

ADMINISTRATIVE POLICY



STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES FRAUD PREVENTION & LABOR STANDARDS

TITLE: LAW RESTRICTING MANDATORY OVERTIME FOR CERTAIN HEALTHCARE WORKERS **NUMBER: HLS.A.1**

**CHAPTER: [RCW 49.28.130](#), [RCW 49.28.140](#),
and [RCW 49.28.150](#)**

ISSUED:
UPDATED:
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ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Health Care Labor Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

Covered health care facilities are prohibited from requiring certain credentialed healthcare employees from working overtime in excess of their agreed upon, regularly scheduled shift; more than twelve hours in a twenty-four hour period; or more than eighty hours in a consecutive fourteen-day period. A covered employee may volunteer to work overtime, but can only be required to work overtime when the healthcare facility can show that one of four exceptions to the prohibition on mandatory overtime are met. Covered employers must document their efforts to obtain other staffing before requiring mandatory overtime.

1. Who are the healthcare employees covered under the law prohibiting mandatory overtime?

Certain healthcare employees are entitled to mandatory overtime protections if they: (1) are employed by a covered health care facility, (2) involved in direct patient care activities or clinical services, (3) receive an hourly wage or are covered by a collective bargaining agreement; and (4) are one of the following:

- Licensed practical nurse;
- Registered nurse;
- Surgical technologist registered under [RCW 18.215](#);
- Diagnostic radiologic technologist or cardiovascular invasive specialists certified under [RCW 18.84](#);

- Respiratory care practitioner licensed under [RCW 18.89](#); or
- Nursing assistant-certified under [RCW 18.88A.020](#). See [RCW 49.28.130\(1\)](#).

An employee's status as "part time" or "full time" does not affect whether the employee is covered. The section of the healthcare facility in which the employee works also does not affect whether the employee is covered.

2. What is a "health care facility" subject to the law restricting mandatory overtime?

A health care facility means certain medical facilities that operates on a twenty-four hour per day, seven-day-a-week basis, but there are exceptions. The following are covered health care facilities:

- Hospitals licensed under [RCW 70.41](#);
- Hospices licensed under [RCW 70.127](#);
- Rural health care facilities defined in [RCW 70.175.020](#);
- Psychiatric hospitals licensed under [RCW 71.12](#); and,
- Facilities owned and operated by the Department of Corrections or by a governing unit defined in [RCW 70.48.020](#) in a correctional institution defined in [RCW 9.94.049](#) that provide health care services.

Nursing homes regulated under [RCW 18.51](#) or a home health agency regulated under [RCW 70.127](#) that are operating under the license of a health care facility are also considered health care facilities. See [RCW 49.28.130\(3\)\(a\)](#).

Covered healthcare facilities include any part of a facility that meets the requirements above and include: hospices; acute-care hospitals, including long-term care wings; rural health care facilities; private, county, or municipal psychiatric facilities; nursing homes or home health agencies operating under the license of a 24-hour health care facility; and health care facilities in certain correctional institutions. See [RCW 49.28.130\(3\)](#). Hospices include hospice care centers and hospice agencies providing in-home hospice services. A home health agency operating under the license of a health care facility is part of the health care facility and therefore covered, unless it is a home health agency operating under its own license issued by the Department of Health. Facilities in correctional institutions owned and operated by the Department of Corrections or a city or county that provide health care services to detainees or inmates are considered health care facilities.

Certain healthcare facilities are not covered. Any healthcare facility that is not one of designated licensed facilities above or does not operate on a twenty-four hour per day, seven-day-a-week basis is not covered. For example, a specialty clinic operating only six days a week is not covered, even if it employs nurses or diagnostic radiologic technologists. There are also a few facilities that are specifically excluded from coverage. Nursing homes operating under their own licenses issued by the Department of Social and Health Services (DSHS) and state psychiatric hospitals such as Western State Hospital and Eastern State Hospital or other state facilities operated by DSHS are not considered health care facilities.

3. When are hours considered “overtime” for covered healthcare employees?

There are three types of overtime prohibited for covered healthcare employees, unless an exception applies. In this context, “overtime” means:

- 1) Hours worked in excess of an agreed upon, predetermined, regularly scheduled shift;
- 2) Hours that exceed twelve hours worked in a twenty-four hour period; and
- 3) Hours that exceed eighty hours worked in a consecutive fourteen-day period. See [RCW 49.28.130\(4\)](#).

The criteria for what constitutes overtime in excess of an agreed upon, predetermined, regularly scheduled shift is the employee’s typical shift length. For example, if the employee is regularly scheduled to work an 8-hour shift, any time worked beyond 8 hours is considered overtime.

