# URGENT

# NOTICE TO ALL NYSHFA MEMBERS

# CALL TO ACTION

# IMMEDIATE ATTENTION REQUIRED

Re: The Spending Mandate (70/40/5) and the Staffing Mandate (3.5 hours per resident day)

On August 10, 2022, the New York State Department of Health (“DOH”) published revised proposed regulations in the New York State Register, signaling its intent to implement and enforce two laws enacted in 2021 and signed into law by former Governor Cuomo. The first of those two laws (the “Spending Mandate”) requires that beginning in 2022, nursing homes must spend at least 70% of their revenue on direct resident care, 40% of which must be spent on resident-facing staff, and each facility must repay to the State any shortfalls in meeting those benchmarks. In addition, facilities must also pay back to the State the amount of any revenues that exceed 5% of its total expenses. The second law (the “Staffing Mandate”) requires that beginning in 2022, facilities must provide a minimum of 3.5 hours of care staffing per resident each day, at least 1.1 hours of which must be provided by licensed nursing professionals, and 2.2 hours of which must be provided by certified nursing assistants (or, in 2022 only, by certified nursing assistants or temporary nursing assistants (TNAs)). Failure to abide by the staffing mandate could result in penalties of up to $2,000 per day. Although these proposed regulations have yet to be implemented, it appears that once they are, DOH intends to apply them retroactively to April 1, 2022 at the latest.

Based on NYSHFA’s initial review of preliminary data submitted by our members, it is clear that a significant number of facilities will be unable to meet either or both the spending and staffing mandates which will have serious adverse operational and financial consequences unless the regulations are either substantially modified or not adopted at all.

**There is still time, however, to prevent these laws from being implemented.** Before DOH can enforce these requirements, the New York State Public Health and Health Planning Council (“PHHPC”) is required to approve and adopt the aforementioned proposed regulations. Before doing that, however, PHHPC must first afford affected stakeholders a 45-day opportunity to comment on the regulations and why they should not be adopted in their current form. While facilities technically have until September 24, 2022 to file such comments with PHHPC, the Codes Committee of PHHPC is scheduled to meet on September 15, 2022. Accordingly, all comments should be filed on or before that date.

It is, therefore, **IMPERATIVE** that all facilities file written comments with PHHPC explaining how the regulations will affect their specific facility – both operationally and financially. At the very least, each NYSHFA member facility that will be adversely affected by either the 70/40/5 spending mandate and/or the 3.5 hour staffing requirement, should file at least one letter, jointly signed by its administrator, chief financial officer and director of nursing, addressing the impact of the regulations and setting forth the hardship the facilities will face in attempting to comply with these mandates.

It is also very important to **STICK TO THE FACTS**  and refrain from impassioned and/or anecdotal rhetoric that lacks actual data. This would only be counterproductive. PHHPC will be far more interested in the hard facts which will provide a sufficient legal justification for it to reject the regulations in their current form.

Attached is a draft template of a letter to be sent to the PHHPC members to be signed by the Administrator, Chief Financial Officer and Director of Nursing. We caution that this is a template and that each facility may have to make individual changes tailored to fit the precise facts that apply to it. It should be emphasized that facts differ from facility to facility and it is not possible to draft a perfect template that necessarily applies to all facilities, so you should be mindful of the need to review the template and delete from it or add to it to make sure that the salient facts applicable to your facility are called to PHHPC’s attention.

**WHERE TO SEND COMMENTS:** All comments should be filed electronically to the following address: [regsqna@health.ny.gov](mailto:regsqna@health.ny.gov) and sent by first class mail as well to Katherine Ceroalo, NYSDOH Bureau of Program Counsel, Regulatory Affairs Unit, Room 2438, Erastus Corning Tower, Nelson A. Rockefeller Empire State Plaza, Albany, New York 12237. Additionally, please also make sure to provide a copy of your comments to Stephen Hanse at [comments@nyshfa.org](mailto:comments@nyshfa.org).

# TEMPLATE LETTER FROM FACILITY

VIA EMAIL ([regsqna@health.ny.gov](mailto:regsqna@health.ny.gov)) AND FIRST-CLASS MAIL

Members of the New York State Public Health and Health Planning Council (PHHPC)

c/o Katherine Ceroalo

New York State Department of Health

Bureau of Program Counsel

Regulatory Affairs Unit

Room 2438

Erastus Corning Tower

Nelson A. Rockefeller Empire State Plaza

Albany NY 12237

Re: Proposed Nursing Home Spending Mandate (HLT-46-21-00005-RP) and Proposed Nursing Home Staffing Mandate (HLT-46-21-00007-RP)

Dear Members of the Public Health and Health Planning Council:

We, the undersigned are respectively the Administrator, Chief Financial Officer, and Director of Nursing of ***[INSERT name of facility]***, located at ***[insert mailing address]***, a \_\_\_\_\_\_\_\_\_ ***[INSERT number of beds]*** facility located in ***[INSERT name of county]***. Our average payor mix is Medicaid ***[insert percentage]***, Medicare ***[INSERT percentage]***, and private/third-party insurer ***[INSERT percentage]***. We respectfully submit these comments on behalf of the aforementioned facility to express our concern about the impact of the above-captioned proposed regulations published in the August 10, 2022 edition of the New York State Register. If implemented, these proposed regulations will have a devastating impact on this facility.

