STATE OF NEW YORK

7328

2023-2024 Regular Sessions

IN ASSEMBLY

May 17, 2023

Introduced by M. of A. PAULIN -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to establishing a four-year demonstration project and workgroup to reduce the use of temporary staffing agencies in residential healthcare facilities

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

Section 1. Paragraph (c) of subdivision 1 and paragraph (a) of subdivision 2 of section 2828 of the public health law, paragraph (c) of subdivision 1 as amended by section 4 and paragraph (a) of subdivision 2 as amended by section 1 of part M of chapter 57 of the laws of 2022, are amended to read as follows:

(c) [~~Such~~] **(i) Except as provided in subparagraph (ii) of this paragraph, such** regulations shall further include at a minimum that any residential health care facility for which total operating revenue exceeds total operating and non-operating expenses by more than five percent of total operating and non-operating expenses or that fails to spend the minimum amount necessary to comply with the minimum spending standards for resident-facing staffing or direct resident care, calculated on an annual basis, or for the year two thousand twenty-two, on a pro-rata basis for only that portion of the year during which the failure of a residential health care facility to spend a minimum of seventy percent of revenue on direct resident care, and forty percent of revenue on resident-facing staffing, may be held to be a violation of this chapter, shall remit such excess revenue, or the difference between the minimum spending requirement and the actual amount of spending on resident-facing staffing or direct care staffing, as the case may be, to the state, with such excess revenue which shall be payable, in a manner to be determined by such regulations, by November first in the year following the year in which the expenses are incurred. The department shall collect such payments by methods including, but not limited to, bringing

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

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suit in a court of competent jurisdiction on its own behalf after giving notice of such suit to the attorney general, deductions or offsets from payments made pursuant to the Medicaid program, and shall deposit such recouped funds into the nursing home quality pool, as set forth in paragraph [~~d~~] (d) of subdivision two-c of section [~~two thousand eight hundred eight~~] twenty-eight hundred eight of this article. Provided further that such payments of excess revenue shall be in addition to and shall not affect a residential health care facility's obligations to make any other payments required by state or federal law into the nursing home quality pool, including but not limited to medicaid rate reductions required pursuant to paragraph [~~g~~] (g) of subdivision two-c of section [~~two thousand eight hundred eight~~] twenty-eight hundred eight of this article and department regulations promulgated pursuant thereto. The commissioner or their designees shall have authority to audit the residential health care facilities' reports for compliance in accordance with this section.

(ii) The commissioner shall establish a four-year (January first, two thousand twenty-three -- December thirty-first, two thousand twenty-six) demonstration project to reduce the use of temporary staffing agencies. Any remittance or amounts owed to the state pursuant to subparagraph (i) of this paragraph, including, but not limited to, amounts owed relating to excess revenue, or the difference between the minimum spending requirement and the actual amount of spending on resident-facing staffing or direct care staffing, as the case may be, shall be reduced as follows for reporting periods beginning on January first, two thousand twenty-three and ending on December thirty-first, two thousand twenty-six, and, to the extent the demonstration project continues, years thereafter:

(A) a fifty percent reduction, if a residential healthcare facility which has a fifty percent or lower use of resident-facing staffing contracted out to a temporary staffing agency for services provided by registered professional nurses, licensed practical nurses, or certified nurse aids, has reduced its use of such contracted agency services by at least thirty percent during any year in which such remittance or amounts owed to the state are payable, as measured by subparagraph (iii) of this paragraph.

(B) a twenty-five percent reduction, if a residential healthcare facility which has a fifty percent or lower use of resident-facing staffing contracted out to a temporary staffing agency for services provided by registered professional nurses, licensed practical nurses, or certified nurse aides, has reduced its use of such contracted agency services by at least twenty percent, but less than thirty percent, during any year in which such remittance or amounts owed to the state are payable, as measured by subparagraph (iii) of this paragraph.

(iii) In measuring temporary staffing agency usage for purposes of determining the reductions provided for in clauses (A) and (B) of subparagraph (ii) of this paragraph, the following measuring periods shall apply: in two thousand twenty-three, the fourth calendar quarter of two thousand twenty-two shall be compared to the fourth calendar quarter of two thousand twenty-three; for two thousand twenty-four and years thereafter, the average of the four calendar quarters of the previous year shall be compared to the average of the four calendar quarters of the current year. Temporary staffing shall be measured using the publicly available U.S. Centers for Medicare and Medicaid Services (CMS) Payroll Based Journal (PBJ) facility-reported data.