Any work performed by an employee in excess of twelve hours in a twenty-four hour period is considered overtime. For example, if an employee works a regularly scheduled morning shift of 12 hours from 6:00 am to 6:00 pm, and then is asked to come in early at 5:00 am the following morning, the 5:00-6:00 am work causes the employee to exceed 12 hours in a 24-hour period and is considered overtime. The healthcare facility cannot require the employee to come in early for that overtime, unless an exception applies.

Additionally, when an employee volunteers for overtime and works more than twelve consecutive hours the employee is to be provided with the option of having at least eight consecutive hours of uninterrupted time off work. See [RCW 49.28.140\(4\)](#).

4. When may a covered health care facility ask an employee to work mandatory overtime?

A covered health care facility may offer a covered employee overtime work, but unless one of the four exceptions apply, the employee may not be required to work overtime. The acceptance of overtime is normally entirely voluntary. An offer of overtime to an employee is not considered voluntary if it comes in the form of a request that does not specify the overtime is entirely voluntary, or if it contains any pressure or coercion to accept the overtime. Examples of coercive pressure that may make an overtime offer appear non-voluntary include guilt-tripping the employee for leaving a facility or area short-staffed, reminding the employee that others have pitched in or stayed to cover for them in the past, questioning the employee’s dedication to the team or the patients, or implying consequences such as less desirable shift scheduling or work assignments if the employee does not accept the overtime.

An covered employee’s decision to accept overtime is voluntary and if the employee refuses to accept overtime an employer may not discriminate, discharge or threaten the employee with discipline. See [RCW 49.28.140\(1\), \(2\)](#). For instance, an employee cannot receive a counselling or even a verbal warning for choosing not to work overtime. Similarly, an employee’s performance review cannot penalize the employee as “not a team player” or “not committed to patient needs and care” based on an employee’s protected choice not to work overtime.

5. What are the four exceptions to the mandatory overtime prohibition?

A covered healthcare employee may volunteer for overtime, but may not be required to work overtime.

There are only four exceptions to the prohibition on mandatory overtime:

- 1) When overtime is caused by an unforeseeable emergent circumstance;
- 2) When overtime is caused by prescheduled on-call time;
- 3) When the employer uses and documents reasonable efforts to obtain staffing but cannot avoid overtime; or
- 4) When an employee is required to work overtime to complete a patient care procedure already in progress and it could be detrimental to the patient if the employee left. See [RCW 49.28.140\(3\)](#).

These limited exceptions are described in greater detail below.

6. What is an “unforeseeable emergent circumstance”?

When an employer cannot anticipate an emergency circumstance in advance, the situation may fall under the “unforeseeable emergent circumstance” exception. The law defines this as:

- Any unforeseen declared national, state or municipal emergency;
- When a health care facility disaster plan is activated; or
- Any unforeseen disaster or other catastrophic event that substantially affects or increases the need for health care services. See [RCW 49.28.130\(7\)](#).

To qualify, the circumstance must be both unforeseeable—something a health care facility could not predict and thus plan for in advance—and emergent, which means newly arising. A circumstance that is foreseeable or extended is not an unforeseeable emergent circumstance. For instance, the department would generally presume that a circumstance is no longer newly arising if it has continued 90 days or more, and the unforeseen emergent circumstance exception would therefore no longer apply. The circumstance, if expected to continue, would also no longer be unforeseeable, but rather would be something healthcare facilities would be expected to take steps to address and plan for.

7. What is “prescheduled on-call time”?

On-call time means time an employee is compensated for being available to work or who, as a condition of employment, has agreed to be available on short notice if needed. See [RCW 49.28.130\(5\)](#). On call time is not time spent actively working on an employer’s premises.

On-call time may be pre-scheduled as part of regular scheduling practices and/or provisions of a collective bargaining agreement, or may be scheduled for coverage or as a result of staffing changes or other reasons. Only prescheduled on-call time qualifies for the mandatory overtime exemption. See [RCW 49.28.140\(3\)\(b\)](#). If an employee worked mandatory overtime as a result of being called in during prescheduled on-call time, that overtime is not a violation. Prescheduled on-call time does not include situations when additional employees are placed on-call who were not previously scheduled for on-call time. For example, when an employer seeks additional on-call coverage because the scheduled on-call employee or employees were called-in during their

prescheduled, on-call time. It also does not include post-scheduling changes that necessitate additional on-call employees or placing an employee on call in a last-minute effort to cover an open shift.

8. What are the conditions of using prescheduled on-call time for mandatory overtime?

If an employer requires mandatory overtime from an employee on prescheduled on-call time, the employer is subject to the following requirements:

- Mandatory prescheduled on-call time may not be used in the place of scheduling employees to work regularly scheduled shifts when a staffing plan indicates the need for a scheduled shift;
- Mandatory prescheduled on-call time may not be used to address regular changes in patient census or acuity or expected increases in the number of employees not reporting for predetermined schedules shifts; and,
- Mandatory prescheduled on-call time may not be used to begin at a time when the duration of the procedure is expected to exceed the employee's regular scheduled hours of work, except for the case of a non-emergent patient procedure that in the judgement of the provider responsible for the procedure believes a delay would cause a worse clinical outcome.

