



2023 
**STAFFING
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CONFERENCE

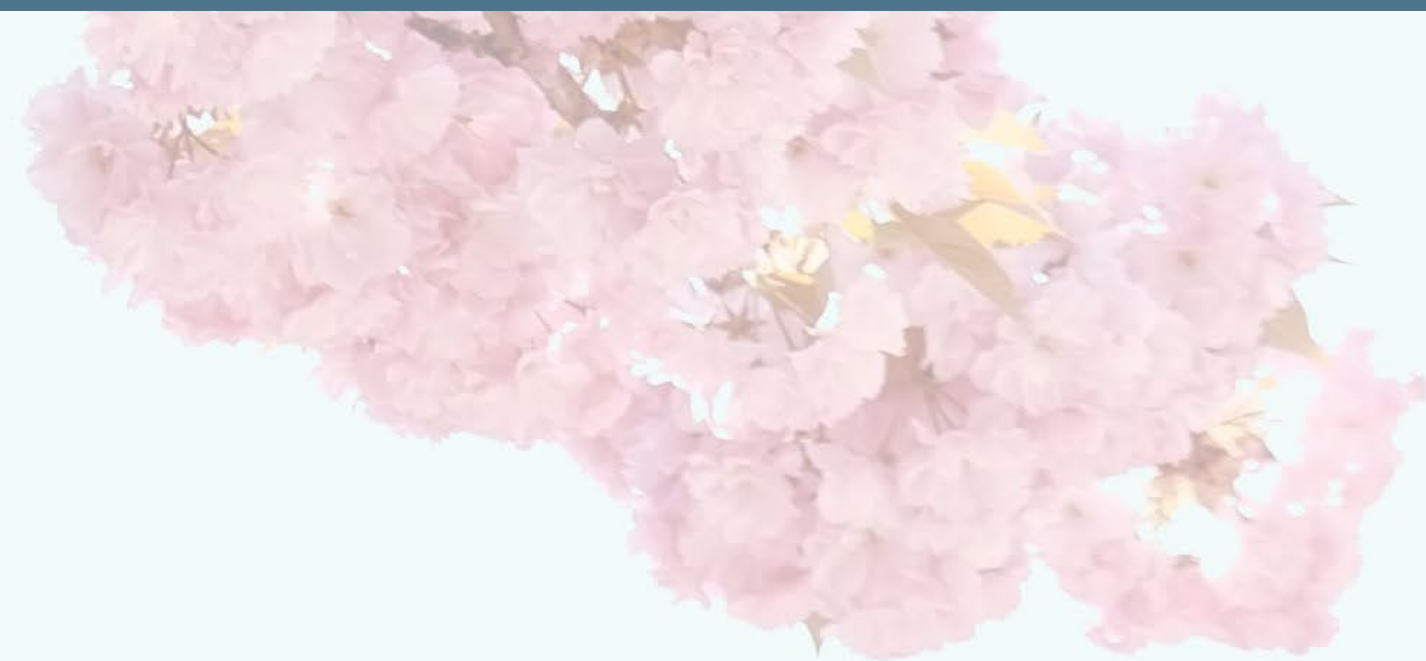
★ **MAY 18–19**
WASHINGTON, DC


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Special Session: Health Care Staffing—Combating the Legal and Legislative Issues Ahead

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Special Session:
Health Care Staffing—Combating the Legal and
Legislative Issues Ahead

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Snapshot of a Big Year





A big year for health care staffing lawyers...

Important Decisions

- *Moriana v. Viking River Cruises* → LOOK OUT FOR *Adolph v. Uber*
- *Hamilton v. Walmart* → LOOK OUT FOR *Estrada v. Royalty Carpet Mills Inc.*
- *Bonta v. Chamber of Commerce* → LOOK OUT FOR federal legislation

Threatened Actions

- “Bait & Switch Claims”
- Per diem claims join the “kitchen sink” repertoire

New Market-Driven Challenges from handling bankrupt clients to competing with Uber nurse models.

Explosion of Non-Clinical State Regulation → LOOK OUT FOR more legislation



PAGA and Arbitration

The Issue:

- After a plaintiff's *individual* PAGA claim is compelled to arbitration, does the plaintiff have standing to pursue *non-individual* PAGA claims on behalf of other employees in court?
- In *Viking River Cruises v. Moriana*, the Supreme Court of the United States said “no,” but the California Supreme Court will have the final word in *Adolph v. Uber*.

The Timing:

- Decision likely this summer.