(a) "Revenue" shall mean the total operating revenue from or on behalf of residents of the residential health care facility, government payers, or third-party payers, to pay for a resident's occupancy of the residential health care facility, resident care, and the operation of the residential health care facility as reported in the residential health care facility cost reports submitted to the department; provided, however, that revenue shall exclude:

(i) [~~the average increase in~~] the capital portion of the Medicaid reimbursement rate [~~from the prior three years~~];

(ii) funding received as reimbursement for the assessment under subparagraph (vi) of paragraph (b) of subdivision two of section twenty-eight hundred seven-d of this article, as reconciled pursuant to paragraph (c) of subdivision ten of section twenty-eight hundred seven-d of this article;

(iii) [~~the capital per diem portion of the reimbursement rate for nursing homes that have an overall four- or five-star rating assigned pursuant to the inspection rating system of the U.S. Centers for Medicare and Medicaid Services (CMS rating), provided however that such exclusion shall not apply to any amount of the capital per diem portion of the reimbursement rate that is attributable to a capital expenditure made to a corporation, other entity, or individual, with a common or familial ownership to the operator or the facility as reported under subdivision one of section twenty-eight hundred three-x of this chapter; and~~

~~(iv)~~] any grant funds from the federal government for reimbursement of COVID-19 pandemic-related expenses, including but not limited to funds received from the federal emergency management agency or health resources and services administration;

(iv) for the first year of the demonstration project established pursuant to subparagraph (ii) of paragraph (c) of subdivision one of this section, all revenue, other than total Medicaid operating revenue, if, in the fourth quarter of two thousand twenty-three, a residential health care facility uses ten percent or less of its resident-facing staffing who are contracted out to a temporary staffing agency for services provided by registered professional nurses, licensed practical nurses, or certified nurse aides;

(v) for the second year of the demonstration project established pursuant to subparagraph (ii) of paragraph (c) of subdivision one of this section, all revenue, other than total Medicaid operating revenue, if, in two thousand twenty-four, a residential health care facility uses nine percent or less of its resident-facing staffing who are contracted out to a temporary staffing agency for services provided by registered professional nurses, licensed practical nurses, or certified nurse aids; and

(vi) for the third and fourth years, respectively, and, to the extent the demonstration project continues, years thereafter, respectively, of the demonstration project established pursuant to subparagraph (ii) of paragraph (c) of subdivision one of this section, all revenue, other than total Medicaid operating revenue, if, in two thousand twenty-five and two thousand twenty-six, respectively, and, to the extent the demonstration project continues, years thereafter, respectively, a residential health care facility uses eight percent or less of its resident-facing staffing who are contracted out to a temporary staffing agency for services provided by registered professional nurses, licensed practical nurses, or certified nurse aides.

§ 2. Joint labor-management nursing home staffing workgroup. Beginning no later than July 1, 2025, the commissioner shall convene an eight-member labor-management nursing home staffing workgroup that shall review and assess the impact of the demonstration program. The workgroup shall consist of an equal number of nursing home operators and representatives of organized labor who represent nursing home staff. The four nursing home operator appointees shall consist of a proportionate representation of operators, including: (i) both for-profit and not-for-profit operators; and (ii) appointees from various regions of the state. In making such nursing home operator appointments, the commissioner shall seek recommendations from regional or statewide associations representing predominantly for-profit and not-for-profit nursing home operators. The commissioner and a representative of the office of long-term care ombudsman shall also be members of the workgroup as ex-officio, non-voting members.

The workgroup shall study, evaluate, and make recommendations with respect to the demonstration program, including whether or not to continue or modify the program. The workgroup shall also assess at least the following issues: (i) the impact of the demonstration program on reducing the use of staffing agencies; (ii) the impact of reduced staffing agencies on continued staffing shortages and meeting required staffing levels in various regions of the state; and (iii) the impact of reduced staffing agency employees on quality of care and nursing home operations. In conducting its duties the workgroup shall solicit input and recommendations from representatives of consumers, and persons with experience in nursing home data.

The workgroup shall prepare a report reflecting a majority of the voting members' recommendations no later than October 1, 2026.

§ 3. This act shall take effect immediately.