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**TO: Memo Distribution List**

LeadingAge New York

**FROM: Hinman Straub P.C.**

**RE: DFS Adopted Regulation Establishing Workers' Compensation Credit for Implemented Safe Patient Handling Programs**

**DATE: December 5, 2016**

**NATURE OF THIS INFORMATION:** This memorandum solicits your comments or responses on new proposals or pending action.

**DATE FOR RESPONSE OR IMPLEMENTATION:** While effective immediately as an emergency regulation, DFS will accept comments on the regulation through September 5, 2016.

**HINMAN STRAUB CONTACT PEOPLE:** Sean Doolan and Michael Paulsen

**THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:**

Category: #4 Regulatory Process

Suggested Key Word(s):

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As you may recall, the Department of Financial Services recently published a proposed regulation that would establish requirements for health care facilities to obtain a reduced workers' compensation insurance rate for safe patient handling programs implemented pursuant to the Public Health Law (PHL). Under the regulation, for each workers' compensation insurance policy issued or renewed in New York, an insurer is required to provide a credit to a health care facility that implements and maintains a safe patient handling program that meets the requirements of PHL § 2997-(k)(2). The Department of Financial Services has adopted the regulation with substantive changes. Notably, the adopted regulation provides that the workers' compensation insurance credit will apply to workers' compensation policies issued or renewed on or after October 1, 2017. A copy of the adopted regulation is [attached](#).

## **Background**

As part of the enacted 2014-15 budget, the Legislature adopted amendments to Article 29-D of the Public Health Law, creating the Safe Patient Handling Act ("Act"). Generally, the Act requires all Article 28 hospitals, nursing homes, and diagnostic and treatment centers (D&TCs) to adopt and implement a safe patient handling program by January 1, 2017. Please see the [attached](#) memorandum providing an overview of the Act and the requirements for implementing and maintain a safe patient handling program. The Department of Health report, containing best practices for implementation and policy templates to assist covered facilities in adopting and implementing facility-specific policies, can be [reviewed](#) on the Department's website.

The Act also amended the Insurance Law, requiring DFS to adopt a regulation establishing the requirements for health care facilities to obtain a reduced workers' compensation insurance rate by July 1, 2016. It is important to note that the statutory language does not expressly require that the reduced workers' compensation insurance rate established through this regulation be available to covered facilities as of the required implementation date (January 1, 2017). Indeed, the regulation now provides that the workers' compensation insurance credit will apply to policies issued or renewed on or after October 1, 2017.

## **Summary of Regulation**

### **1. Covered Health Care Facilities**

The regulation incorporates the definition of "health care facilities" under Article 29-D of the Public Health Law (PHL), which is defined to include: (1) Article 28 hospitals; (2) Article 28 residential health care facilities (nursing homes); (3) Article 28 diagnostic and treatment centers (D&TCs); (4) Article 28 clinics; and (5) physician practices licensed and operated under Article 8 of the Education Law.

Thus, all facilities that are required to implement a safe patient handling program by January 1, 2017 are included under the regulation and eligible to obtain reduced worker's compensation rates for implemented programs.

## 2. Eligibility for Safe Patient Handling Program Credits

In order to be eligible to receive this credit, a health care facility must implement and maintain a safe patient handling program that meets the requirements of PHL § 2997-(k)(2). The facility's workers' compensation insurer is required to verify, or obtain verification from the facility, that the facility has implemented such program prior to providing the credit to the facility's workers' compensation insurance policy. In response to public comments, DFS notes that it is acceptable for a workers' compensation insurer to require a certification from the facility that the facility has a safe patient handling program in conformance with the PHL.

The adopted regulation clarifies that if a health care facility is not maintaining a program that meets the requirements of the Public Health Law, the insurer is not required to provide the credit to the facility. Thus, the failure to provide requested information or a certification to the facility's insurer to allow for verification that the facility has a safe patient handling program in conformance with the PHL could result in the facility not receiving credit, despite the existence of a valid program.

## 3. Safe Patient Handling Program Credits

The regulation requires every insurer that issues a workers' compensation insurance policy in New York to provide a credit to health care facilities that implement and maintain a Safe Patient Handling program. The amount of the credit and the manner in which it is applied will be made in accordance with the approved manual filed by NY Compensation Insurance Rating Board (CIRB). The regulation does not establish the amount of the credit and the amount of the credit will be determined upon the 2017 manual filing.

In response to public comments, DFS states that CIRB's 2016 manual filing, approved on October 1, 2016, did not contain information regarding the credit, and that CIRB has not yet filed its 2017 manual for approval to DFS. The Department must approve workers' compensation loss costs by October 1 of each year and many workers' compensation policies renew on or after October 1 annually. As a result, the Regulation has been amended to provide that the workers' compensation insurance credit will apply to policies issued or renewed on or after October 1, 2017.