See [RCW 49.28.140\(3\)\(b\)\(i\)-\(iii\)](#).

Example 8-1: A hospital regularly staffs six nurses on a floor, consistent with its staffing plan. It also includes in its staffing schedules every month an extra, on-call shift every evening to account for disruptions from traffic or other events. On a day when six nurses are scheduled and the patient census is within expected norms, one nurse indicates she will be two hours late. The hospital activates the on-call nurse to cover until the scheduled nurse has arrived. The on-call nurse worked her regularly-scheduled 12-hour shift early that morning, making the additional work overtime. This is a permissible use of pre-scheduled on-call time and is not prohibited.

Example 8-2: After an unusual number of call-outs, an emergency department activates its on-call CNA to come in and work. It then places another CNA, who was not previously scheduled for on-call time, in the on-call position. An unexpected surge in admissions requires more staffing and the hospital calls the newly-on-call CNA in. The first CNA may be asked to work overtime because she was on pre-scheduled on-call time. The second CNA does not qualify for the pre-scheduled on-call time exception and cannot be required to work mandatory overtime.

9. What are “reasonable efforts”?

On occasion, health care facilities encounter increases in patient censuses, staffing shortages, or other reasons they may need to seek coverage or additional workers. Health care facilities may not use mandatory overtime in these circumstances unless they have exhausted certain “reasonable efforts” to obtain alternative staffing. For an employer to show they have used “reasonable efforts” to obtain staffing under [RCW 49.28.140\(3\)\(c\)](#), the employer *must complete each one of the following four steps*:

- Seek qualified staff who are willing to volunteer for extra work;

- Contact qualified staff who have made themselves available for extra work;
- Seek the use of qualified per diem staff; and
- Seek personnel from a contracted temporary staffing agency, as permitted by law or a collective bargaining agreement, when the employer regularly uses a temporary agency.

The steps may be completed in any order, but all four must be completed to the extent reasonably possible before overtime may be mandated. See [RCW 49.28.130\(6\)](#).

In order to establish the employer was entitled to use the “reasonable efforts” exemption, the employer must document its completion of each of the four steps, and that the steps were completed before the employer required the overtime work in question. The Employer must retain this documentation for a period of three years. Mandatory overtime instituted without documentation that shows each step was completed prior to mandating overtime is presumed to violate the mandatory overtime prohibition.

The “reasonable efforts” exception cannot be used to excuse prohibited mandatory overtime if the overtime is used to fill or supplement vacancies resulting from chronic staff shortages.

Example 9-1: An employer budgets in its staffing plan for up to two emergency department nurses to call out sick per shift during flu season. Unexpectedly, four emergency department nurses call out sick on the same shift. To cover the two additional, unexpected absences, the employer asked if any of the nurses currently working wanted to volunteer to stay on after their shifts. When no one was available, the employer contacted staff on their overtime list who had previously indicated they were available and interested in extra shifts. When the employer still could not locate a volunteer, it called per diem staff, and contacted a temporary staffing agency that they worked with in the past. No one was available to cover the shift. After exhausting all four options and documenting its completion of each step, the employer required an employee to work overtime. The employer has complied with the requirements of the reasonable efforts exception.

Example 9-2: A respiratory therapist at a specialty clinic within a larger health care facility has to leave early because of a family emergency. There is only one other respiratory therapist who regularly works in that clinic and they are on their scheduled day off. The supervisor calls per diem staff and checks with their frequently-used staffing agency and finds no alternative respiratory therapists available. However, the supervisor fails to seek volunteers from among other qualified respiratory therapists who work elsewhere in the health care facility, some of whom have worked in the specialty clinic on occasion before. The clinic supervisor requires the second respiratory therapist to come in and work overtime. The health care facility has not completed all four steps of the “reasonable efforts” exception and the mandatory overtime required therefore violates the law.

Example 9-3: After shifts are already scheduled for the month, a pediatric nurse has to miss work to care for a child home sick from school. No one currently on shift is willing to stay late to cover the missed shift. Her supervisor calls one of her coworkers and reminds them the pediatric nurse covered for their shift when they were out last week and asks them to cover the pediatric nurse’s shift to “help out the team.” The coworker comes in and covers the shift

because their supervisor asked them to. The supervisor does not call anyone else who has previously offered to work overtime, and does not call per diem staff or the facility's contracted temporary agency. The health care facility needed to exhaust and document all four steps to use the "reasonable efforts" exception. The supervisor did not make clear that the overtime was entirely voluntary and the employee did not affirmatively volunteer for the overtime. The health care facility has not complied with the law because it did not seek volunteers and pressured a single, targeted employee to cover the shift.

