STATE OF NEW YORK

2954

2019-2020 Regular Sessions

IN ASSEMBLY

January 28, 2019

Introduced by M. of A. GUNTHER, GOTTFRIED, L. ROSENTHAL, BRONSON, COLTON, BENEDETTO, JAFFEE, MAGNARELLI, M. G. MILLER, WEPRIN, RIVERA, RYAN, AUBRY, OTIS, STECK, SANTABARBARA, ZEBROWSKI, MOSLEY, ORTIZ, TITUS, ABINANTI, BARRON, SEAWRIGHT, WALKER, BICHOTTE, RICHARDSON, HYNDMAN, PEOPLES-STOKES, PICHARDO, JOYNER, JEAN-PIERRE, LENTOL, ROZIC, KIM, HEVESI, O'DONNELL, DILAN, DAVILA, HUNTER, BLAKE, WILLIAMS, CARROLL, D'URSO, WOERNER, PHEFFER AMATO, JONES, WRIGHT, VANEL, NIOU, TAYLOR, ARROYO, DINOWITZ, DICKENS, WALLACE, SMITH, MONTESANO, BYRNE, BRABENEC -- Multi-Sponsored by -- M. of A. ABBATE, BARNWELL, BUCHWALD, CAHILL, COOK, CRESPO, CUSICK, CYMBROWITZ, DenDEKKER, ENGLEBRIGHT, FAHY, GALEF, GLICK, JOHNS, LIFTON, LUPARDO, McDONOUGH, MIKULIN, PAULIN, PERRY, PRETLOW, RA, RAMOS, D. ROSENTHAL, SIMON, SIMOTAS, SOLAGES, THIELE, WALSH -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to enacting the "safe staffing for quality care act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "safe staffing for quality care act".

§ 2. Paragraphs (a) and (b) of subdivision 2 of section 2805 of the public health law, paragraph (a) as amended by chapter 923 of the laws of 1973 and paragraph (b) as added by chapter 795 of the laws of 1965, are amended to read as follows:

(a) Application for an operating certificate for a hospital shall be made upon forms prescribed by the department. The application shall [~~contain~~] **include** the name of the hospital, the kind or kinds of hospital service to be provided, the location and physical description of the institution, **a documented staffing plan, as defined in section twenty-eight hundred twenty-eight of this article,** and such other information as the department may require.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(b) An operating certificate shall not be issued by the department unless it finds that the premises, equipment, personnel, **documented staffing plan,** rules and by-laws, standards of medical care, and hospital service are fit and adequate and that the hospital will be operated in the manner required by this article and rules and regulations thereunder.

§ 3. The public health law is amended by adding nine new sections 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834 and 2835 to read as follows:

§ 2827. Policy and purpose. The legislature finds and declares all of the following:

1. Health care services are becoming complex and it is increasingly difficult for patients to access integrated services;

2. The quality of patient care is jeopardized because of nurse staffing shortages and improper utilization of nursing services;

3. To ensure the adequate protection of patients in health care settings, it is essential that qualified registered nurses and other licensed nurses be accessible and available to meet the needs of patients; and

4. The basic principles of staffing in the health care setting should be based on the patient's care needs, the severity of condition, services needed and the complexity surrounding those services.

§ 2828. Safe staffing; definitions. The following words and phrases, as used in this article, shall have the following meanings unless the context otherwise plainly requires:

1. "Acute care facility" shall mean a hospital other than a residential health care facility and shall also include any facility that provides health care services pursuant to the mental hygiene law, article nineteen-G of the executive law or the correction law if such facility is operated by the state or a political subdivision of the state or a public authority or public benefit corporation.

2. "Acuity system" shall mean an established measurement instrument which (a) predicts nursing care requirements for individual patients based on severity of patient illness, need for specialized equipment and technology, intensity of nursing interventions required, and the complexity of clinical nursing judgment needed to design, implement and evaluate the patient's nursing care plan; (b) details the amount of nursing care needed, both in number of direct-care nurses and in skill mix of nursing personnel required, on a daily basis, for each patient in a nursing department or unit; and (c) is stated in terms that readily can be used and understood by direct-care nurses. The acuity system shall take into consideration the patient care services provided not only by registered professional nurses but also by licensed practical nurses, social workers and other health care personnel.