In response to public comments, DFS states that the adopted regulation does not prohibit a workers' compensation insurer from using the actual loss experience of a health care facility from serving as the basis for any resulting credit. DFS further states that as health care facilities are required to have a safe patient handling program in place on or before January 1, 2017, insurers should be able to use actual loss experience as a basis for a credit.

## 4. Reporting

The Regulation requires every workers' compensation rate service organization to submit an annual report to the Superintendent regarding policies receiving a credit pursuant to the regulation, including policy year payrolls, indemnity losses, indemnity claim counts, medical losses by classification, and such other information as the Superintendent may require. The

adopted regulation clarifies that the requirement that a workers' compensation rate service organization submit an annual report to the Superintendent by June 1 does not start until 2018.

It is important to note that the regulation does not require any facility receiving a Safe Patient Handling Program credit to undertake any reporting for purposes of compliance with the Act or as a condition of the receipt of such credit.

Please contact us with any questions that you may have.

**NEW YORK STATE  
DEPARTMENT OF FINANCIAL SERVICES  
SIXTH AMENDMENT TO  
11 NYCRR 151  
ADDING NEW SUBPART 151-7  
(INSURANCE REGULATION 119)**

**WORKERS' COMPENSATION SAFE PATIENT HANDLING PROGRAM**

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301 and 2304(j) of the Insurance Law, do hereby promulgate the Sixth Amendment to Part 151 of Title 11 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (Insurance Regulation 119) adding new Subpart 151-7, to take effect upon publication in the State Register:

**(ALL MATERIAL IS NEW)**

**§ 151-7.0 Preamble.**

In March 2014, Governor Andrew M. Cuomo signed into law Part A of Chapter 60 of the Laws of 2014, which amended the Public Health Law and Insurance Law with regard to safe patient handling programs. Specifically, Part A of Chapter 60 added a new Title 1-A to Public Health Law Article 29-D. Section 2997-i of Title 1-A required the commissioner of health to establish a safe patient handling workgroup tasked with submitting a report to the commissioner of health by July 1, 2015. Section 2997-j of Title 1-A also required the commissioner of health to disseminate best practices, safe patient handling policies, and other resources and tools to all health care facilities covered by Title 1-A on or before January 1, 2016. Section 2997-k of Title 1-A required each health care facility to establish a safe patient handling committee by January 1, 2016, and requires a health care facility to establish a safe patient handling program on or before January 1, 2017. In addition, Part A of Chapter 60 added a new Insurance Law section 2304(j) to require the department to make rules establishing requirements for health care facilities to obtain a reduced workers' compensation insurance rate for safe patient handling programs implemented pursuant to Public Health Law section 2997-(k)(2) on or before July 1, 2016, which the department did on an emergency basis. Insurance Law section 2304(j) further requires the department to complete an evaluation of the results of the reduced rate, including changes in claim frequency and costs, and to report to the appropriate committees of the legislature on or before December 1, 2018 and again on or before December 1, 2020.

**§ 151-7.1 Definitions.**

In this Subpart, *health care facility* shall have the meaning set forth in Public Health Law section 2997-(h)(1).

**§ 151-7.2 Safe patient handling program credits.**

(a) For each workers' compensation insurance policy issued or renewed in this State on or after October 1, 2017, an insurer shall provide a credit to a health care facility that implements and maintains a safe patient handling program that meets the requirements of Public Health Law section 2997-(k)(2). The amount of the

credit and the manner in which it is applied shall be in accordance with the approved manual filed by the rate service organization of which the insurer is a member.

(b) An insurer shall verify or obtain verification from a health care facility that the health care facility has implemented and maintains a safe patient handling program that meets the requirements of Public Health Law section 2997-(k)(2) before providing a credit.

**§ 151-7.3 Reporting requirements.**

By June 1 of each year, starting in 2018, every workers' compensation rate service organization shall submit a report to the superintendent regarding policies receiving a credit pursuant to this Part, including policy year payrolls, indemnity losses, indemnity claim counts, and medical losses by classification, and such other information as the superintendent may require. Every workers' compensation rate service organization shall report the information, including adjustments, consistent with the comparable classification relativity review.



NEW YORK STATE  
DEPARTMENT *of*  
FINANCIAL SERVICES

Andrew M. Cuomo  
Governor

Maria T. Vullo  
Superintendent

I, Maria T. Vullo, Superintendent of Financial Services, do hereby certify that the foregoing is the Sixth Amendment to Part 151 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 119), entitled "Workers' Compensation Safe Patient Handling Program" promulgated by me on November 8, 2016, pursuant to the authority granted by Financial Services Law Sections 202 and 302 and Insurance Law Sections 301 and 2304(j), to take effect upon publication in the State Register.