Why It Matters:

- If the California Supreme Court answers “yes” where SCOTUS answered “no,” then moving to compel arbitration of individual PAGA claims *may* no longer make sense, with some exceptions.



PAGA Manageability

The Issues:

- The Ninth Circuit held that PAGA claims lack a manageability requirement in *Hamilton v. Walmart*, but the holding only applies to federal trial courts.
- Do state trial courts in California have authority to ensure that PAGA claims can be manageably tried? Put differently, does PAGA permit plaintiffs to pursue PAGA claims even if they cannot be tried in any manageable fashion? The California Court of Appeals is currently split on this issue, which the California Supreme Court will finally resolve in *Estrada v. Royalty Carpet Mills Inc.*

The Timing:

- The *Estrada* appeal is fully briefed, but oral argument has not been scheduled.

Why It Matters:

- The outcome of *Estrada* will have an enormous impact on the scope and breadth of arguments available to defendants faced with PAGA lawsuits.
- Potential outcomes: (1) PAGA claims must be manageable and trial courts can strike them if they are not; (2) PAGA claims lack a manageability requirement, and trial courts are powerless to render them manageable; (3) something in between.



Mandatory Arbitration in California

And Now for Some Good News!

- On February 17, 2023, the Ninth Circuit reversed itself, and held in *Bonta v. Chamber of Commerce* that California's Assembly Bill 51—which sought to prohibit the use of mandatory arbitration agreements by employers—is preempted by the Federal Arbitration Act. Hurray!

What This Means:

- Employers in California who are engaged in interstate commerce may now require their employees to enter arbitration agreements as a condition of new or continued employment (including agreements with class- and collective-action waivers).

But Wait:

- A note of caution: Defendants involved in pending class-action lawsuits must: (1) disclose the existence of that lawsuit in their arbitration agreement; and (2) permit the employee to exclude the lawsuit from the agreement's scope.



Trends in Litigation and Tips for Avoiding Suits



Trending Claims

“Bait and Switch”: Mid-Assignment Rate Change Cases

- Plaintiffs argue that mid-assignment rate changes violate the nurses’ contracts, constitute fraud, and violate a host of state-level wage and hour laws.
- Currently being pursued on a class basis against health care staffing companies across the country, including in California, Colorado, Florida, Maryland, Washington.
- Some motions to compel arbitration and to dismiss certain claims have succeeded.

The Ever-Present “Kitchen Sink”:

- Everything old is new again . . . PLUS per-diem claims

Sexual Harassment “Add Ons” to Wage & Hour Class Actions:

- Offensive use of the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” as an attempted end-run around arbitration agreements with class waivers.



Litigation Avoidance—Low-Hanging Fruit

- Pay for all time worked, including mandatory facility-specific trainings and orientations, regardless of whether that time can be billed.
- Reimburse for cell phones, particularly if you know your employees use them for work purposes (e.g., timekeeping or texting with their recruiters about their assignments) and unquestionably if your policies require the use of a cell phone.
- Do not round time for payroll purposes where prohibited (CA and OR), and pay to the minute, even if your clients round time for billing purposes.
- Pay CA meal-period premiums at the regular rate, including for missed, missed second, late, and short meals.
- Maintain compliant documents, including timecards with space for second meals and up-to-date meal- and rest-period policies.
- Avoid alternative workweek arrangements in California.



Market-Driven Challenges



Cash-Strapped Clients

Approaching Bankruptcy

- Always accept payments: There may be concerns about preference exposure in the 90 days leading up to a bankruptcy filing. But preference claims are usually negotiated at a discount and you are unlikely to get any prepetition unsecured claim paid in full.
- Try to keep payments coming under existing contract terms: This will help to protect you from preference exposure by establishing an ordinary course defense and avoid creating a large prepetition claim.
- Review your contract's term: Make sure the term of your agreement hasn't lapsed. If it has, negotiate a definite end date in the near future. This could potentially allow you to stop performing after that date, even if a bankruptcy is filed, and give you a better chance at critical vendor treatment.
- Consider avoiding discretionary extensions of staff: If it is within your contractual rights, this will limit your exposure both pre- and post-bankruptcy.



