

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL
UNION, LOCAL 7, AFL-CIO

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN OF COLORADO and COLORADO
PERMANENTE MEDICAL GROUP P.C.,

Defendants.

COMPLAINT AND JURY DEMAND

COMES NOW United Food and Commercial Workers International Union, Local 7, AFL-CIO (collectively, the “Plaintiff” or “Local 7”), by and through undersigned counsel, and for its Complaint and Jury Demand against the above-named Defendants, alleges as follows:

SUMMARY OF CASE

1. For over fifty (50) years, the Kaiser Permanente organizations have been on the forefront of healthcare in America, providing high quality care from a talented workforce of everyday heroes to millions of Coloradoans at an affordable price. Sadly, however, Kaiser has become more focused on reducing costs than on providing high-quality health care to its member patients. Even prior to the COVID-19 pandemic, Kaiser’s Colorado regional operation suffered from chronic staffing shortages and inadequate provider coverage. Since the pandemic began in

and around March 2020, that festering problem has become a nightmare for patients and providers alike.

2. Plaintiff Local 7 brings this action as the collective bargaining representative of a variety of health professionals who work for Kaiser in Colorado, including nurses, pharmacists, advanced practice providers, therapists, and others. As the collective bargaining agreement covering these workers provides, “Kaiser shall provide sufficient staffing to address quality of standards of patient care and provider workload including safe coverage.” Sadly, Kaiser has woefully failed to live up to that contractual obligation. For example, Kaiser has so understaffed its operations that many inbound messages from patients are not responded to, *or even reviewed* until days or weeks – and sometimes *months* – after their receipt. Instead of increasing staffing to meet demand, Kaiser has instead chosen to overwork its existing staff by calling them in for weekend overtime to reduce backlogs of unopened messages. Moreover, despite repeated entreaties by Local 7, Kaiser has failed to fix these dangerous concerns. The within litigation is the necessary result of that failure.

PARTIES

3. Plaintiff Local 7 is a labor organization as that term is defined in 29 U.S.C. §152. Plaintiff is a local chartered body of the United Food and Commercial Workers International Union, AFL-CIO. Plaintiff is party to collective bargaining agreements with Defendants covering a variety of workers employed at healthcare facilities operated by Defendants.

4. Defendant Kaiser Foundation Health Plan of Colorado (“KFHP”) is a Colorado nonprofit corporation with its principal place of business in Oakland, California. KFHP sells health insurance plans to corporations, organizations, and the general public in Colorado, and operates those plans, under the name of Kaiser Permanente. KFHP is a party to a collective bargaining

agreement with Plaintiff. Defendant KFHP is an employer in an industry affecting commerce as defined in 29 U.S.C. § 142(1).

5. Defendant Colorado Permanente Medical Group P.C. (“CPMG”) is a Colorado professional corporation with its principal place of business in Denver, Colorado. CPMG is the exclusive Colorado provider of medical and other healthcare services for KFHP health insurance plans. CPMG is a party to several collective bargaining agreements with Plaintiff. Defendant CPMG is an employer in an industry affecting commerce as defined in 29 U.S.C. § 142(1).

6. Defendants are part of a larger, nationwide network, and are the entities responsible for that national network’s operations in Colorado. Defendants collectively and in concert operate an integrated enterprise which sells health insurance plans and provides services to patients under those plans in a health maintenance organization (“HMO”) model, and together are more commonly referred to as Kaiser Permanente. Defendants are collectively referred to throughout this Complaint as “Kaiser Permanente” or “Kaiser.”

JURISDICTION AND VENUE

7. This action arises out of a collective bargaining agreement between Plaintiff and Defendants. This court has jurisdiction over Plaintiff’s claim pursuant to 29 U.S.C. § 185 and 28 U.S.C. §1331.

8. The acts complained of herein were committed, or had their principal effect, within the District of Colorado, and Defendants are Colorado corporations subject to the personal jurisdiction of the State of Colorado, and therefore, venue is proper within this District pursuant to 28 U.S.C. § 1391.

