Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Labor & Workplace Standards Committee

E2SSB 5236

Brief Description: Concerning hospital staffing standards.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Robinson, Keiser, Conway, Frame, Hunt, Kauffman, Lovelett, Nguyen, Nobles, Pedersen, Shewmake, Stanford, Trudeau, Valdez and Wilson, C.).

Brief Summary of Engrossed Second Substitute Bill

- Makes numerous changes to nurse staffing committees and staffing plan requirements, including requiring hospitals to report noncompliance, requiring the Department of Health and Department of Labor and Industries to establish a formal agreement on oversight and enforcement roles, and creating a hospital staffing advisory committee.
- Amends the meal and rest break provisions, including requiring reporting noncompliance, and amends overtime provisions for health care employees.

Hearing Date: 3/15/23

Staff: Trudes Tango (786-7384).

Background:

Nurse Staffing Committees.
Hospitals are required to have nurse staffing committees, whose membership consist of: (a) at least one-half who are registered nurses providing direct patient care; and (b) up to one-half who are determined by the hospital administration. Nurse staffing committees develop and review

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annual staffing plans and respond to staffing variations and complaints presented to the nurse staffing committee.

When developing the annual staffing plan (staffing plan), the nurse staffing committee (staffing committee) must consider certain statutory factors, such as patient activity, intensity level, nature of care required, and level of experience of staff.

If the staffing plan is not adopted by the hospital, the chief executive officer (CEO) must provide reasons why the plan was not adopted and either identify the changes to the plan prior to the hospital's adoption, or prepare an alternative staffing plan that the hospital will adopt. Hospitals must submit their staffing plans annually to the Department of Health (DOH).

Registered nurses may submit complaints to the staffing committee about variations to the staffing plan and shift-to-shift adjustments. The DOH may investigate complaints of violations of the nurse staffing statutes, as well as complaints related to the hospital's failure to: establish a staffing committee; submit a staffing plan annually; conduct semiannual reviews of the plan; and follow nursing assignments or shift-to-shift adjustments.

The DOH may investigate complaints of nursing assignments and shift-to-shift adjustments only if the complainant submits evidence of data showing a continuing pattern of unresolved violations for a minimum 60-day continuous period. If the complaint is substantiated, the DOH will issue the hospital a statement of deficiencies. The hospital has 45 days to submit a corrective action plan. If the hospital fails to submit or follow the corrective action plan, the DOH may impose a civil penalty of $100 per day.

The DOH may not investigate complaints in the event of unforeseeable emergency circumstances or if the hospital made reasonable efforts to obtain staffing but was unable to do so. "Unforeseeable emergency circumstance" is defined as: (1) any unforeseen national, state, or municipal emergency; (2) when a hospital disaster plan is activated; (3) any unforeseen disaster or catastrophic event that substantially affects the need for health care services; or (4) when a hospital is diverting patients to another hospital or receiving diverted patients from another hospital.

Various provisions related to the staffing committees, including requirements for the DOH to investigate complaints, expire on June 1, 2023.

Meal and Rest Breaks.

Generally, hospitals must provide certain employees with uninterrupted meal and rest breaks. This rule does not apply:

- in a case of an unforeseeable emergent circumstance; or
- in a clinical circumstance that may lead to a significant adverse effect on the patient: (1) without the knowledge, skill, or ability of the employee; or (2) due to an unforeseen or unavoidable event requiring immediate action.

In the case of a clinical circumstance, if a rest break is interrupted by the employer before 10

complete minutes, the employee must be given an additional 10 minute uninterrupted rest break at the earliest reasonable time during the work period.

The meal and rest break provision applies to a hospital employee who is:
- involved in direct patient care activities or clinical services;
- receiving an hourly wage or covered by a collective bargaining agreement; and
- is a licensed practical nurse, registered nurse, surgical technologist, diagnostic radiologic technologist, cardiovascular invasive specialist, respiratory care practitioner, or a nursing assistant-certified.

Overtime Restrictions in Health Care Facilities.
Hospitals and other health care facilities are prohibited from requiring certain employees to work overtime. Health care facilities include hospices, rural health care facilities, psychiatric hospitals, and facilities owned and operated by the Department of Corrections. The definition of "employee" is the same as used in the meal and rest break statutes.