Cash-Strapped Clients

After Bankruptcy

- Respect the automatic stay: A bankruptcy will create an automatic stay that includes your services contract. Once the bankruptcy is filed, you generally cannot try to collect on prepetition debt or terminate the contract without the bankruptcy court's permission.
- Keep performing under your contract: Unless you get relief from the bankruptcy court, your contract is likely an executory contract that you will need to keep performing under after the bankruptcy is filed until there is a confirmed plan.
- Debtor needs to compensate you for post-petition work: However, the debtor needs to pay you for such work under the existing terms of your contract.
- Ask a bankruptcy professional if you are a critical vendor: Some courts allow vendors that are essential to the debtor's business to receive a payment on their prepetition debt and to renegotiate their payment terms if they are deemed to be "critical vendors." The test varies widely, so ask a professional.



Worker Classification Issues

In general, classifying medical professionals as independent contractors carries *significant* risk—both under employment laws and under tax laws.

- The FLSA uses the “economic realities” test to determine worker classification. A number of courts have held that staffing companies misclassified workers (e.g., nurses) as contractors based on application of the economic realities test. See, e.g., *Walsh v. Medical Staffing of America LLC*, 580 F. Supp. 3d 216 (E.D. Va. 2022).
- The Internal Revenue Service uses the common law test (behavioral control, financial control, type of relationship).
- In California, the “ABC” test establishes a presumption that a worker is an employee. Cal. Labor Code § 2775(b)(1). This presumption may be rebutted but only if all three factors are proven—a very high bar for health care staffing companies.
- California Referral Agency Exemption—If an individual or business provides services to clients through a *referral agency*, then the determination of whether the service provider is an employee or independent contractor of the referral agency is governed by California’s *Borello* test.