FACTUAL BACKGROUND

9. Plaintiff repeats and realleges all prior paragraphs of its Complaint as though fully incorporated herein.

10. Defendants constitute the Colorado operation of America's most prodigious health maintenance organization ("HMO") network, Kaiser Permanente. Kaiser's not-for-profit model attempts to provide a single, uniform network of care for its healthcare plan holders (known as "members"). Members who have paid applicable premiums are provided whatever medical care may be required for as long as their policy remains in effect – and in almost all cases, Kaiser Permanente practitioners provide that care.

11. Defendant CPMG employs numerous physicians – from family practice and primary care providers – to advanced specialists in innumerable areas of practice. Although Local 7 does not represent most CPMG physicians, Local 7 represents the overwhelming majority of the other Kaiser clinical, non-physician professionals here in Colorado.

12. Kaiser operates a number of medical offices and facilities throughout the Denver metro area at which care is provided to members, from standard medical offices to urgent care to surgery centers. Although in some states, Kaiser operates hospitals directly, in Colorado, Kaiser instead partners with separately-operated hospitals for some aspects of patient care.

13. Plaintiff and Defendants have an extensive bargaining history – with Local 7 having represented the multi-professional collective bargaining unit since approximately 1980. The parties have, since 1980, negotiated a collective bargaining agreement, and numerous successor agreements.

14. Plaintiff and Defendants are currently party to several collective bargaining agreements which are presently in force.

- (a) Plaintiff is part of a larger multi-union grouping known as the Alliance of Health Care Unions which negotiates a “National Agreement” with Kaiser’s national leadership setting certain minimum standards covering all member unions.
- (b) Plaintiff and Defendants have entered into a “Local Agreement” which covers a “Multi-Professional Unit” consisting of a wide variety of medical staff categories including registered nurses (“RNs”), advanced practice nurses, physician assistants, pharmacists, and numerous other job functions. A true and accurate copy of the Local Agreement for the Multi-Professional Unit currently in effect is attached as Exhibit A (the “Multi-Professional Local Agreement”).
- (c) Plaintiff and Defendants have also entered into an agreement covering a separate bargaining unit consisting of behavioral health professionals, such as licensed social workers and psychologists. This unit is known as the “Behavioral Health Unit.” A true and accurate copy of the Local Agreement for the Behavioral Health Unit currently in effect is attached as Exhibit B (the “Behavioral Health Local Agreement”).

15. The Multi-Professional Local Agreement provides that broadly speaking, the Company has the right to set staffing levels and determine the number of employees necessary to perform a particular job. *See, e.g.*, Exhibit A at Art. 1, Sec. 3(B) (recognizing job reductions can occur); Exhibit A at Art. 3, Sec 1 (management rights clause); Exhibit A at Art. 9 (regarding reduction in force).

16. Notwithstanding the foregoing, the Multi-Professional Local Agreement places certain limitations on Kaiser’s rights to determine levels of staffing. For example, one provision provides for a regional staffing committee consisting of at least three (3) Kaiser Permanente managers

(“Manager Representatives”) and three (3) Local 7 representatives (“Labor Representatives”) (collectively known as the “Staffing Committee”) to hear concerns about staffing. *See* Exhibit A at Art. 26.

17. The parties have developed an extensive process to escalate concerns about staffing levels in Kaiser’s facilities:

- (a) Step One – A staffing concern is brought to the Staffing Committee. Representatives for labor and management are notified, and begin gathering information about the concern.
- (b) Step Two – Within two weeks of Step One, a Management Committee representative notifies the Medical Office Director and manager or equivalent of the staffing concern, and asks the relevant administrator and manager to gather documentation and data concerning the staffing decisions for the Department(s) at issue. A Labor representative will notify the employee(s) who filed the complaint that the process has begun. A meeting is set for a date within thirty (30) days of the submission of the staffing concern.
- (c) Step Three – Staffing Committee Representatives meet with the Department(s) at issue, including Labor, management, and physicians when applicable. The attendees use the Staffing Checklist to ascertain what information is needed. The Committee determines the root cause of the staffing concern, and may jointly make recommendations to the Department(s) at issue, including what resources may assist the relevant team(s).
- (d) Step Four – Staffing Representatives report findings and possible recommendations to the Local 7 Staffing Committee for review.

