JULY 8, 2021

New York enacts law requiring hospitals to develop and submit clinical staffing plans to the Department of Health

By Stephanie Caffera, Laurie Cohen, and Conor Tallet

The New York Legislature continues its efforts to regulate the details of business operations in the State and to require the establishment of union-like employee participation committees. The latest focus of such efforts is on New York hospitals.

Governor Cuomo recently signed into law new legislation requiring general hospitals[1] to establish clinical staffing committees—comprised of direct patient care and management employees—tasked with developing and overseeing the implementation of clinical staffing plans in each facility. Specifically, the new law amends Section 2805-t of the New York Public Health Law and requires each general hospital to:

- Establish a clinical staffing committee by January 1, 2022,
- Submit a clinical staffing plan developed by the committee to the New York State Department of Health ("Department of Health") by July 1, 2022, and
- Implement the adopted plan on January 1, 2023.

Further, the clinical staffing committee must conduct a semiannual review of the plan and annually submit an updated plan to the Department of Health by July 1st of each year. The Department of Health will post these plans publicly and collect data concerning their implementation.

Clinical staffing committee

By January 1, 2022, all general hospitals licensed in New York must establish a clinical staffing committee, either by creating a new committee or by assigning the clinical staffing functions to an existing committee. If a collective bargaining agreement already provides for a staffing committee, then the required functions of the clinical staffing committee must be incorporated into the existing committee. The new law contains detailed requirements for the composition of the

[1] The staffing provisions of the new law apply only to general hospitals. Other provisions, however, apply to all Article 28 licensed facilities, as discussed below.

committee, and requires that direct care employees comprise at least half of its members. Committee members are elected by their peers or are selected in accordance with the terms of any collective bargaining agreement. Each clinical staffing committee must be comprised of:

- At least one-half registered nurses (RNs), licensed practical nurses (LPNs), and ancillary members of the frontline team providing or supporting direct patient care; and
- Up to one-half hospital administration employees, such as the chief financial officer (CFO), the chief nursing officer (CNO), and/or patient care unit directors or managers.

The clinical staffing committee is primarily responsible for developing and overseeing the implementation of the hospital's annual clinical staffing plan. "Implementation" includes conducting a semiannual review of the adopted plan and handling any employee complaints concerning violations of the plan.

The law entitles committee members to participate in committee functions on scheduled work time, during which time they must be fully relieved of other job duties. Committee members must be paid for the time spent on committee functions. Committee work is instead of—not in addition to—regular work hours; employers may not extend the work hours of committee members to account for the time spent on committee work or require them to make up the time elsewhere.

Clinical staffing plan

The clinical staffing plan developed by the committee must include specific staffing for each patient care unit and work shift based on the needs of patients. Additionally, the plan must contain specific guidelines or ratios, matrices, or grids indicating how many patients are assigned to each RN and the number of nurses and ancillary staff who must be present on each unit and shift. The law also requires general hospitals to use the adopted plan as the "primary component" of its staffing budget.

The clinical staffing committee must consider numerous factors in developing its clinical staffing plan, including:

- Patient census;
- Measures of acuity and intensity of all patients and the nature of care to be delivered on each unit and shift;
- Skill mix;
- The availability, level of experience, and specialty certification or training of nursing personnel providing patient care;
- The need for specialized or intensive equipment;
- The architecture and geography of the patient care unit;
- Mechanisms and procedures to provide for one-to-one patient observation, when needed, for patients on psychiatric or other units as appropriate;
- Other special characteristics of the unit or community patient population;
- Measures to increase worker and patient safety;
- Staffing guidelines adopted or published by other states or local jurisdictions, national nursing professional associations, specialty nursing organizations, and other health professional organizations;

- Availability of other personnel supporting nursing services on the unit;
- Waiver of plan requirements in the case of unforeseeable emergency circumstances;
- Coverage to enable RNs, LPNs, and ancillary staff to take meal breaks, planned time off, and unplanned absences;
- The nursing quality indicators;
- General hospital finances and resources; and
- Provisions for limited short-term adjustments necessary to account for unexpected changes in circumstances.