New Non-Clinical State Regulation



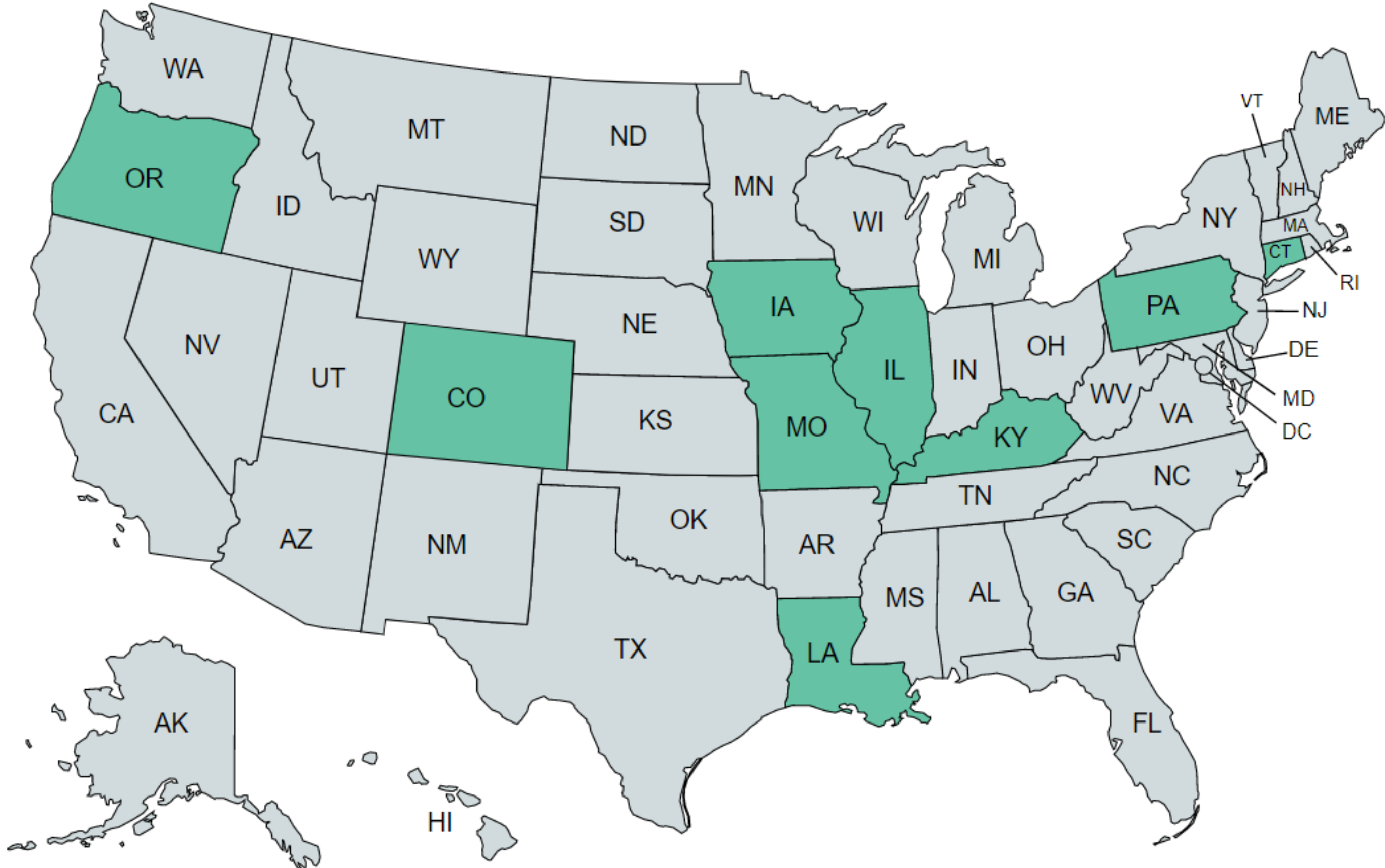
Pay Disclosure Laws

- States with pay disclosure laws include California, Washington, New York, Colorado (note that 1 employee in a state may be enough to trigger application).
- Job-Posting Content
 - Keep in mind that these laws usually do not allow employers to combine all forms of compensation and present it as a single range for the complete pay package.
- Reporting Obligations
 - Some states, like California, also require the submission of a pay data report.
 - Staffing companies must submit their own pay data report as the employer AND provide facility clients with data for employees assigned to those facilities.
- Records Retention Requirements—Some of these laws require employers to maintain job title and compensation records for each employee for up to 3 years after the end of employment.



2022 State Health Care Staffing Agency Laws

- Colorado
- Connecticut
- Illinois
- Iowa
- Kentucky
- Louisiana
- Missouri
- Oregon
- Pennsylvania





Content of the Laws

Common Themes

- Registration or licensure requirement
- Reporting requirements
- Contract requirements (client contracts and worker contracts)
- Credentialing requirements

Mixed Bag of Other Requirements

- Minimum insurance requirements
- Employee bond requirement
- Supervising nurse requirements
- Recordkeeping requirements
- Prohibition on soliciting employees of health care facilities (and vice versa)

Registration or Licensure Deadlines

State	Deadline	Notes
Colorado	Not Applicable	Colorado DOL's position is that only an agency that is an "employee leasing company" is required to complete Application and Certification.
Connecticut	January 1, 2023	Renew by July 1, 2023, and annually thereafter.
Illinois	Licensure Requirement Already Existed	Licensure requirement already existed in Illinois before the new law. New forms and requirements for new applicants and renewals of existing licenses.
Iowa	January 4, 2023	Grace period allowed through February 4, 2023.
Kentucky	Unspecified	Application available. Register ASAP.
Louisiana	Within 90 Days of Proposed Regulations	No regulations yet.
Missouri	No Deadline Established Yet	Rulemaking in progress. No application available yet.
Oregon	July 1, 2023	Rulemaking in progress. No application available yet.
Pennsylvania	Unspecified	Application available. Register ASAP.



Reporting Requirements

No two states are the same. Requirements may include:

- Invoices or invoice data
- Amounts charged to facilities
- Amounts paid to workers
- Cost information
- States where workers have their permanent residence
- Employee rosters or other personnel information
- Copies of contracts with health care facilities

Reporting Requirements

State	Frequency and Deadlines	Notes
Colorado	Twice a year: <ul style="list-style-type: none"> ▪ April 30 (Oct–Mar data) ▪ October 31 (Apr–Sept data) 	Agency guidance posted. Regulations not expected to be issued.
Connecticut	Once a year—by July 1	Awaiting agency guidance.
Illinois	<ul style="list-style-type: none"> ▪ Submit facility contracts and material amendments within 5 business days of effective date. ▪ Submit facility data and invoice data monthly—first submission due Sept. 15, 2022, and every 15th of the month thereafter. ▪ Quarterly report—first report due June 15, 2023, for the March 1–May 31, 2023, period. 	Agency guidance posted. Regulations proposed but withdrawn.
Iowa	Quarterly report—report for each calendar quarter due by the 15 th day of calendar month after end of quarter; first report due April 15, 2023.	Regulations in effect. Agency guidance posted.



Reporting Requirements

State	Frequency and Deadlines	Notes
Kentucky	Quarterly reports due Feb 1, May 1, Aug 1, and Nov 1 for the preceding calendar quarter.	Regulations in effect. Agency guidance posted.
Louisiana	No reporting requirements in the new law.	Awaiting agency guidance on other aspects of the law; guidance not anticipated on this reporting requirement.
Missouri	Quarterly report—due dates not yet announced.	Awaiting agency guidance and/or regulations.
Oregon	No reporting requirements in the new law.	
Pennsylvania	No reporting requirements in the new law.	