(e) Step Five – If the responsible administrator agrees with the recommendations, the recommendations are implemented, with follow up to ensure compliance; the staffing concern is closed pending implementation. If the responsible administrator disagrees, Local 7 can request a timely explanation. Local 7 may escalate concerns through the grievance procedure and/or other means as appropriate based on the concern raised. The administrator must provide a written response within sixty (60) days of the Committee’s meeting (Step 3).

18. Separate and apart from the staffing concern escalation process, Kaiser has contractually guaranteed to provide a certain minimum level of staffing:

The parties recognize their mutual and ethical responsibility to provide sufficient staffing to meet quality standards of patient care, workload, and other issues affecting patient care, including, but not limited to, assuring adequate coverage, sick replacement, overtime, and to assure that no employee is required to work in any situation in which his or her license is threatened or places any employee or patient in danger.

To that end, Kaiser shall provide sufficient staffing to address quality standards of patient care and provider workload including safe coverage.

Exhibit A at Art. 27.

19. Although nearly every other provision in the Multi-Professional Local Agreement is subject to a robust grievance procedure and arbitration clause (*see* Exhibit A at Art. 25), the sufficient staffing guarantee is *specifically exempted* from that procedure: “The parties expressly agree that any disputes arising under this provision of the collective bargaining agreement shall not be subject to the grievance arbitration procedure outline in Article 25.” Exhibit A at Art. 27. Indeed, bargaining unit members viewed this provision to be so essential, that they engaged in a

strike in 2000 to ensure this language and its accompanying exclusion from the grievance procedure were added to the contract.

20. Article 25 of the Behavioral Health Local Agreement is identical to Article 27 of the Multi-Professional Local Agreement, and likewise exempts staffing concerns raised under Article 25 from the grievance procedures outlined in Article 23 of that Agreement.

Kaiser’s History of Understaffing in Colorado

21. Following the 2000 strike resolution, staffing issues persisted and Plaintiff filed a lawsuit under the provisions described above (what is now Article 27 of the Multi-Professional Local Agreement). After nearly two years of litigation and multiple orders denying Defendants’ motion to dismiss, the litigation was resolved in 2004.

22. In the years since 2004, Local 7 has continued to address staffing shortages with the Defendants, primarily through the utilization of the separate procedures in Article 26 of the Multi-Professional Local Agreement (the language that is now Article 26 was a letter of understanding known as the “Staffing LOU” at the time of the 2002 litigation). For years, although the parties did not agree on every issue, they were able to address many key staffing issues.

23. However, more recently, Defendants have and continue to exhibit resistance to addressing persistent staffing concerns – and owing to this recalcitrance, have failed under Article 27 “to meet quality standards of care, workload, and other issues affecting patient care, including but not limited to, assuring adequate coverage, sick replacement, overtime, and to assure that no employee is required to work in any situation in which his or her license is threatened or places any employee or patient in danger.” *See* Exhibit A at Art. 27; Exhibit B at Art. 25.

24. As Defendants have become less willing to address staffing concerns, Defendants' staffing shortages have developed into a full-blown crisis – threatening patient safety and provider licensure.

Kaiser's Message Management Department Exemplifies the Danger of Short Staffing

25. On or about October 28, 2019, Defendants reorganized their operation, creating a centralized "Message Management Department" to respond to calls, e-mails, texts and other incoming communications from patients, as well as handle outgoing communications from physician providers to patients.