# STAFFING MANDATE

We have undertaken an analysis of the staffing mandate and determined that, if implemented, this Facility may be unable, despite its best efforts, to comply with the mandate given the well-documented shortage of healthcare staff that affects not just this facility, but indeed the entire state. The following will be the additional cost to the facility for 2022, even assuming it will be able to meet the staffing mandates, which is highly problematic:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Current Hours Per Day | Mandated Hours Per Day | Additional Cost to Comply |
| RNs and LPNs |  |  |  |
| CNAs and TNAs (for 2022 only) |  |  |  |

The foregoing does not take into account the additional cost of a bidding war among facilities and staffing agencies that has and will continue to drive up the cost of attracting staff to the Facility.

***[In this paragraph, state what efforts the facility has implemented to retain and recruit staff].***

As we are sure the Council appreciates, the COVID pandemic has created profound problems in recruiting and retaining staff. If we are unable to comply with this mandate, the facility will have to pay fines as much as $2,000 per day. This could result in fines as high as $730,000 a year, which will only exacerbate rather than resolve the current crisis, making it even more difficult to achieve quality when revenues are being diverted from the need to care for our residents in order to pay fines to the Department of Health.

***[INSERT this paragraph if your facility has a 5-star rating of 3 or above, and a quality pool quintile rating of either 1, 2 or 3].*** We note that our facility already has a 5-star quality rating of \_\_\_\_\_ and is in the ***[INSERT appropriate (first, second or third)]*** quintile of the quality pool. It is difficult to comprehend why a facility would be further penalized, despite the fact that it is providing quality care.

# THE SPENDING MANDATE

Compounding the problem is the spending mandate, which requires facilities to spend 70% of their revenues on direct resident care, 40% of which must be on resident-facing staff, and requires facilities to disgorge and pay back to the state any revenues in excess of 5% of total cost. Based on our most recently filed cost report, the impact on this facility would be as follows:

Failure to comply with 70% spending mandate \_\_\_\_\_\_\_\_\_\_\_\_

Failure to comply with 40% spending mandate \_\_\_\_\_\_\_\_\_\_\_\_

Penalty for revenue in excess of 5% \_\_\_\_\_\_\_\_\_\_\_\_

Total: \_\_\_\_\_\_\_\_\_\_\_\_

Under the regulations, revenue that must be spent on patient care includes revenues received from the state Medicaid program, a significant component of which ***[INSERT appropriate percentage amount]*** is to be for reimbursement of capital expenses, including mortgage interest and amortization, and depreciation on capital equipment.

This makes no sense since that reimbursement is intended to be spent on capital expenses rather than direct patient care. It is noteworthy that the capital component of the Medicaid reimbursement rate contains no factor for a return on equity or residual reimbursement for buildings over 40 years old. Accordingly, capital expenses are pass-through expenses meant to directly reimburse facilities for the capital expenses it incurs to provide care, yet under the law and regulations, unless the facility is either a 4- or 5-star facility, it must include that revenue which must be diverted to direct resident care. This facility, however, will still have to maintain and upgrade its physical plant and meet its financial obligations to its lenders.

***[INSERT HERE: If the 70/40/5 mandate will cause your facility to violate its lending covenants with your bank.]*** This facility is also required under existing covenants with its mortgage lender to maintain certain debt-service coverage notices which it will / may ***[INSERT which ever applies]*** be unable to meet if it is required to comply with the spending mandate. This could result in foreclosure or additional financial penalties imposed by the lender that will only make our financial situation worse.

Moreover, another portion of the revenue as defined by the regulations includes reimbursement received from the federal Medicare program, which facilities receive directly from the federal government for services already provided to Medicare patients. The proposed regulations require that a portion of those funds be diverted to the quality pool in order to cross-subsidize the state's Medicaid program which is illegal under federal law.

# RETROACTIVITY

The regulations purport to be retroactive to January 1, 2022, despite the fact that they have yet to be formally adopted. That means facilities will be held responsible for complying with regulations, and subject to severe penalties for non-compliance, despite the fact that for at least the first nine months of 2022, those regulations were not in effect. The manifest unfairness of demanding retroactive compliance is compounded by the fact that there is really no excuse for the prolonged delay. The legislation on which the regulations are based was passed in April 2021, and now, almost a year and a half later, there has still been no formal adoption of these regulations that are necessary to provide guidance to providers. Whatever happens, we respectfully request that any regulations that are adopted, if any, be prospective only, commencing no sooner than January 1, 2023.

# CONCLUSION

The spending and staffing mandates are fatally flawed, and for all the foregoing reasons, we respectfully request that the Council reject the DOH proposed spending and staffing regulations as they will only exacerbate rather than ameliorate the current health care crisis facing the long-term care delivery system throughout New York State.

Respectfully submitted.

NAME OF FACILITY

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Administrator

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Chief Financial Officer

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Director of Nursing