Pursuant to the provisions in the State Administrative Procedure Act, prior notice of the proposed regulation was published in the State Register on July 20, 2016. No other publication or prior notice is required by statute.

A handwritten signature in blue ink, appearing to read "Maria T. Vullo".

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Maria T. Vullo  
Superintendent of Financial Services

Date: November 8, 2016

On April 1, 2014, the New York State Legislature enacted the 2014-15 state health and mental hygiene budget. As part of the final 2014-15 budget, the Legislature adopted amendments to Article 29-D of the Public Health Law, creating the Safe Patient Handling Act (“Act”). Generally, the Act requires all Article 28 hospitals, nursing homes, and diagnostic and treatment centers (D&TCs) to adopt and implement a Safe Patient Handling Program by January 1, 2017. The Department of Health is required to establish an internal workgroup to identify best practices for implementation and develop policy templates to assist covered facilities in adopting and implementing facility-specific policies. A copy of the Act is attached.

## **Background**

Safe patient handling is a policy and practice that replaces manual lifting and moving tasks for healthcare professionals with machines and training, resulting in comfortable and safe mobility for the patient without risk of injury to the care-provider. Safe patient handling incorporates knowledge of human anatomy and physiology with technologies that ease the stress of repetitive motions and dangerous lifting tasks.

The New York State Legislature has supported the development of a safe patient handling policy within the state. In 2009, the Legislature enacted legislation authorizing the Department of Health to provide funding to select healthcare facilities to participate in a safe patient handling demonstration program. The majority of funding was dedicated to purchasing lifting and safe patient handling equipment. In 2011, the Assembly Subcommittee on Workplace Safety recommended the adoption of a statewide safe patient handling policy and requiring covered healthcare facility to develop a plan that coincides with that policy. A number of different proposals establishing safe patient handling requirements were introduced by legislators in the 2013-14 Legislative Session.

## **Summary**

### 1. Covered Health Care Facilities

Health care facilities subject to the provisions of the Act include: (1) Article 28 hospitals; (2) Article 28 residential health care facilities (nursing homes); (3) Article 28 diagnostic and treatment centers (D&TCs); (4) Article 28 clinics; and (5) physician practices licensed and operated under Article 8 of the Education Law.

### 2. Implementation Timeline

While the provisions of this Act are effective on April 1, 2014, the structure of the Act does not require facilities to immediately adopt and implement a Safe Patient Handling Policy. As opposed to prior versions of this legislation, requirements will be phased-in over a period of time. Below is an overview of the implementation timeline of this legislation:

- January 1, 2015: DOH is required to establish a safe patient handling workgroup within the Department;



- July 1, 2015: The workgroup is required to submit a report to the Department on findings and recommendations;
- January 1, 2016: DOH must make available best practices, templates for policies, and any other relevant resources to facilities required to implement a safe patient handling policy;
- January 1, 2016: All covered facilities must establish a safe patient handling committee;
- July 1, 2016: The Department of Financial Services must develop rules for facilities to obtain reduced worker's compensation rate for implemented programs;
- January 1, 2017: *All covered facilities must establish a safe patient handling program that meets the requirements of the Act.*

### 3. Safe Patient Handling Workgroup

As discussed above, the Department of Health is required to establish a safe patient handling workgroup ("workgroup") within the Department. The workgroup will consist of, at a minimum, the Commissioner of Health, the Commissioner of Labor, representatives of health care provider organizations; representatives of employee organizations representing nurses and direct care workers; representatives of nurse executives; representatives who are certified ergonomist evaluation specialists; and representatives who have expertise in fields of discipline related to health care or occupational safety.

The workgroup is tasked with reviewing existing safe patient handling programs, both within the state and nationally, and developing training materials for health care facilities. The workgroup will be required to prepare a report identifying safe patient handling program best practices, providing sample policies and identifying resources. The Department must make available best practices, templates for policies, and any other relevant resources to facilities required to implement a safe patient handling policy.

### 4. Facility Safe Patient Handling Committee

Prior to January 1, 2016, all covered facilities must establish a safe patient handling committee ("committee") to design and recommend the process for implementing a safe patient handling program for the facility. Facilities can meet this requirement by either creating a new committee or assigning the required functions to an existing committee or subcommittee.