26. The Message Management Department is responsible for everything from an incoming message to a primary care physician about stomach pain, to handling patient requests for renewed prescriptions, to handling outgoing calls where a physician is requesting a patient be contacted so that he or she can arrange to go into a hospital.

27. The Message Management Department is staffed with a large number of licensed practical nurses (LPNs), medical assistants (MAs), registered nurses (RNs), and small number of advanced practice providers (advanced practice nurse and/or physician assistant) – with RNs having defined responsibilities different from those of LPNs/MAs because of the higher scope of the RN license.

28. At the time the Department was created, Kaiser initially staffed the Department with just 40% of the staff level needed for the Department to perform the tasks it was assigned. This wasn't based on a staffing model generated by Local 7, but rather by Kaiser's own guidelines.

29. Almost overnight, the backlog of calls that Kaiser failed to respond to exploded. On the first day of the new program, Kaiser had ninety-six (96) unreturned calls for primary care. Numbers rose each day – and by the end of the week when the Department effectively shut down

on Friday afternoon, there were more than 393 patient calls which were pending and unreturned. Of course, because the Department largely does not work over the weekends, this represented hundreds of patients whose communications with their health care providers would go without a response for three (3) to four (4) days, or even longer. When Local 7 bargaining unit members elevated these numbers and related concerns to management, the complaints were ignored.

30. Since the Fall of 2019, short staffing in Message Management has only worsened, and has been exacerbated in many cases by Kaiser's response to the COVID-19 pandemic. After the outbreak of the pandemic – the bulk of primary care services went from being provided in person to being provided online. A patient's ability to communicate with his or her medical provider has never been more critical to patient safety and outcomes.

31. Although the Message Management Department was nominally divided among a number of regional Kaiser facilities around metropolitan Denver, short staffing has resulted in almost daily "emergency" coverage shifts where staff from one facility respond to messages at another due to critical short staffing. One RN reported that although she was nominally assigned to cover messages from one geographic area, she was forced to spend the bulk of her week ignoring her own area and letting those messages pile up while covering for shortfalls in another area. Message Management RNs are not transferred from one facility to cover another facility – rather, they are expected to cover messages for *both* facilities. This necessarily means they have less time to respond to messages for their scheduled facility as they need to address messages in priority order across two facilities.

32. RNs working in Message Management across various facilities send "end of day" emails to their immediate supervisor(s) at the culmination of their shifts, including a tally of outstanding messages by category. RNs have included higher-level management on these emails

as well, in particular when the outstanding unreturned messages are particularly excessive. The correspondence may also include notations about coverage requested, and facilities left uncovered – to ensure management is aware of volume of patient communications awaiting reply. Although numerous RNs reported sending such emails after *each* shift for various periods across two years, the RNs reported receiving few, if any, responses from management.

33. Kaiser has failed to take action to address the major staffing concerns in the Message Management Department, which Local 7 has argued requires as many as ten (10) additional full-time equivalent employees (“FTEs”). Instead, Kaiser has resorted to overworking its current staff in order to manage the crisis – by routinely holding “swarms” on Saturdays where numerous staff are called in to work overtime and attempt to manage the backlog. Reports from these swarms show that as of one Saturday in November of 2020, Message Management had over 1,631 unread messages of various types to deal with, in addition to nearly five hundred (500) more messages which required follow up – forty-four (44) of which were designated as “high priority.” Similar data was reported for other swarms held in early 2021. A swarm Saturday was even held as recently as October 9, 2021 to further manage the growing backlog, even though management conveyed to certain RNs that they had caught up on outstanding messages.

34. Backlogs in message management have become so swollen that at one time there may have been as many as 94,000 messages which were awaiting a response from Kaiser Permanente Colorado clinicians.

35. To the contrary of management’s assertions, and despite routinely holding Saturday swarms, there remains an ongoing and dangerous problem of message backlog within Message Management. On or about October 14, 2021, RNs in Message Management reported receiving an email stating that the region’s “goal” was to address all messages within *three months* of receipt.