3. "Assessment tool" shall mean a measurement system that compares the staffing level in each nursing department or unit against actual patient nursing care requirements in order to review the accuracy of an acuity system.

4. "Direct-care nurse" and "direct-care nursing staff" shall mean any nurse who has principal responsibility to oversee or carry out medical regimens, nursing or other bedside care for one or more patients.

5. "Documented staffing plan" shall mean a detailed written plan setting forth the minimum number and classification of direct-care nurses required in each nursing department or unit in an acute care facility for a given year, based on reasonable projections derived from the patient census and average acuity level within each department or unit

during the prior year, the department or unit size and geography, the nature of services provided and any foreseeable changes in department or unit size or function during the current year.

6. "Nurse" shall mean a registered professional nurse or licensed practical nurse licensed pursuant to article one hundred thirty-nine of the education law.

7. "Nursing care" shall mean that care which is within the definition of the practice of nursing pursuant to section sixty-nine hundred two of the education law, or otherwise encompassed with the recognized standards of nursing practice, including assessment, nursing diagnosis, planning, intervention, evaluation and patient advocacy.

8. "Safe staffing requirements" shall mean the provisions of this section and sections twenty-eight hundred twenty-seven, twenty-eight hundred twenty-nine, twenty-eight hundred thirty, twenty-eight hundred thirty-one, twenty-eight hundred thirty-two, twenty-eight hundred thirty-three, twenty-eight hundred thirty-four and twenty-eight hundred thirty-five of this article and all rules and regulations adopted pursuant thereto.

9. "Skill mix" shall mean the differences in licensing, specialty and experience among direct-care nurses.

10. "Staffing level" shall mean the actual numerical nurse to patient ratio within a nursing department or unit.

11. "Unit" shall mean a patient care component, as defined by the department, within an acute care facility.

12. "Non-nursing direct-care staff" shall mean any employee who is not a nurse or other person licensed, certified or registered under title eight of the education law whose principal responsibility is to carry out patient care for one or more patients or provides direct assistance in the delivery of patient care.

§ 2829. Commissioner and council; powers and duties. The commissioner shall:

1. appoint an acute care facility council consisting of thirteen members. No less than seven members shall be registered professional nurses, three of whom shall be direct care registered nurses, three of whom shall be nurse managers and one of whom shall be a nurse administrator. No less than two members of the acute care facility council shall be representatives of recognized or certified collective bargaining agents of non-nursing direct care staff. There shall be at least two representatives of acute care facilities, one representative of a nursing professional association, and one representative of a recognized or certified bargaining agent of nurses. The acute care facility council shall advise the commissioner in the development of regulations, including registered professional nurse to patient staffing requirements and non-nursing direct-care staff to patient ratios that are not specified in this article; the efficacy of acuity systems submitted for approval by the commissioner; the development of an assessment tool used to evaluate the efficacy of acuity systems; and review and make recommendations on approval of staffing plans prior to the granting of an operating certificate by the department.

2. promulgate, after consultation with the acute care facility council, the rules and regulations necessary to carry out the purposes and provisions of the safe staffing requirements, including regulations defining terms, setting forth direct-care nurse to patient ratios, setting forth non-nursing direct-care staff to patient ratios and prescribing the process for approving facility specific acuity systems; and

3. assure that the provisions of safe staffing requirements are enforced, including the issuance of regulations which at a minimum provide for an accessible and confidential system to report the failure to comply with such requirements and public access to information regarding reports of inspections, results, deficiencies and corrections pursuant to such requirements.

§ 2830. Staffing requirements. 1. Staffing requirements. Each acute care facility shall ensure that it is staffed in a manner that provides sufficient, appropriately qualified direct-care nurses in each department or unit within such facility in order to meet the individualized care needs of the patients therein. At a minimum, each such facility shall meet the requirements of subdivisions two and three of this section.

