

# STATE OF NEW YORK

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6897

2023-2024 Regular Sessions

## IN SENATE

May 15, 2023

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Introduced by Sen. RIVERA -- read twice and ordered printed, and when printed to be committed 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:

1 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:

2 (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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1 suit in a court of competent jurisdiction on its own behalf after giving  
2 notice of such suit to the attorney general, deductions or offsets from  
3 payments made pursuant to the Medicaid program, and shall deposit such  
4 recouped funds into the nursing home quality pool, as set forth in para-  
5 graph ~~[d]~~ (d) of subdivision two-c of section ~~[two-thousand-eight~~  
6 ~~hundred-eight]~~ twenty-eight hundred eight of this article. Provided  
7 further that such payments of excess revenue shall be in addition to and  
8 shall not affect a residential health care facility's obligations to  
9 make any other payments required by state or federal law into the nurs-  
10 ing home quality pool, including but not limited to medicaid rate  
11 reductions required pursuant to paragraph ~~[g]~~ (g) of subdivision two-c  
12 of section ~~[two-thousand-eight-hundred-eight]~~ twenty-eight hundred eight  
13 of this article and department regulations promulgated pursuant thereto.  
14 The commissioner or their designees shall have authority to audit the  
15 residential health care facilities' reports for compliance in accordance  
16 with this section.

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

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

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

45 (iii) In measuring temporary staffing agency usage for purposes of  
46 determining the reductions provided for in clauses (A) and (B) of  
47 subparagraph (ii) of this paragraph, the following measuring periods  
48 shall apply: in two thousand twenty-three, the fourth calendar quarter  
49 of two thousand twenty-two shall be compared to the fourth calendar  
50 quarter of two thousand twenty-three; for two thousand twenty-four and  
51 years thereafter, the average of the four calendar quarters of the  
52 previous year shall be compared to the average of the four calendar  
53 quarters of the current year. Temporary staffing shall be measured using  
54 the publicly available U.S. Centers for Medicare and Medicaid Services  
55 (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.

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

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

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

29     § 3. This act shall take effect immediately.