NEW YORK BUDGET REQUIRES NURSING HOMES SPEND 70% OF REVENUE ON DIRECT RESIDENT CARE

Under the recently passed New York State Budget for Health and Mental Hygiene (A3007C/S2507C) and beginning January 2022, New York State residential health care facilities will be required to spend at least 70% of their revenue on direct resident care, with 40% of revenue focused on resident-facing staffing ("Minimum Spending Requirements"). For example, if a facility has a total revenue of $1,000,000.00, the facility must spend at least $700,000.00 on direct resident care, with $400,000.00 of that amount spent on resident-facing staffing.

Significant Highlights:

- The new Public Health Law § 2828 ("Section 2828") requires that, if a facility's total operating revenues exceed its total operating and non-operating expenses by more than 5%, the facility must return the excess revenue to the State.
- Facilities failing to meet either minimum spending requirement must pay the State the difference between its actual spending and the required minimum spending amount.
    - The Department of Health may collect these excess funds through Medicaid deductions and offsets or bringing a lawsuit against the Facility.
- *Residential health care facilities* <u>do not include</u> continuing care retirement communities or facilities that are authorized to primarily care for medically fragile children, people with HIV/AIDS, persons requiring behavioral intervention or neurodegenerative services, or other specialized populations that the Department may designate.
- The Department may waive these requirements for certain facilities unable to comply due to "unexpected or exceptional circumstances that prevented compliance." The Department can also exclude extraordinary revenues and capital expenses resulting from a natural disaster (or some other circumstances as determined by the Department) from its calculations.

Important Definitions:

<u>Revenue:</u> the total operating revenue from or on behalf of facility residents, government payers, or third-party payers, to pay for a resident's occupancy at a facility, resident care, and the operation of the facility as reported in the facility's cost reports; but shall **exclude** the average increase in the capital portion of a facility's Medicaid reimbursement rate from the previous 3 years.

<u>Expenses:</u> all operating and non-operating expenses, before extraordinary gains, reported in a facility's cost report.

- Section 2828 expressly carves out expenses related to any related party transaction or compensation that exceeds fair market value, as well as any employee compensation for any person not actively engaged in or providing services at the facility.

<u>Direct resident care spending:</u> To satisfy a facility's 70% Minimum Spending Requirement, the following:

1. **<u>CAN BE INCLUDED</u>**: nonrevenue support services (e.g., laundry, housekeeping, and nursing administration; ancillary services (e.g., laboratory, PT/OT and speech/hearing therapy); and program services (e.g., adult day health care).

2. **CANNOT BE INCLUDED**: administrative costs (other than nurse administration), capital costs, debt service, taxes (other than sales taxes or payroll taxes), capital depreciation, rent and leases, and fiscal services.

Resident facing staffing: all staffing expenses in the ancillary and program services cost report cost centers. Section 2828 requires the Department to deduct 15% of resident-facing staffing costs associated with contracted services provided by RNs, LPNs, or CNAs from the total calculation of the amount spent on resident-facing staffing and direct resident care.

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Should you have any questions regarding the above, please contact the Garfunkel Wild attorney with whom you regularly work, or contact us at info@garfunkelwild.com.

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