2. Staffing plan. The department shall not issue an operating certificate to any acute care facility unless such facility annually submits to the department a documented staffing plan and a written certification that the submitted staffing plan is sufficient to provide adequate and appropriate delivery of health care services to patients for the ensuing year. The documented staffing plan shall:

(a) meet the minimum requirements set forth in subdivision three of this section;

(b) be adequate to meet any additional requirements provided by other laws, rules or regulations;

(c) employ and identify an acuity system for addressing fluctuations in actual patient acuity levels and nursing care requirements requiring increased staffing levels above the minimums set forth in the plan;

(d) factor in other unit or department activity such as discharges, transfers and admissions, staff breaks, meals, routine and expected absences from the unit and administrative and support tasks that are expected to be done by direct-care nurses in addition to direct nursing care;

(e) include a plan to meet necessary staffing levels and services provided by non-nursing direct-care staff in meeting patient care needs pursuant to subdivision one of this section; provided, however, that the staffing plan shall not incorporate or assume that nursing care functions required by laws, rules or regulations, or accepted standards of practice to be performed by a registered professional nurse are to be performed by other personnel;

(f) identify the system that will be used to document actual staffing on a daily basis within each department or unit;

(g) include a written assessment of the accuracy of the prior year's staffing plan in light of actual staffing needs;

(h) identify each nurse staff classification referenced in such plan together with a statement setting forth minimum qualifications for each such classification; and

(i) be developed in consultation with a majority of the direct-care nurses within each department or unit or, where such nurses are represented, with the applicable recognized or certified collective bargaining representative or representatives of the direct-care nurses and of other supportive and assistive staff.

3. Minimum staffing requirements. (a) The documented staffing plan shall incorporate, at a minimum, the following direct-care nurse-to-patient ratios:

(i) one nurse to one patient: operating room and trauma emergency units and maternal/child care units for the second or third stage of labor;

(ii) one nurse to two patients: maternal/child care units for the first stage of labor, and all critical care areas including emergency critical care and all intensive care units and postanesthesia units;

(iii) one nurse to three patients: antepartum, emergency room, pediatrics, step-down and telemetry units and units for newborns and intermediate care nursery units;

(iv) one nurse to three patients: postpartum mother/baby couplets (maximum six patients per nurse);

(v) one nurse to four patients: non-critical antepartum patients, postpartum mother only units and medical/surgical and acute care psychiatric units;

(vi) one nurse to five patients: rehabilitation units and subacute patients; and

(vii) one nurse to six patients: well-baby nursery units.

For any units not listed in this paragraph, including, but not limited to, psychiatric units, and acute care facilities operated pursuant to the mental hygiene law or the correction law, the department shall establish by regulation the appropriate direct-care nurse-to-patient ratio.

(b) The nurse-to-patient ratios set forth in paragraph (a) of this subdivision shall reflect the maximum number of patients that may be assigned to each direct-care nurse in a unit at any one time.

(c) There shall be no averaging of the number of patients and the total number of nurses on the unit during any one shift nor over any period of time.

(d) The commissioner, in consultation with the acute care facility council, shall establish regulations providing for the maintenance of minimum nurse-to-patient ratios, as set forth in this section, including during routine or expected absences from the unit, such as meals or breaks.

4. Licensed practical nurses. In any situation in which licensed practical nurses are included in the documented staffing plan, any patients assigned to the licensed practical nurse shall also be included in calculating the number of patients assigned to any registered professional nurse who is required by law, rule, regulation, contract or practice to supervise or oversee the direct-nursing care provided by the licensed practical nurse.

5. Skill mix. The skill mix shall not incorporate or assume that nursing care functions required by section sixty-nine hundred two of the education law or accepted standards of practice to be performed by a registered professional nurse are to be performed by a licensed practical nurse or unlicensed assistive personnel, or that nursing care functions required by section sixty-nine hundred two of the education law or accepted standards of practice to be performed by a licensed practical nurse are to be performed by unlicensed assistive personnel.