Contract Requirements

State	Requirements
<p>Illinois</p>	<p>Facility Contracts:</p> <ul style="list-style-type: none"> ▪ Contain full disclosure of charges and compensation including: (1) schedule of hourly bill rates for each category of employee; (2) schedule of rates of all compensation for each category of employee, including regular hourly rate, OT rate, holiday pay, travel or mileage payments, charge nurse add-on, etc.; and (3) description of administrative charges. ▪ Confirm that agency determined the individual to be able to perform all duties within full scope of practice for which the nurse or CNA is licensed or certified. ▪ Confirm that no less than 100% of the hourly rate will be paid to the individual nurse or CNA. ▪ NO liquidated damages, conversion fees, employment fees, buy-out fees, placement fees, or other compensation if a temporary worker is hired by a facility; okay if long-term basis contract. <p>Employee Contracts:</p> <ul style="list-style-type: none"> ▪ NO covenant not to compete if temporary worker; okay if long-term basis contract. ▪ NO liquidated damages, conversion fees, employment fees, buy-out fees, placement fees, or other compensation if a temporary worker is hired by a facility; okay if long-term basis contract. <p>*Temporary means undefined duration or duration of 24 months or less. **Long-term basis means longer than 24 months <u>and</u> agency incurs certain expenses in connection with placement.</p>

Contract Requirements

State	Requirements
Connecticut	Facility Contracts: Written agreement is required, and it must contain an assurance from staffing agency that assigned personnel have appropriate credentials.
Iowa	Facility <u>and</u> Employee Contracts: <ul style="list-style-type: none"> ▪ No noncompete clauses restricting employment opportunities of agency workers ▪ No liquidated damages, employment fees, or other compensation if agency worker is hired by the health care facility Prohibitions do not apply to workers for whom agency helped obtain authorization to work in U.S. if contract is at least 24 months but less than 36 months at a single facility.
Kentucky	Facility <u>and</u> Employee Contracts: <ul style="list-style-type: none"> ▪ No noncompete clauses restricting employment opportunities of agency workers ▪ No liquidated damages, employment fees, or other compensation if agency worker is hired by the health care facility, unless payable only by the facility and reduced pro rata based on length of worker's assignment.
Louisiana	Facility <u>and</u> Employee Contracts: No liquidated damages, employment fees, or other compensation if agency worker is hired by the health care facility, unless payable only by the facility and reduced pro rata based on length of worker's assignment (not to exceed 18 months).



Contract Requirements

State	Requirements
Missouri	Facility <u>and</u> Employee Contracts: <ul style="list-style-type: none">▪ No noncompete clauses restricting employment opportunities of agency workers▪ No liquidated damages, employment fees, or other compensation if agency worker is hired by the health care facility
Oregon	Facility Contracts: Conversion fees only permitted if <ul style="list-style-type: none">▪ Facility directly solicits the agency employee; and▪ Facility contract allows each party to charge or receive the conversion fee (bilateral provision)
Pennsylvania	Facility <u>and</u> Employee Contracts: <ul style="list-style-type: none">▪ No noncompete clauses restricting employment opportunities of agency workers



Compliance Considerations

1. Confirm agency is licensed/registered in states where applicable law requires it. Track when renewals are required.
2. Confirm agency has required insurance coverage, bonds, etc.
3. Review applicable reporting requirements, and confirm reports and data and documents submissions have been/will be made when required.
4. Review and revise standard form client contracts and employee contracts to ensure they are compliant.
5. Confirm credentialing procedures satisfy applicable requirements.
6. Review records retention schedules and procedures to confirm they are compliant.
7. Ensure processes in place for ongoing compliance.



