

# Now & Next

## Healthcare Alert

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### **Temporary health care services agencies must register by September 30, 2023**

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NYSDOH plans to publish FAQs, and could potentially extend the deadline.



#### **What's the impact?**

- Registering entities can submit a “compliance plan” to NYSDOH if they are not in compliance as of the registration deadline.
- It is unclear whether contract provisions that are inconsistent with statute registration requirements will be enforceable after the registration deadline has passed.
- NYSDOH has provided verbal guidance that the registration requirements apply to staffing agencies that provide not only registered nurses, LPNs, and certified nurse aides, but also other direct care workers, including physicians.

Earlier this year, as part of New York State’s annual budget legislation, the State enacted a new law that requires all “temporary health care services agencies” to register with the New York State Department of Health (“NYSDOH”). The new [Article 29-K of the Public Health Law](#) clearly signals that the State is seeking a detailed understanding of the shifts in healthcare costs

occasioned by nurses and other healthcare workers leaving permanent jobs with providers for positions with temporary staffing agencies. However, numerous questions remain.

## **Agency registration is currently due September 30, 2023**

NYSDOH has posted on its website [registration instructions and materials](#). Unless NYSDOH extends the registration deadline, all temporary health care services agencies must register by September 30, 2023. There is a separate deadline of November 30, 2023, to begin submitting quarterly reports with significant data regarding the agencies' relationships with NY health care entities.

NYSDOH held a webinar on September 18, 2023. During the webinar, NYSDOH stated that the registration deadline remains September 30, 2023, while commenting that NYSDOH is considering multiple requests to extend the deadline. NYSDOH staff also stated that if a temporary services agency has questions, the agency should delay registering until closer to September 30th, as those questions might be answered in the pending FAQs.

## **NYSDOH stated verbally that the new registration law applies broadly to all types of health care staffing agencies**

Notably, the new law's definition of "temporary health care services agency" captures any business that provides or procures temporary employment of "health care personnel for health care entities." The term "health care personnel," in turn, specifically includes nurses and certified nurse aides (CNAs), but also generally includes "licensed or unlicensed direct care staff." Although the term "direct care staff" is not defined, the law defines "direct care worker" as including any individual "responsible for patient/resident handling or patient/resident assessment as a regular or incidental part of their services."

These definitions are significant because, arguably, NYSDOH could have interpreted the law as limited to agencies that provide nurses, CNAs, and personal care workers. However, on the webinar, NYSDOH stated that it interprets the statute as applying broadly, such that it includes agencies that provide physicians, nurse practitioners (NPs), and physician assistants (PAs). In other words, NYSDOH currently views physicians, NPs, and PAs as covered by the definition of "direct care workers" who are responsible for patient "handling" and "assessment."

## **How long is "temporary" employment?**

NYSDOH has not yet addressed how long an employment arrangement must be to qualify as "temporary." Absent clarification, there remains significant uncertainty as to whether the registration requirements apply to some arrangements that provide longer-term professional staffing to a hospital or nursing home. For example, if a private medical practice provides staff to

a hospital to deliver services or provider coverage in a specific department or hospital unit, would NYSDOH consider the private practice to be a temporary staff agency? Does the answer depend on the length of the contract or frequency of services provided? It appears that the State may not have fully considered the law's implications in this regard.

## **Registration materials can include a “plan to meet compliance”**

The registration forms state that temporary service agencies must meet certain minimum requirements as a condition of registration, which generally track the requirements of the new law. Notably, however, the registration forms allow agencies to answer “Yes” or “No” as to whether the agency will adhere to the registration requirements, including the following statements:

- / “Agency agrees to not restrict employment opportunities of personnel.”
- / “Agency does not require the payment of liquidated damages, employment fees, or other compensation should personnel be hired as a permanent employee.”

The form continues to state: “If an agency does not meet this registration requirement, please provide plan to meet compliance.” During the webinar, NYSDOH stated that it understands that it will take time for temporary health care agencies to comply with every requirement of the new law. NYSDOH appeared to be seeking to encourage compliance, rather than demand it, considering that the requirements are new and that questions remain. However, it is conceivable that the agency will at some future date take enforcement measures against an agency that marks “No” to any question, by denying or revoking registration.

Moreover, NYSDOH has not, and likely will not, express an opinion as to whether contract terms are valid where such terms do not comport with statutory conditions of registration. To put a finer point on it, it remains unclear whether contract provisions that restrict employment opportunities of personnel, or that require the payment of liquidated damages or employment fees if a temporary staff member is hired as a permanent employee, are enforceable after the registration deadline has passed.

## **Contracts must be submitted to NYSDOH within five (5) days of their effective date**

Article 29-K provides that every temporary health care services agency must have contracts with each health care entity to which it provides services. Each contract must include, at a minimum:

- / The minimum licensing, training, and continuing education requirements for assigned health care personnel.
- / Any requirement for minimum advance notice relating to the assignment of health care

personnel.

- / Procedures for notice from health care entities if medical personnel fail to report to an assignment.
- / The rates charged by the agency, as well as the maximum rates that the agency can charge pursuant to law.
- / Procedures for the investigation and resolution of complaints about the performance of temporary health care services agency personnel.
- / Procedures for notice of actual or suspected abuse, theft, tampering with or diversion of controlled substances.
- / The types and qualifications of health care personnel available.

Temporary health care services agencies must send NYSDOH copies of all such contracts within five business days of its effective date, as well as “copies of all invoices to health care entities personnel.” The phrase “invoices to health care entities personnel” is puzzling and could be a legislative drafting error. Nevertheless, NYSDOH incorporated the phrase into its current forms.

Notably, contracts submitted pursuant to the new registration requirements are not subject to New York’s Freedom of Information Law.

## Quarterly reports

Finally, beginning November 30, 2023, temporary health care services agencies must send NYSDOH quarterly reports that include, but are not limited to, the following information:

- / By personnel title: hourly regular pay rate, shift differential, weekend differential, hazard pay, charge nurse add-on, overtime, holiday pay, travel, mileage pay, and other fringe benefits.
- / The percentage of health care entity dollars that the agency expended on temporary personnel wages and benefits, compared to the temporary health care services agency’s profits and other administrative costs.
- / A list of the states and zip codes of health care personnel primary residences.
- / Names of all health care entities with which the agency has contracts in New York state.
- / The number of health care personnel assigned to each entity.

NYSDOH’s website states that questions about registration requirements can be sent to: [TempAgencyRegistration@health.ny.gov](mailto:TempAgencyRegistration@health.ny.gov).

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

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