The law provides the management members of the committee and the employee members of the committee, in the aggregate, have one vote each (regardless of the actual number of members on either side), and each group shall determine its own method of casting its vote to adopt all or part of the clinical staffing plan. The staffing committee is expected to reach a consensus before adopting any clinical staffing plan. If there is no consensus among the committee members on a full or partial plan, the hospital's chief executive officer (CEO) may exercise discretion to adopt a plan or partial plan. The CEO must provide a written explanation to the Department of Health concerning the elements of the staffing plan that the committee was unable to agree on, including the final written proposals from the two sides of the committee and their rationales.

The law also requires hospitals to provide data to the Department of Health on how their staffing plans are functioning. After the initial clinical staffing plan is submitted to the Department of Health, the hospital must submit updated information each year, including data on the frequency and duration of variations from the adopted clinical staffing plan, the number of complaints relating to the clinical staffing plan and their disposition, and a description of any unresolved complaints. The hospital's adopted plan will be posted on the Department of Health website as part of each individual hospital's health profile no later than July 31st of each year. If a hospital amends its plan after it is submitted, it must submit any amendments to the plan within thirty days after they are adopted.

Beginning January 1, 2023, all general hospitals must implement their adopted clinical staffing plans by January 1st each year following submission of the plan to the Department of Health—and must post the adopted plan in a publicly conspicuous area on each patient care unit of the hospital.

The law also creates an advisory commission to be composed of nine experts in staffing standards and quality of patient care, including three experts in nursing practice, quality of nursing care, or patient care standards, three representatives of unions representing nurses, and three members representing general hospitals. The Governor, the Speaker of the Assembly, and the Temporary President of the Senate will appoint one member to the advisory commission in each of the three categories. The advisory commission is tasked with evaluating staffing levels and other quality metrics related to nurse staffing in hospitals, and evaluating the effectiveness of the clinical staffing committees, including evaluating quantitative and qualitative data on whether staffing levels were improved and maintained, patient satisfaction, employee satisfaction, patient quality care metrics, workplace safety, and any other metrics the commission deems relevant.

The law further requires the advisory commission to submit a report and recommendation to the Legislature no later than October 31, 2024, recommending further legislative action, if any, in order to improve working conditions and quality of care in general hospitals.

Disclosure of nursing quality indicators

Although the NYS Legislature has not passed the nurse staffing ratio bills championed by unions, the new law addresses many of the same issues. The law requires every licensed Article 28 facility—not just general hospitals—to provide information regarding nurse staffing and patient outcomes to the Department of Health on a quarterly basis. This information will then be made publicly available. The Commissioner of Health is required to promulgate rules and regulations for the uniform disclosure of such information by December 31, 2022, including "at least" the following information:

- The number of RNs providing direct care and the ratio of patients per RN;
- The number of LPNs providing direct care; and
- The number of unlicensed personnel utilized to provide direct patient care, including adjustment for case mix and acuity.

This information must be expressed in actual numbers, in terms of total hours of care per patient, and as a percentage of patient care staff, and must be broken down in terms of the total patient care staff, each unit, and each shift.

Penalties for violations

The law authorizes the Department of Health to investigate possible violations of the law that are brought to its attention, including a hospital's failure to:

- Form or establish a clinical staffing committee,
- Comply with the requirements of the law in creating a clinical staffing plan,
- Adopt all or part of a clinical staffing plan approved by the clinical staffing committee's consensus,
- Conduct a semiannual review of the clinical staffing plan, or
- Submit a clinical staffing plan to the Department of Health on an annual basis or within thirty days of any amendment to the plan.

If the Department of Health's investigation finds a violation, the hospital must submit a corrective action plan within forty-five days of the Department's findings. The Department may impose a civil monetary penalty if a hospital fails to submit a corrective action plan, or fails to implement a corrective plan.

Additionally, while there is no provision for an employee to sue the hospital directly for any violation of the law, retaliation is expressly prohibited against any employee who performs duties in connection with the clinical staffing committee, as well as against any employee who notifies the clinical staffing committee or hospital of staffing concerns.

Conclusion

It is clear that the new legislation will impose significant burdens on hospitals as they address staffing going forward and will create new enforceable obligations on hospitals to involve direct care staff in ways not previously required in non-union settings. Hospitals and other Article 28 facilities should remain in contact with counsel over the course of the next calendar year to ensure compliance with the new law.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Stephanie Caffera, 585-263-1066, scaffera@nixonpeabody.com
- Laurie Cohen, 518-427-2708, lauriecohen@nixonpeabody.com
- Conor Tallet, 585-263-1378, ctallet@nixonpeabody.com