2023 State-Proposed Health Care Staffing Legislation





2023 Proposed Health Care Legislation

Colorado

- Bill number: HB 23-1030
- Bill summary: An act prohibiting the use of conversion fees
- End of session: May 6
- Lobbying firm: Hicks and Associates
- Status of bill: Passed House; being debated in the Senate

Indiana

- Bill number: HB 1461
- Bill summary: A bill that would require the registration of health care staffing firms, a schedule of all fees and charges to be made, all contracts, and a prohibition of conversion fees
- End of session: April 27
- Lobbying firm: Taft Stettinius & Hollister LLP and 19th Star State Solutions
- Status of bill: Passed House; awaiting action in the Senate



2023 Proposed Health Care Legislation

Iowa

- Bill number: HF 357 and SF 327
- Bill summary: These bills codify regulations published last year
- End of session: April 28
- Lobbying firm: Resolv Partners
- Status of bill: House bill is waiting to be scheduled for final debate in the Senate

Indiana

- Bill number: SF 5
- Bill summary: This bill eliminates the reporting requirements contained in last year's law
- End of session: April 27
- Lobbying firm: Resolv Partners
- Status of bill: Bill is dead for the year



2023 Proposed Health Care Legislation

Kansas

- Bill number: HB 2265
- Bill summary: Requires annual registration and quarterly report filing
- End of session: May 22
- Lobbying firm: Watkins Public Strategies
- Status of bill: No further action is expected on this bill this year

Maine

- Bill number: SP 205
- Bill summary: Requires annual registration and annual report filings
- End of session: June 21
- Lobbying firm: None
- Status of bill: No further action is expected on this bill this year



2023 Proposed Health Care Legislation

Massachusetts

- Bill number: H 1174 and S 810
- Bill summary: An act to ensure temporary nursing service agency quality and accountability
- End of session: Nov. 15
- Lobbying firm: Issues Management Group
- Status of bill: No action on bills yet as the state is focusing on budget and other issues

Massachusetts

- Bill number: H 1166 and S 780
- Bill summary: An act to address the overuse of temporary nursing service agencies at Massachusetts skilled nursing facilities
- End of session: Nov. 15
- Lobbying firm: Issues Management Group
- Status of bill: No action on bills yet as the state is focusing on budget and other issues



2023 Proposed Health Care Legislation

Missouri

- Bill number: SB 261
- Bill summary: Establishes a rebuttable presumption regarding price gouging by a health care staffing agency
- End of session: May 13
- Lobbying firm: Capitol City Insights
- Status of bill: No further action is expected on this bill this year

Nebraska

- Bill number: LB 335
- Bill summary: Establishes registration and reporting requirements, including a schedule of rates to be charged which must be filed with the state; prohibits conversion fees
- End of session: June 9
- Lobbying firm: Kelly Plucker LLC
- Status of bill: Amended and under consideration for movement; Speaker priority bill



2023 Proposed Health Care Legislation

New Hampshire

- Bill number: SB 149
- Bill summary: Establishes licensing and quarterly reporting requirements
- End of session: June 30
- Lobbying firm: Sheehan Phinney Capitol Group
- Status of bill: Legislation amended significantly; currently under consideration in the House

New York

- Bill number: Article 29-k (Governor's Proposed Budget) and A 4621
- Bill summary: Governor's proposed budget and legislation that contain registration requirement, quarterly reports, ban on conversion fees and rate caps
- End of session: June 8
- Lobbying firm: Constantinople & Vallone Consulting
- Status of bill: Ongoing; ASA and NYSA have met with Governor's office and bill sponsor



2023 Proposed Health Care Legislation

Other Bills We Are Monitoring

- Bill number: HB 2665
- Bill summary: Establishes rate caps on temporary staffing agencies placing nurses
- End of session: June 25
- Lobbying firm: Public Affairs Counsel
- Status of bill: Legislation currently in Ways and Means Committee, faces opposition

Rhode Island

- Bill number: H 5870 and S 927
- Bill summary: Both bills establish rate caps, prohibit the charging of conversion fees and hiring of health care facility employees
- End of session: June 30
- Lobbying firm: Constantinople & Vallone Consulting
- Status of bill: Session continues; ASA lobbyists looking to set up a meeting with the House Speaker



2023 Proposed Health Care Legislation

Texas

- Bill number: SB 401
- Bill summary: Adds nurse staffing agencies to state's price-gouging law
- End of session: May 29
- Lobbying firm: None
- Status of bill: Meetings and testimony by local members led to substantial amendment to the bill

Virginia

- Bill number: SB 1458
- Bill summary: Called for regulations regarding the use of supplemental nursing services
- End of session: Feb 25
- Lobbying firm: None
- Status of bill: Bill was amended into a study bill; passed Senate but died in House



2023 Proposed Health Care Legislation

Other Nurse Staffing Issues We Are Following

- Nurse Licensure Compact (NLC): Washington adopts
- Staff Ratio bills
- SHARE Act: Federal bill, HR 1310
- Medicaid/Medicare payment increases
- Increase in funding for nursing schools/faculty