RNs reported exasperation at this “three month” goal because such a lengthy delay in responding to patients poses an extreme risk to patient safety. In the same communication, Kaiser encouraged providers to enter patient safety concerns into its internal reporting platform, SafetyConnect – but RNs reported *repeatedly* submitting concerns through SafetyConnect over a number of years, which have been ignored or left largely unaddressed.

36. Of course, persistent backlogs undeniably adversely affect patient outcomes and cause delays in care – even when far shorter than three months. Examples of some of these negative consequences include:

- A patient whose spouse called in with concerns of depression and suicide risk; by the time the message was returned, the patient had killed himself.
- A patient who called in with flu-like symptoms and was requesting Tamiflu – which is most effective when administered within forty-eight (48) hours of the onset of symptoms, and whose call went unreturned for nearly thirty (30) hours.
- A patient sent a message on a Monday morning requesting pain medication. The patient’s message was not reviewed by a nurse until that Friday – by which time the patient had skipped Kaiser’s primary care completely and gone to urgent care.
- A patient who reported chest pain – a potentially life-threatening symptom - to Kaiser on a Saturday morning was not responded to until the following Wednesday.
- A patient who complained of palpitations did a video visit with a physician on September 22, 2021. The physician sent a message requesting the patient be contacted and set for a next day appointment on September 23, 2021. As a result of the logjam – the patient was not contacted until the afternoon of September 23rd and could not be seen on the 23rd as a result.

- A patient contacted Kaiser via message on a Thursday requesting a refill for Albuterol (an asthma medication). The message went without a response until the following Friday – threatening the patient’s safety.
- Numerous messages with complaints such as sinus pain/congestion, nausea/vomiting, and other symptoms going four (4) days without a response due to the low staffing levels.

37. These Message Management logjams caused by inadequate staffing are endemic to Kaiser and just one example of how inadequate staffing has caused Kaiser to compromise patient care and safety.

Kaiser’s Short Staffing Threatens Patient Care and Provider Licensure

38. While short staffing in the Message Management Department causes incalculable harm, in departments providing hands-on care to patients, the potential for short staffing to be life-threatening and career ending can be even more acute.

39. As a result of inadequate staffing, patients have faced lengthy delays in securing appointments in primary care departments. Often, patients have been forced to wait weeks to even see a nurse – much less a physician. In 2021, Kaiser unilaterally responded to these delays, which Local 7 had been complaining about for months, not by increasing staffing in order to ensure quality patient care, but rather by shortening appointment times for all patients – compromising care and giving RNs less time to accurately and adequately triage and diagnose patients.

40. In Kaiser’s Oncology Infusion Center at one Denver-area facility, the workload is so high and staffing so low that one RN reported being regularly forced to skip her daily lunch break. The issue began in or around 2017 when Kaiser closed a non-oncology infusion center in the Denver area. Many of the patients moved their treatment facility to the other, nearby facilities.

Although titled Oncology Infusion, the Department has for years handled non-oncology infusions – but the closure of the non-oncology center increased the non-oncology patient load. No additional RN FTE was added despite the influx in patients.

41. At this facility, the work is extraordinarily demanding and dangerous. RNs are administering life-threatening and life-saving medication and must assess a patient daily to ensure the patient is well enough to be treated. Documentation must be precise and detailed given the nature of the work. This facility is so short staffed, Kaiser has taken to paying extraordinary prices for “travelling nurses” who they had to train before the travelers could adequately assist in the workload – instead of hiring additional Kaiser-employed FTE. Kaiser also relies on on-call/*per diem/pro re nata* (“PRN”) staffing – but the PRNs are typically assigned first to cover Primary Care – and can choose when they work – so do not provide a reliable source of staffing coverage for Oncology Infusion. One RN estimated that they request PRN help every week but do not get coverage.