6. Adjustments by facility. The minimum staffing requirement and nurse-to-patient ratio set forth in this section shall be adjusted by the acute care facility as necessary to reflect the need for additional direct-care nurses. Additional staff shall be assigned in accordance with the approved, facility-specific patient acuity system for determining nursing care requirements, including the severity of the illness, the need for specialized equipment and technology, the complexity of clinical judgment needed to design, implement and evaluate the patient care plan and the ability for self-care, and the licensure of the personnel required for care.

7. Commissioner regulations. The commissioner may by regulation require a documented staffing plan to have higher nurse-to-patient ratios than those set forth in this section.

8. Nothing contained in this section shall supersede or diminish the terms of a collective bargaining agreement that provides for staffing ratios that exceed the ratios established under this section.

§ 2831. Compliance with staffing plan and recordkeeping. 1. Each acute care facility shall at all times staff in accordance with its documented staffing plan and the staffing standards set forth in section twenty-eight hundred thirty of this article; provided, however, that nothing in this section shall be deemed to preclude any such facility from implementing higher direct-care nurse-to-patient staffing levels, nor shall the requirements set forth in such section twenty-eight hundred thirty of this article be deemed to supersede or replace any higher requirements otherwise mandated by law, regulation or contract.

2. For purposes of compliance with the minimum staffing requirements standards set forth in section twenty-eight hundred thirty of this article, no nurse shall be assigned, or included in the nurse-to-patient ratio count in a nursing unit or a clinical area within an acute care facility unless that nurse has an appropriate license pursuant to article one hundred thirty-nine of the education law, has received prior orientation in that clinical area sufficient to provide competent nursing care to the patients in that unit or clinical area, and has demonstrated current competence in providing care in that unit or clinical area. Acute care facilities that utilize temporary nursing agencies shall have and adhere to a written procedure to orient and evaluate personnel from such sources to ensure adequate orientation and competency prior to inclusion in the nurse-to-patient ratio. In the event of an emergency staffing situation in which insufficient staffing may lead to unsafe patient care, nurses may be temporarily assigned to a different unit or clinical area, provided that such nurses shall be assigned patients appropriate to their skill and competency level. The facility shall establish a consistent plan for addressing emergency staffing situations and monitor outcomes. Emergencies are defined as natural disasters, declared emergencies, mass casualty incidents or other events not reasonably anticipated and planned for and not regularly occurring within the facility.

3. Each acute care facility shall maintain accurate daily records showing:

(a) the number of patients admitted, released and present in each nursing department or unit within such facility;

(b) the individual acuity level of each patient present in each nursing department or unit within such facility; and

(c) the identity and duty hours of each direct-care nurse in each nursing department or unit within such facility.

4. Each acute care facility shall maintain daily statistics, by nursing department and unit, of mortality, morbidity, infection, accident, injury and medical errors.

5. All records required to be kept pursuant to this section shall be maintained for a period of seven years.

6. All records required to be kept pursuant to this section shall be made available upon request to the department and to the public; provided, however, that information released to the public shall comply with the applicable patient privacy laws, rules and regulations, and that in facilities operated pursuant to the correction law the identity and hours of staff shall not be released to the public.

§ 2832. Work assignment policy. 1. General. Each acute care facility shall adopt, disseminate to direct-care nurses and comply with a written work assignment policy, that meets the requirements of subdivisions two and three of this section, detailing the circumstances under which a direct-care nurse may refuse a work assignment.

2. Minimum conditions. At a minimum, the work assignment policy shall permit a direct-care nurse to refuse an assignment:

(a) for which the nurse is not prepared by education, training or experience to safely fulfill the assignment without compromising or jeopardizing patient safety, the nurse's ability to meet foreseeable patient needs or the nurse's license; or

(b) would otherwise violate the safe staffing requirements.