Example 9-4: After a major traffic incident, multiple surgical technologists in a major metro-area hospital call in indicating they will be hours late for their shifts. The hospital has previously set up an e-alert system that goes out by an app and text to employees and per diem workers. The hospital uses the system to seek volunteers for coverage. After receiving no responses, the hospital reaches out to a temporary staffing agency by email. The agency has no surgical technologists available in the needed timeframe. The hospital then asks a surgical technologist completing an 8-hour shift to stay on until relief arrives. The hospital has made reasonable efforts, which are documented in its e-alert system and emails with the staffing agency. The hospital has complied with the requirements of the reasonable efforts exception.

10. What constitutes a chronic staff shortage?

Mandatory overtime cannot be used to fill vacancies from chronic staffing shortages, regardless of whether an exception might also apply.

Multiple factors impact what determines staffing adequacy and this will vary among facilities. Chronic staffing shortages are those where vacancies are either: (1) long-standing, or (2) frequently recurring. A long-standing vacancy, for instance, would occur where a position is open and not filled by the facility within a reasonable period of time.

A long-standing vacancy is generally considered one that has been open and/or under active recruitment for at least 90 days.

Example 10-1: The full complement of nurses on an ICU is 12 and there are two unfilled positions still open four months after the previous staff departed, which results in a "chronic" blank spot in the schedule. Mandatory overtime cannot be used to fill the shifts that are open as a result of the unfilled vacancies.

"Frequently recurring" staffing shortages are the kind that result from staff vacations, medical leaves, leaves of absence, regularly anticipated turnover, expected changes in program rotations, residency or other short-term program departures, and other absences or staffing shortages that should be readily anticipated by the facility. The reasonable efforts exemption in the law does not apply to overtime work that is used to fill vacancies resulting from these frequently recurring chronic staff shortages.

The table below illustrates whether the following potential staffing situations could meet the “reasonable efforts” exception:

Staffing Situation	Can the facility use the reasonable efforts exception?
Unfilled positions resulting in holes in the schedule	No
Anticipated gaps in the schedule due to planned vacation, medical leave, or leave of absence	No
Frequently recurring increases in census such that the scheduled complement of nurses is inadequate	No
Unanticipated increases in census above that anticipated by the health care facility resulting in additional staffing demands	Yes
Unanticipated absences (such as same-day sick calls) that exceed the staffing plan tolerances	Yes

11. When would requiring an employee to work overtime fall under the “procedure already in progress” exception?

An employer may require an employee to work overtime to complete a procedure already in progress where the absence of the employee could have an adverse effect on the patient. See [RCW 49.28.140\(3\)\(d\)](#). This could include situations where:

- There is an emergency code in progress (trauma, cardiac arrest, stroke);
- A cardiovascular invasive specialist needs to complete documentation after an emergency situation;
- A nurse has skills needed for an ongoing procedure that no other relief nurse would have;
- A surgical technologist is the only person with knowledge of a piece of equipment or a procedure;
- A covered employee is completing outpatient surgical or specialty procedures, such as those performed in a cardiac or gastroenterology lab that is located within a 24-hour hospital facility; or
- In outpatient surgery or specialty clinics that operate with a single shift, a nurse may have to stay long enough for the patient to recover and be released.

The determining factor for this exception is whether the absence of the specific, covered employee could have an adverse effect on the patient.

Example 11-1: A critical surgery continues for 20 hours. At the beginning of the fourth hour, a surgical technologist’s shift ends and she is replaced by a second surgical technologist. At the 16th hour, the second surgical technologist’s shift is due to end and a third shift surgical technologist is available and able to come in and complete the procedure. The second surgical technologist cannot be required to stay on and complete the procedure because there is a qualified, scheduled replacement and there would be no adverse effect on the patient if the shift changed as expected.

Example 11-2: A NICU (Neonatal Intensive Care Unit) respiratory therapist is operating and monitoring specialty NICU equipment for a post-op neonate patient, when his shift is due to end. The NICU respiratory therapist who would normally work the next shift is out of town and unavailable. Although the hospital has other respiratory therapists, none are certified or experienced in the NICU or on the neonatal-specific equipment. The absence of a NICU-specialized respiratory therapist could have an adverse affect on the patient. The NICU can require the respiratory therapist to work mandatory overtime.

12. Can a covered employee file a complaint about mandatory overtime?

Questions regarding this policy or the related law can be directed to <contact email>. Individuals who believe that their rights as described by this policy have been violated may file a complaint using the <complaint address> on the Department of Labor and Industries website.