitute amendment, for opposing a practice prohibited under the substitute amendment, or for filing a complaint or testifying or assisting in any action or proceeding to enforce a right under the substitute amendment, may file a complaint with the Department of Workforce Development (DWD), and DWD must process the complaint in the same manner that employment discrimination complaints are processed under current law. In addition, a health care facility that discharges or discriminates against a health care worker in violation of the substitute amendment may be required to forfeit not more than \$1,000 for a first violation, not more than \$5,000 for a violation committed within 12 months of a previous violation, and not more than \$10,000 for a violation committed within 12 months of two or more previous violations.

For purposes of the substitute amendment, a "health care facility" is defined as any hospital, nursing home, county home, county infirmary, county hospital, county mental health center, rural medical center, hospice, mental health treatment facility, public dispensary for the diagnosis and treatment of tuberculosis or facility providing care under a continuing care contract; the University of Wisconsin Hospitals and Clinics Authority, the Mendota Mental Health Institute, the Winnebago Mental Health Institute, the Milwaukee County Mental Health Complex, the Wisconsin veterans homes at King, Union Grove, and Chippewa Falls, or the northern, central, and southern centers for the developmentally disabled; or a state prison, county jail, or county house of correction.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 106.54 (8) of the statutes is created to read:

2 106.54 **(8)** The division shall receive complaints under s. 146.999 (4) of
3 violations of s. 146.999 (2) and (3) and shall process those complaints in the same
4 manner that employment discrimination complaints are processed under s. 111.39.

5 **SECTION 2.** 111.322 (2m) (a) of the statutes, as affected by 2009 Wisconsin Acts
6 3 and 28, is repealed and recreated to read:

7 111.322 **(2m)** (a) The individual files a complaint or attempts to enforce any
8 right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12,
9 109.03, 109.07, 109.075, 146.997, or 146.999 or ss. 101.58 to 101.599 or 103.64 to
10 103.82.

11 **SECTION 3.** 111.322 (2m) (a) of the statutes, as affected by 2009 Wisconsin Act
12 (this act), is amended to read:

13 111.322 **(2m)** (a) The individual files a complaint or attempts to enforce any
14 right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.34, 103.455, 103.50,
15 104.12, 109.03, 109.07, 109.075, 146.997, or 146.999 or ss. 101.58 to 101.599 or
16 103.64 to 103.82.

17 **SECTION 4.** 111.322 (2m) (b) of the statutes, as affected by 2009 Wisconsin Acts
18 3 and 28, is repealed and recreated to read:

19 111.322 **(2m)** (b) The individual testifies or assists in any action or proceeding
20 held under or to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32,
21 103.455, 103.50, 104.12, 109.03, 109.07, 109.075, 146.997, or 146.999 or ss. 101.58
22 to 101.599 or 103.64 to 103.82.

23 **SECTION 5.** 111.322 (2m) (b) of the statutes, as affected by 2009 Wisconsin Act
24 (this act), is amended to read:

1 111.322 **(2m)** (b) The individual testifies or assists in any action or proceeding
2 held under or to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32,
3 103.34, 103.455, 103.50, 104.12, 109.03, 109.07, 109.075, 146.997, or 146.999 or ss.
4 101.58 to 101.599 or 103.64 to 103.82.

5 **SECTION 6.** 111.91 (2) (t) of the statutes is created to read:

6 111.91 **(2)** (t) Hours of work above the maximum hours specified in s. 146.999
7 (2) for health care workers, as defined in s. 146.999 (1) (c), employed by a health care
8 facility, as defined in s. 146.999 (1) (b). Nothing in this paragraph prohibits a health
9 care facility from bargaining on fewer hours of work than the hours provided in s.
10 146.999 (2).

11 **SECTION 7.** 146.999 of the statutes is created to read:

12 **146.999 Health care worker overtime. (1) DEFINITIONS.** In this section:

13 (a) “Department” means the department of workforce development.

14 (b) “Health care facility” means a facility, as defined in s. 647.01 (4); any
15 hospital, nursing home, county home, county hospital, county infirmary, county
16 mental health center, rural medical center, hospice, treatment facility, or other place
17 licensed, certified, or approved by the department of health services under s. 49.70,
18 49.71, 49.72, 50.02, 50.03, 50.35, 50.52, 50.92, 51.04, 51.08, or 51.09; a facility under
19 s. 45.50, 51.05, 51.06, or 252.10 or under ch. 233; or a state prison, county jail, or
20 county house of correction.