The composition of the committee must consist of the following:

- Individuals with expertise relevant to safe patient handling, including risk management or occupational safety and health;
- One half of the committee membership must be frontline, non-managerial employees who provide direct care to patients;
- One non-managerial nurse;
- One non-managerial direct care worker;
- In facilities where there are employee representatives, at least one representative on behalf of nurses and one on behalf of direct care workers; and
- In facilities with an established resident council, at least one representative of the resident council.

## 5. Development of Safe Patient Handling Program

Every covered facility is required to establish a safe patient handling program by January 1, 2017. Each facility is directed to develop the program in consultation with the facility's committee. It is important to note that the Act currently allows facilities to "phase-in" the implementation of specific safe patient handling policies as long as other aspects of the program are implemented.

A safe patient handling program must include the following:

- *Safe patient handling policy.* Covered facilities must implement a safe patient handling policy. Generally, safe patient handling policies instruct direct care workers to assess patient handling tasks in advance to determine the safest way to accomplish such tasks and provide for the use of mechanical lifting equipment and/or other approved patient handling aids when necessary for high-risk patient handling (tasks with a high risk of musculoskeletal injury). The policy must apply to all units and all shifts of the facility.

It is important to note that the policy does not require facilities to use mechanical lifting equipment and/or other approved patient handling aids for all patient handling tasks. It is possible that some facilities, after conducting a patient handling hazard assessment, may determine that high-risk patient handling tasks are not required as part of their practice, thus limiting the need to obtain mechanical lifting equipment or patient handling aids.

- *Patient handling hazard assessment.* Covered facilities must conduct an assessment of their current practice in relation to patient handling, considering variables such as patient-handling tasks, types of nursing units, patient populations and the physical environment of patient care areas.
- *Appropriate Uses.* Covered facilities must develop a process to identify the appropriate use of the safe patient handling policy based on a patient's physical and medical condition and the availability of safe patient handling equipment. This process must also develop a process to identify when the use of such equipment should not be used as it may cause harm to the patient due to various factors, such as age, weight, cognitive and/or rehabilitative status.
- *Training.* Covered facilities must provide initial training to all direct care staff members regarding the program and safe patient handling policies. The program should provide for on-going yearly training and education for existing and new employees. The program should also provide for retraining for employees.
- *Incident Investigation.* The program must establish a process for incident investigation and post-investigation review of any patient handling injuries. The post-investigation review should include a plan of correction and consider the implementation of controls.
- *Performance Evaluations.* Covered facilities must conduct an annual performance evaluation of the program to determine its effectiveness. The evaluation must determine

whether the program has resulted in a reduction in the risk of injury to staff and patients and musculoskeletal disorder claims by staff.

- *Construction/Remodeling.* When developing architectural plans for constructing or remodeling a facility or unit of a facility in which patient handling occurs, facilities are instructed to consider the feasibility of incorporating patient handling equipment or the design needed to incorporate equipment at a later date.
- *Employee Refusal.* The program must include a policy to identify a process in which an employee may refuse to perform or assist in a patient handling activity that the employee reasonably believes in good faith will expose a patient or employee to an unacceptable risk of injury. An employee who reasonably and in good faith follows the process established by the facility may not be subject to any disciplinary action by the facility for the refusal to perform employment duties. The process may require that the employee make a good faith effort to ensure patient safety (i.e. to not decline in a medical emergency) and to inform a manager of the safety issue in a timely manner.

#### 6. Malpractice and Confidentiality Protections

The Act provides that all components of a facility's safe patient handling program, including performance evaluations and incident investigations, will be kept confidential and not subject to release except to the Department of Health or pursuant to Section 2805-m of the Public Health Law. For general hospitals, the safe patient handling program is to be conducted consistent with the requirements of the required Medical, Dental and Podiatric Malpractice Prevention Program and are to be considered activities of the program. As a result, information collected under the facility's safe patient handling program will be subject to the confidentiality provisions of Section 2805-m of the Public Health Law.

#### 7. Reduction of Worker's Compensation Rates

The SPH Act directs the Department of Financial Services (DFS) to develop rules establishing requirements for facilities to obtain a reduced worker's compensation rate for implemented Safe Patient Handling policies. DFS is required to promulgate such regulations by July 1, 2016. While unclear at this time, it is likely that facilities will be required to document the existence and scope of their implemented safe patient handling policy in order to be eligible for any rate reduction or credit.

In addition, the SPH Act requires DFS to conduct an evaluation of the results of the reduced rate, including changes in claim frequency and costs. DFS will be required to prepare a report to be submitted to the Legislature prior to December 1, 2018 and again prior to December 1, 2020. It is possible, in the event that the reports prepared by DFS do not show that worker's compensation rates are reduced as a result of the implementation of safe patient handling policies, that the Legislature may revisit the requirements contained in this section.

Please contact us with any questions that you may have.