The overtime restriction does not apply to overtime work that occurs:
- because of any unforeseeable emergent circumstance;
- because of prescheduled on-call time, subject to certain limitations;
- when the employer documents that it has used reasonable efforts to obtain staffing (an employer has not used reasonable efforts if overtime work is used to fill vacancies resulting from chronic staff shortages); or
- when an employee must work overtime to complete a patient care procedure.

A violation of the overtime provision is a class 1 civil infraction.

Department of Labor and Industries.
The Department of Labor and Industries (L&I) enforces wage and hour laws and workplace health and safety standards, including the meal and rest break and overtime provisions.

Summary of Bill:

Hospital Staffing Committees, Staffing Plans, and Charters.
The expiration date for the statutes related to staffing committees is repealed. By January 1, 2024, hospitals must establish hospital staffing committees (staffing committee). The staffing committee must be comprised of 50 percent of voting members who are nonsupervisory and nonmanagerial nursing staff providing direct patient care. The remaining 50 percent of members must be determined by the hospital administration, but must include the chief financial officer, the chief nursing officers, and patient care unit directors or managers or their designees. Additional staffing relief must be provided if necessary for committee members to attend staffing committee meetings. Staffing committees must, among other things, review, assess, and respond to complaints presented to the staffing committee.

Changes are made to the process for adopting staffing plans. By July 1, 2024, and annually thereafter, the staffing committee must propose, by a 50 percent plus one vote, a draft of the annual staffing plan to be delivered to the chief executive officer (CEO). The CEO or their designee must provide written feedback that, among other things:

- identifies elements of the staffing plan that could cause the CEO concerns regarding financial feasibility, unit closures, or patient care risk; and
- provides a status report on implementation of the staffing plan.

The staffing committee must review the feedback before approving a revised staffing plan. If the hospital does not adopt the revised staffing plan, the staffing plan that remains in effect is the most recent of either:

- the plan that was in effect on January 1, 2023; or
- the plan last approved by a 50 percent plus one vote of a duly constituted hospital staffing committee and adopted by the hospital.

Beginning January 1, 2025, staffing committees must submit their final staffing plans to the Department of Health (DOH) and annually thereafter or after the plan is updated. The staffing committee must submit staffing plans using the uniform form created by DOH. The form must allow for variations in service offerings, facility design, and other differences between hospitals, but must allow patients and the public to clearly understand and compare staffing plans. The DOH may determine that a hospital has failed to timely submit a staffing plan if the form is incomplete.

By July 1, 2024, the staffing committee must file with the DOH a charter that must contain specified information, including processes for:

- electing cochairs and conducting other administrative functions;
- resolving complaints within 90 days;
- conducting quarterly reviews of staff turnover rates and other data;
- providing the staffing committee with information regarding patient complaints; and
- using information from the noncompliance reports to develop staffing plans.

The DOH and the Department of Labor and Industries (L&I) must provide technical assistance to staffing committees to comply with the staffing committee's duties and responsibilities. Technical assistance may not be provided during an inspection or pending an investigation.

Beginning July 1, 2025, hospitals must implement their staffing plans, except in instances of unforeseeable emergent circumstances. When an unforeseeable emergent circumstance lasts for 15 days or more, the hospital incident command must report to the staffing committee cochairs an assessment of the staffing needs arising from the unforeseeable emergent circumstance and the hospital's plan to address staffing needs. The staffing committee must develop a contingency staffing plan to address the needs. The hospital's deviation from its staffing plan may not be in effect for more than 90 days without a review by the staffing committee. Within 90 days of an initial deviation, the hospital must report to DOH the basis for the deviation.

A direct care registered nurse or direct care nursing assistant-certified may not be assigned to a nursing unit or clinical area unless the nurse has received orientation in that clinical area and has demonstrated current competence in providing care in that area. By July 1, 2025, the hospitals must adopt written policies regarding this requirement.

Documenting and Reporting Noncompliance and Corrective Plans of Action.
A hospital must document when a patient care unit nursing staff assignment is out of compliance with the staffing plan. Hospitals must adopt written policies and procedures regarding documentation by October 1, 2024.

Beginning in 2026, a hospital must report to the DOH, on a semiannual basis, the accurate percentage of nurse staffing assignments where the assignment in a patient care unit is out of compliance with the staffing plan. Reports are due on January 31 and July 31 of each year, with the January 2026 report covering the last six months of 2025.