42. The short-staffing is further exacerbated by new pumps that were introduced in or around March 2021, which if properly functioning might alleviate some of the RNs’ workload. Instead, the pumps routinely malfunction, causing medication to infuse faster than it should based on the data an RN programs into the pump. One RN reported an incident in which a patient received an arsenic infusion across ninety minutes that should have been administered over one hundred twenty minutes based on the metrics programmed into the pump – this could have put the patient into cardiac arrest.

43. One RN at this facility has described to Defendants how she feels her license is being threatened every day as a result of this short staffing – just one wrong move or judgment due to workload might cause a patient to die.

44. The Mental Health and Chemical Dependency Intensive Outpatient Program has had to refer certain high acuity patients outside the Department. One provider reported a two-week waiting period for a mental health patient referred for Intensive Outpatient Program services – which creates huge risk for a patient needing intensive services. Although the staffing levels have been a concern for years, matters have deteriorated since Kaiser restructured Chemical Dependency.

Kaiser's Inaction in Response to Repeated Complaints

45. Kaiser employees have repeatedly engaged the processes established by Defendants for raising their concerns – at least over the preceding two years, employees have reported thousands of concerns related to staffing and patient safety through Kaiser's online platform, SafetyConnect; have called repeatedly into Kaiser's compliance hotline; have sent numerous, and often daily communications to their immediate supervisors and their supervisors' superiors via email and messenger; and have engaged in countless telephonic and in-person conversations to the same effect.

46. Local 7 has likewise engaged in the parties' agreed-upon procedures for reporting and escalating concerns about insufficient staffing – repeatedly taking issue with the staffing levels in numerous departments across a variety of Kaiser facilities and working through the Steps outlined above – to little or no avail.

47. Despite these omnipresent concerns, and repeated entreaties to Defendants to remedy these issues, Kaiser has steadfastly failed and/or refused to take the actions to address these critically short-staffed areas – and in doing so, has sabotaged the ability of its staff to ensure quality standards of patient care to the community.

48. As a result of Defendants' inadequate staffing and breach of the guarantee set forth in Article 27 (and Article 25) of the collective bargaining agreements, respectively, Plaintiff has suffered and continues to suffer damages.

STATEMENT OF CLAIMS

FIRST CLAIM FOR RELIEF

(Breach of Contract – 29 U.S.C. § 185)

49. Plaintiff repeats and realleges all previous paragraphs of its Complaint as though fully incorporated herein.

50. Plaintiff and Defendants are party to a series of agreements, including the Multi-Professional Local Agreement and the Behavioral Health Local Agreement.

51. Under these agreements, Defendants are obligated to, "provide sufficient staffing to address quality of standards of patient care and provider workload including safe coverage."

52. Defendants have failed to adhere to their obligations under Article 27 of the Multi-Professional Local Agreement and Article 25 of the Behavioral Health Local Agreement.

53. As a result of Defendants' breaches, Plaintiff has suffered damages, including, but not limited to, the loss of its ability to meet its members' ethical responsibility to provide quality patient care, lost employment opportunities for its members, lost bargaining unit work including additional FTEs, and increased risk of harm to its members and their licensure obligations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for an order of this Honorable Court:

1. Entering judgment in Plaintiff's favor on all claims;
2. Declaring Defendants to be in breach of Article 27 of the Multi-Professional Local Agreement and Article 25 of the Behavioral Health Local Agreement;

3. Entering a permanent injunction requiring Defendants to increase staffing at its facilities and maintain adequate staffing in compliance with the parties' agreements;
4. Awarding economic damages in an amount to be proven at trial;
5. Awarding pre and post judgment interest;
6. Awarding Plaintiff's reasonable costs of suit, and;
7. Such other and further relief this Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Respectfully submitted this 14th day of October, 2021.

/s/ Mathew S. Shechter
Mathew S. Shechter, *General Counsel*
Samantha L. Palladino, *Associate General Counsel*
United Food and Commercial Workers, Local 7
7760 West 38th Avenue, Suite 400
Wheat Ridge, Colorado 80033

Attorneys for Plaintiff