3. Minimum procedures. At a minimum, the work assignment policy shall contain procedures for the following:

(a) reasonable requirements for prior notice to the nurse's supervisor regarding the nurse's request and supporting reasons for being relieved of an assignment or continued duty;

(b) where feasible, an opportunity for the supervisor to review the specific conditions supporting the nurse's request, and to decide whether to remedy the conditions, to relieve the nurse of the assignment, or to deny the nurse's request to be relieved of the assignment or continued duty;

(c) a process that permits the nurse to exercise the right to refuse the assignment or continued on-duty status when the supervisor denies the request to be relieved if:

(i) the supervisor rejects the request without proposing a remedy or the proposed remedy would be inadequate or untimely,

(ii) the complaint and investigation process with a regulatory agency would be untimely to address the concern, and

(iii) the employee in good faith believes that the assignment meets conditions justifying refusal; and

(d) recognition that a nurse who refuses an assignment pursuant to a work assignment policy as set forth in this section shall not be deemed, by reason thereof, to have engaged in negligent or incompetent action, patient abandonment, or otherwise to have violated any law relating to nursing.

§ 2833. Public disclosure of staffing requirements. Every acute care facility shall:

1. post in a conspicuous place readily accessible to the general public a notice prepared by the department setting forth a summary of the safe staffing requirements applicable to that facility together with information about where detailed information about the facility's staffing plan and actual staffing may be obtained;

2. upon request, make copies of the documented staffing plan filed with the department available to the public; and

3. upon request make readily available to the nursing staff within a department or unit, during each work shift, the following information:

(a) a copy of the current staffing plan for that department or unit,

(b) documentation of the number of direct-care nurses required to be present during the shift, based on the approved adopted acuity system, and

(c) documentation of the actual number of direct-care nurses present during the shift.

§ 2834. Enforcement responsibilities. The department shall not delegate its responsibilities to enforce the safe staffing requirements promulgated pursuant to this article.

§ 2835. Private right of action for violations of section twenty-eight hundred thirty-two of this article. Any acute care facility that violates the rights of an employee pursuant to an adopted work assignment policy under section twenty-eight hundred thirty-two of this article may be held liable to such employee in an action brought in a court of competent jurisdiction for such legal or equitable relief as may be appropriate to effectuate the purposes of the safe staffing requirements, including but not limited to reinstatement, promotion, lost wages and benefits, and compensatory and consequential damages resulting from the violation together with an equal amount in liquidated damages. The court in such action shall, in addition to any judgment awarded to a prevailing plaintiff, award reasonable attorneys' fees and costs of action to be paid by the defendant. An employee's right to institute a private action pursuant to this subdivision shall not be limited by any other right granted by the safe staffing requirements.

§ 4. Section 2801-a of the public health law is amended by adding a new subdivision 3-b to read as follows:

3-b. In considering character, competence and standing in the community under subdivision three of this section, the public health and health planning council shall consider any past violations of state or federal rules, regulations or statutes relating to employer-employee relations, workplace safety, collective bargaining or any other labor related practices, obligations or imperatives. The public health and health planning council shall give substantial weight to violations of the provisions of this chapter concerning nurse staff and supportive staff ratios.

§ 5. Section 2805 of the public health law is amended by adding a new subdivision 3 to read as follows:

3. In determining whether to issue or renew an operating certificate to an applicant seeking to operate, or operating, a hospital in accordance with this article, the commissioner shall consider any past violations of state or federal rules, regulations or statutes relating to employer-employee relations, workplace safety, collective bargaining or any other labor related practices, obligations or imperatives. The public health and health planning council shall give substantial weight to violations of the provisions of this chapter concerning nurse staff and supportive staff ratios.

§ 6. The public health law is amended by adding a new section 2895-b to read as follows:

§ 2895-b. Residential health care facility staffing levels. 1. Definitions. As used in this section, the following terms shall have the following meanings:

(a) "Certified nurse aide" means any person included in the residential health care facility nurse aide registry pursuant to section twenty-eight hundred three-j of this chapter.