The DOH must develop a form for reporting noncompliance that includes a checkbox that a staffing committee cochair may check if the cochairs believes that the validity of the report should be investigated. If the box is checked, the DOH may investigate the validity of the report. Beginning January 1, 2027, the DOH must ensure the forms are complete and received by the deadline and that the checkbox has not been checked.

Beginning July 1, 2025, if a hospital is in compliance for less than 80 percent of the nurse staffing assignment in a month, the hospital must report its noncompliance to the DOH within seven calendar days of the end of the month.

Beginning January 1, 2027, the DOH, in consultation with L&I, must require a hospital to submit a corrective plan of action within 45 calendar days of the noncompliance report to the DOH or if an investigation regarding the validity of a semiannual report shows that the hospital is not in compliance.

Based on the formal agreement between the DOH and L&I, the departments must review and approve a hospital's corrective plan of action. A corrective plan of action may include:
- exercising efforts to obtain additional staff;
- implementing actions to improve staffing plan variation or shift-to-shift adjustments;
- delaying new services or procedure areas;
- requiring minimum staffing standards;
- reducing hospital beds or services; or
- closing emergency departments to ambulance transport except for critical care patients.

If a hospital follows a corrective plan of action, but remains in compliance for less than 80 percent of the staffing assignment in the month following completion of the corrective plan, the hospital must submit a revised corrective plan of action.

The requirements to document noncompliance, report on a semiannual basis, and report when

compliance is less than 80 percent, do not apply to the following hospitals (exempt hospitals):

- hospitals certified as critical access hospitals;
- hospitals with fewer than 25 acute care licensed beds;
- hospitals certified by the centers for Medicare and Medicaid services as sole community hospitals that are not owned or operated by a health system that owns or operates more than one acute hospital; and
- hospitals located on an island operating within a public hospital district in Skagit County.

Penalties and Other Provisions Regarding Staffing Plans.
The DOH may impose a penalty of up to $10,000 per 30 days of noncompliance for failure to submit a staffing plan, charter, or corrective plan of action by the relevant deadlines. L&I may impose civil penalties of up to $50,000 per 30 days for failure to follow a corrective plan of action. The DOH may also take actions against a hospital's license on the basis of L&I findings that the hospital failed to follow a corrective plan of action.

The DOH must post staffing plans, charters, and the semiannual compliance reports on its website. As resources allow, the DOH must make records of administrative actions and civil penalties and notices of resolutions available to the public.

Joint Agreement Between the Department ofHealth and the Department of Labor and Industries.
By July 1, 2024, the DOH and L&I must jointly establish a formal agreement identifying the roles of each agency regarding oversight and enforcement of the various requirements. To the extent feasible, the agreement must provide for oversight and enforcement actions by a single agency and must include measures to avoid multiple citations for the same violations. The agreement must allow for data sharing.

Investigations of Complaints.
Based on their formal agreement, the DOH and L&I must investigate complaints regarding variations to the staffing plan and shift-to-shift adjustments, but only if the complaint has been submitted to the staffing committee and remains unresolved for 60 days after receipt by the staffing committee.

If after an investigation, the DOH and L&I determine that there have been multiple unresolved violations related to variations of the staffing plan or shift-to-shift adjustments that are of a similar nature within 30 days prior to the receipt of the complaint by the DOH, then the DOH must require the hospital to submit a corrective plan of action.

Hospitals will not be in violation of the staffing committee and staffing plan requirements if it is determined that:

- there were unforeseeable emergent circumstances and certain procedures were followed;
- the hospital, after consulting with the staffing committee, documents that it has made reasonable efforts to obtain and retain staffing to meet required personnel assignments but was unable to do so; or
- an individual patient admission from another hospital who was in need of critical care

caused the staffing plan violation.

The DOH and L&I may investigate and take enforcement action without any complaint if either department discovers data in the course of an investigation or inspection that suggests a violation of the staffing committee and staffing plan requirements.

Advisory Committee on Hospital Staffing.
By September 1, 2023, the DOH, in consultation with L&I, must establish a 12-member advisory committee on hospital staffing (advisory committee). The advisory committee must advise the DOH on developing the uniform staffing plan form and advise L&I on developing a uniform form for recording missed meal and rest breaks.

