

**12 NYCRR Part 177**  
**Regulatory Flexibility Analysis for Small Businesses and Local Governments**

**1. Effect of rule:**

This rule will apply to all health care employers which include any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

**2. Compliance requirements:**

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care employer must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

**3. Professional services:**

Legal services may be required to negotiate, draft and review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional

nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

#### **4. Compliance costs:**

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan that may reduce the need for last-minute supplemental staffing.

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Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

## **5. Economic and technological feasibility:**

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

## **6. Minimizing adverse impact:**

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

## **7. Small business and local government participation:**

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.