(b) "Staffing ratio" means the quotient of the number of personnel in a particular category regularly on duty for a particular time period in a nursing home divided by the number of residents of the nursing home at that time.

2. Commissioner and residential health care facility council; powers and duties. The commissioner shall: Appoint a residential health care facility council consisting of thirteen members. No less than two members shall be direct care licensed practical nurses, no less than two members shall be direct care certified nurse assistants and no less than one member shall be a direct care registered professional nurse. The council shall also include no less than one representative each of recognized or certified collective bargaining agents of registered nurs-

es, of non-registered nurse direct care staff and a representative of nursing professional associations. The council shall also include no less than two representatives of residential health care facility operators, two representatives of residential health care facility nurse administrators and one representative of consumers. The residential health care facility council shall advise the commissioner in the development of regulations relating to the staffing standards under this section; and may from time to time, report to the governor, the legislature, the public and the commissioner any recommendations regarding staffing levels in residential health care facilities.

3. Staffing standards. (a) The commissioner, in consultation with the council, shall, by regulation, establish staffing standards for residential health care facility minimum staffing levels to meet applicable standards of service and care and to provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident of the facility. The commissioner shall also require by regulation that every residential health care facility maintain records on its staffing levels, report on such records to the department, and make such records available for inspection by the department.

(b) Every residential health care facility shall:

(i) comply with the staffing standards under this section; and

(ii) employ sufficient staffing levels to meet applicable standards of service and care and to provide service and care and to provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident of the facility.

(c) Subject to subdivision five of this section, staffing standards under this section shall, at a minimum, be the staffing standards under subdivision four of this section.

(d) In determining compliance with the staffing standards under this section, an individual shall not be counted while performing services that are not direct nursing care, such as administrative services, food preparation, housekeeping, laundry, maintenance services, or other activities that are not direct nursing care.

4. Statutory standard. Beginning two years after the effective date of this section, every residential health care facility shall maintain a staffing ratio equal to at least the following:

(a) 2.8 hours of care per resident per day by a certified nurse aide;

(b) 1.3 hours of care per resident per day by a licensed practical nurse or a registered nurse;

(c) 0.75 hours of care per resident per day by a registered nurse; the minimum of 0.75 hours of care per resident provided by a registered nurse shall be divided among all shifts to ensure an appropriate level of registered nurse care twenty-four hours per day, seven days a week, to meet resident needs; and

(d) Residential health care facilities that care for subacute patients shall maintain at a minimum, the following direct-care nurse-to-patient ratio: one nurse to five patients.

5. Any residential health care facility that violates the rights of an employee pursuant to an adopted work assignment policy under this section may be held liable to such employee in an action brought in a court of competent jurisdiction for such legal or equitable relief as may be appropriate to effectuate the purposes of the safe staffing requirements, including but not limited to reinstatement, promotion, lost wages and benefits, and compensatory and consequential damages resulting from the violation together with an equal amount in liquidated

damages. The court in such action shall, in addition to any judgment awarded to a prevailing plaintiff, award reasonable attorneys' fees and costs of action to be paid by the defendant. An employee's right to institute a private action pursuant to this subdivision shall not be limited by any other right granted by the safe staffing requirements.

6. Public disclosure of staffing levels. (a) A residential health care facility shall post information regarding nurse staffing that the facility is required to make available to the public under section twenty-eight hundred five-t of this chapter. Information under this paragraph shall be displayed in a form approved by the department and be posted in a manner which is visible and accessible to residents, their families and the staff, as required by the commissioner.

(b) A residential health care facility shall post a summary of this section, provided by the department, in proximity to each posting required by paragraph (a) of this subdivision.

§ 7. If any provision of this act, or any application of any provision of this act, is held to be invalid, or ruled by any federal agency to violate or be inconsistent with any applicable federal law or regulation, that shall not affect the validity or effectiveness of any other provision of this act, or of any other application of any provision of this act.

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.