The DOH and L&I must appoint to the advisory committee six members representing hospitals and hospital systems from nominees provided by the Washington State Hospital Association (WSHA), and six members representing frontline patient care staff from nominees provided by the collective bargaining representatives of frontline staff.

On a quarterly basis, the DOH and L&I must provide the advisory committee with data on hospital compliance with staffing plans, complaints and disposition trends, and corrective plans of action.

By December 1, 2023, the WSHA must survey hospitals in the state and report to the advisory committee on the use of innovative staffing and care delivery models.

Duties and responsibilities of the advisory committee include the following:
- The advisory committee must meet at least once per month until the hospital staffing form is developed, and after January 1, 2027, the advisory committee may meet when necessary.
- By December 1, 2024, the advisory committee must review the report created by the Washington Institute for Public Policy (WSIPP).
- After July 1, 2029, the advisory committee must discuss issues related to applying the requirement to report noncompliance to the exempt hospitals.

The provisions creating the advisory committee expire July 1, 2030.

Washington State Institute for Public Policy Study.
The WSIPP must conduct a study on hospital staffing standards and must review current and historical staffing plans filed with the DOH. The study must describe, among other things:
- nurse staffing assignments;
- statistics on submissions by hospital unit type;
- trends; and
- staffing standards from other jurisdictions and other data.

The WSIPP must provide a report to the department and relevant committees of the Legislature

by June 30, 2024.

Meal and Rest Breaks.
Changes are made to the exceptions for when uninterrupted meal and rest breaks must be provided. The provision requiring that the employee be given an additional ten minute break if the employee's rest break was interrupted is removed. An exception to the requirement to provide uninterrupted breaks is created for an unforeseeable clinical circumstance, as determined by the employee that may lead to a significant adverse effect on the patient's condition, unless the employer determines that the patient may suffer life-threatening adverse effects. This provision does not apply to exempt hospitals, until July 1, 2026.

Combining meal and rest breaks is allowed for any work period in which an employee is entitled to one or more meal periods and more than one rest period.

The definition of employee is broadened, applying the meal and rest break provisions to an employee who is employed by a hospital, involved in direct patient care activities or clinical services, and receives an hourly wage or is covered by a collective bargaining agreement.

The hospital must provide quarterly reports to L&I of the total number of meal and rest periods missed during the quarter. The reports must be on forms issued by L&I. This provision does not apply to exempt hospitals, until July 1, 2026.

If L&I determines that an employer is not 80 percent compliant with the meal and rest break requirements, and more than 20 percent of the meal and rest periods were missed, or if the employer fails to submit a report, L&I must offer the employer technical assistance until June 30, 2026, after which offering technical assistance is discretionary.

Beginning July 1, 2026, if L&I finds that an employer has exceeded the quarterly threshold for compliance on meal and rest periods, L&I must impose monetary penalties. This provision does not apply to exempt hospitals until July 1, 2028. The penalties assessed are:

- $5,000 for hospitals certified as critical access hospitals or with up to 25 licensed beds;
- $15,000 for hospitals with 100-299 beds; and
- $20,000 for hospitals with 300 or more beds.

The penalty amounts must be doubled if L&I is imposing penalties for a third consecutive quarter. A hospital in compliance for a single quarter is no longer subject to the penalties for subsequent violations for consecutive quarters.

The data in the quarterly reports must be valid, which means it is attested to and has not been inappropriately manipulated or modified. L&I must investigate complaints on the validity of data if the complaint is based on the actual knowledge of the complaining party. If L&I finds that a hospital violated the requirement regarding valid data, L&I may impose civil penalties and other appropriate relief. Employees must be free from coercion in recording their meal and rest periods.

A hospital may not take adverse action against an employee for exercising any right under the meal and rest break provisions. L&I must investigate complaints related to adverse actions and may order civil penalties of up to $1,000 for the first violation and up to $5,000 for subsequent violations and other appropriate relief.

Overtime.
For purposes of the exception to the overtime prohibition, 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 health care facility's regular scheduled hours of work, except for a nonemergent patient procedure for which a delay would cause a worse clinical outcome.

L&I must investigate and enforce the overtime provisions under an administrative complaint procedure with civil penalties. L&I may waive or reduce penalties if the health care facility has taken corrective action, and L&I may not assess a penalty if the health care facility reasonably relied on a rule, written order, opinion, advice, or other department-issued policy.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 9, 2023.

Effective Date: The bill contains multiple effective dates.