21 (c) “Health care worker” means any of the following:

22 1. An employee of a health care facility who is involved in providing direct
23 health care for patients, residents, or clients or in providing clinical or laboratory
24 services and who is paid an hourly wage or is classified as a nonsupervisory employee
25 for collective bargaining purposes.

1 2. An employee of a temporary help agency, as defined in s. 102.01 (2) (f), or of
2 a professional employer organization, as defined in s. 461.01 (5), who is placed with
3 a health care facility under a contract between the health care facility and the
4 temporary help agency or professional employer organization; who is involved in
5 providing direct health care for patients, residents, or clients or in providing clinical
6 or laboratory services; and who is paid an hourly wage or is classified as a
7 nonsupervisory employee for collective bargaining purposes.

8 (d) “On-call time” means time during which a health care worker is not on the
9 premises of a health care facility, but is required as a condition of employment to be
10 ready to report to those premises to work on short notice if the need arises.

11 (e) “Overtime” means time worked in excess of a regularly scheduled daily work
12 shift that has been determined and agreed to before the performance of the work.

13 (f) 1. “Unforeseeable emergency” means any of the following:

14 a. A major disaster or emergency declared under 42 USC 5170.

15 b. A state of emergency, including a state of emergency related to public health,
16 declared under s. 166.03 (1) (b) 1. or 166.23 (1).

17 c. Any other unanticipated or unavoidable disaster that substantially affects
18 or increases the need for health care workers.

19 2. “Unforeseeable emergency” does not include a situation in which a health
20 care facility has inadequate staff due to chronic short staffing or other foreseeable
21 causes.

22 **(2) MANDATORY OVERTIME LIMITED.** (a) A health care facility may not require a
23 health care worker to work overtime or require a health care worker to be on on-call
24 time in lieu of working overtime or as a means of circumventing the prohibition

1 under this subsection against mandatory overtime, unless any of the following
2 applies:

3 1. An unforeseeable emergency occurs and the health care facility first
4 exhausts all other options before requiring the health care worker to work overtime
5 or to be on on-call time in lieu of working overtime.

6 2. The health care worker consents to working overtime or to being on on-call
7 time in lieu of working overtime.

8 3. The health care worker's continued presence through the completion of an
9 ongoing medical or surgical procedure in which the health care worker is actively
10 engaged is essential to the health and safety of a patient.

11 (b) A health care facility may not use mandatory overtime as a means of filling
12 vacancies in staffing.

13 **(3) RETALIATION PROHIBITED.** A health care facility may not discharge or
14 discriminate against a health care worker in promotion, in compensation, or in the
15 terms, conditions, or privileges of employment for refusing to work overtime or to be
16 on on-call time in violation of sub. (2), opposing a practice prohibited under sub. (2),
17 filing a complaint or attempting to enforce any right under sub. (2), or testifying or
18 assisting in any action or proceeding to enforce any right under sub. (2).

19 **(4) ENFORCEMENT.** A health care worker who is discharged or discriminated
20 against in violation of sub. (3) may file a complaint with the department, and the
21 department shall process the complaint in the same manner that employment
22 discrimination complaints are processed under s. 111.39. If the department finds
23 that a violation of sub. (3) has been committed, the department may order the health
24 care facility to take such action under s. 111.39 as will effectuate the purpose of this

1 section. Section 111.322 (2m) applies to discharge or other discriminatory acts
2 arising in connection with any proceeding under this subsection.

3 **(5) CIVIL PENALTY.** In addition to ordering a health care facility that has violated
4 sub. (3) to take such action as will effectuate the purpose of this section, the
5 department may require the health care facility to forfeit not more than \$1,000 for
6 a first violation, not more than \$5,000 for a violation committed within 12 months
7 of a previous violation, and not more than \$10,000 for a violation committed within
8 12 months of 2 or more previous violations. The 12-month period shall be measured
9 by using the dates of the violations that resulted in convictions.

10 **(6) POSTING OF NOTICE.** Each health care facility shall post, in one or more
11 conspicuous places where notices to employees are customarily posted, a notice in a
12 form approved by the department setting forth the rights of health care workers
13 under this section. Any health care facility that violates this subsection shall forfeit
14 not more than \$100 for each offense.

15 **SECTION 8. Initial applicability.**

16 (1) COLLECTIVE BARGAINING AGREEMENTS. This act first applies to a health care
17 worker, as defined in section 146.999 (1) (c) of the statutes, as created by this act, who
18 is affected by a collective bargaining agreement that contains provisions inconsistent
19 with this act on the day on which the collective bargaining agreement expires or is
20 extended, modified, or renewed, whichever occurs first.

21 **SECTION 9. Effective dates.** This act takes effect on the day after publication,
22 except as follows:

