

THOMAS P. DINAPOLI
COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 9, 2019

Ms. Roberta Reardon
Commissioner
Department of Labor
Building 12, W.A. Harriman Campus
Albany, NY 12240

Re: Restrictions on Consecutive Hours
of Work for Nurses
Report 2019-F-12

Dear Commissioner Reardon:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law, we have followed up on the actions taken by officials of the Department of Labor to implement the recommendations contained in our audit report, *Restrictions on Consecutive Hours of Work for Nurses* (Report [2017-S-14](#)), issued April 23, 2018.

Background, Scope, and Objective

The Department of Labor (Department) is charged with protecting workers in New York State and is responsible for enforcing the requirements of Section 167 of the New York State Labor Law – referred to as the Restrictions on Consecutive Hours of Work for Nurses Law (Law). This Law, along with Part 177 of Title 12 of the New York Codes, Rules and Regulations (NYCRR), was established to protect the public health and quality of patient care by limiting consecutive hours of work by nurses in non-emergency situations. The Law, effective July 1, 2009, applies to Registered Nurses and Licensed Practical Nurses who provide direct patient care in public and private general hospitals, nursing homes, diagnostic and treatment centers (clinics), and other facilities licensed under Article 28 of the Public Health Law, or in facilities operated by the State, political subdivisions of the State, or public corporations pursuant to the Mental Hygiene Law, the Education Law, and the Correction Law. These include psychiatric centers operated by the Office of Mental Health (OMH) and correctional facilities operated by the Department of Corrections and Community Supervision. The Law does not apply to voluntary providers licensed or certified by OMH, the Office for People with Developmental Disabilities, or the Office of Alcoholism and Substance Abuse Services.

The Law and the NYCRR establish certain responsibilities and requirements for applicable health care employers to reduce nurse fatigue and decrease the risk of serious and preventable medical errors that impact the quality of patient care. Under the Law, health care facilities cannot require nurses to work beyond their regularly scheduled and agreed-upon hours. The Law does not preclude nurses from volunteering to work additional hours and does not apply in situations such as a health care disaster (e.g., a situation resulting in multiple injuries) or a federal, State, or local declaration of an emergency.

Employers are required to implement Nurse Coverage Plans (Coverage Plans) to address typical patterns of staff absenteeism due to illness, bereavement, and other similar factors, as well as typical levels and types of patients served. Coverage Plans must describe alternative staffing methods available to the employer to ensure adequate staffing through means other than mandatory overtime. Employers must document all good faith efforts to avoid the use of mandatory overtime before requiring a nurse to remain on duty.

Nurses may file complaints with the Department's Division of Labor Standards (Division) if they feel their employers violated the Law. Between May 14, 2018 and June 26, 2019, the Division completed 234 investigations involving 295 complaints related to possible violations of the Law.

Our initial report, covering the period January 1, 2015 through June 30, 2017, examined whether the Department adequately enforced the Law. The audit found the Division lacked policies and procedures to guide its complaint investigations, leading to missing documentation, inconsistent application of the Law, poor communication with complainants, and delayed investigations of State-operated facilities. Additionally, the Division's Worker Protection Monetary (WPM) System lacked the functionality to provide useful information to Division management to effectively manage complaint investigations. Furthermore, the Division was unaware of all employers subject to the Law, increasing the risk that employers may not be aware of the Law's requirements.

Because of these and other weaknesses, we concluded that the Division needed to improve its enforcement of the Law by developing policies and procedures to ensure consistent and timely investigations of complaints, improving the functionality of the WPM System to provide information that could be used to better manage complaint investigations, and identifying all employers subject to the Law and educating them about the Law's requirements.

The objective of our follow-up was to assess the implementation, as of June 11, 2019, of the five recommendations in our initial report.

Summary Conclusions and Status of Audit Recommendations

Department officials made some progress in addressing the problems we identified in the initial audit. Of the five prior audit recommendations, one was implemented and four were partially implemented.

Follow-Up Observations

Recommendation 1

Establish policies and procedures to ensure that nurse overtime complaints are investigated timely using consistent methods and application of the Law.

Status – Partially Implemented

Agency Action – The Division has not established policies or procedures to ensure that complaints are investigated consistently within prescribed time frames. However, the Division has improved its communication, developing and implementing standard letters to send to facilities under investigation and to complainants to acknowledge their concerns and provide investigation results. Furthermore, whereas in the past complaints regarding State-operated facilities were aggregated and investigated once or twice per year, now the Division addresses these complaints individually, improving the timeliness of some investigations.

Recommendation 2

Improve the functionality of the WPM System to better assist management in tracking nurse overtime complaints and investigations in a comprehensive manner.

Status – Implemented

Agency Action – The Division designated managers to enter complaint information into the WPM System as complaints are received and investigations progress. The system has also been expanded to electronically upload claim acknowledgement letters and responses. Additionally, Division officials can now run management reports that allow for better oversight of complaint investigations and more effective enforcement of the Law. These include reports of investigations by status (e.g., open or closed) and by employer. Furthermore, the Division now utilizes biweekly summary reports to assess overall performance for nurse overtime complaints. The summary reports provide key operating statistics, such as complaints (from State-operated facilities) that have been open for more than 60 or 90 days, the oldest active investigations, and all correspondence with employers. Additionally, the statistics from these reports may be organized by district, allowing district offices to focus on only the most relevant information.

Recommendation 3

Develop and maintain a listing of all employers covered by the Law.

Status – Partially Implemented

Agency Action – The Division has developed a partial listing of about 250,000 employers to whom the Law may apply and is currently developing a new database of employers based on North American Industry Classification System codes. The Division has

also started a list of provider type codes to help identify more employers covered by the Law, but officials noted it has been a cumbersome process and that further levels of review are required to complete the list.

Recommendation 4

Establish an outreach and education program to ensure that all covered employers are aware of the Law and its requirements.

Status – Partially Implemented

Agency Action – The Division has improved access to employers’ legal requirements on its public website. It has also developed a presentation about the Law and employer responsibilities, what a Coverage Plan should include, the role of the Division in investigating complaints, and issuing violations based on findings. Although the presentation has been with the Department’s Counsel’s Office for approval since April 2018, Division officials stated the presentation was recently approved and will be posted to the Department’s website in the next 30 days. The Division also drafted a Coverage Plan Template/Checklist, which it estimated would be approved in August 2019.

Recommendation 5

Explore feasible actions to strengthen the Division’s enforcement options.

Status – Partially Implemented

Agency Action – In February 2019, in an effort to encourage compliance, Division officials initiated a proposal seeking to publicly post on their website a list of employers who violate the Law. However, the Department’s Counsel’s Office must approve this proposal before implementation and officials do not know how long that will take. The Division also met with the New York State Nurses Association (NYSNA) to discuss the Law and the Division’s views on enforcement. NYSNA agreed that publishing employers in violation of the Law could promote compliance and encouraged the Division to continue in its efforts to get approval.

Major contributors to this report were Nadine Morrell, Scott Heid, Michele Turmel, and Gayle Clas.

We would appreciate your response to this report within 30 days, indicating any actions planned to address the unresolved issues discussed in this report. We thank the management and staff of the Department for the courtesies and cooperation extended to our auditors during this review.

Very truly yours,

Brian Reilly, CFE, CGFM
Audit Director

cc: Erin Murphy, Director of Internal Audit