

Health Care Facilities, Staffing Companies and Home Care Service Agencies Undergoing a Change in Control Need to Comply With the New Law Protecting Continuity of Employees

Health care facilities, staffing companies and home care service agencies undergoing a change in control need to be aware of a new law impacting their employees.

The new law (P.L.2022, c.101), which becomes effective on November 16, 2022, applies to health care facilities licensed under the Health Care Facility Planning Act (N.J.S.A. 26:2H-1, etseq.), staffing registries, and home care service agencies who undergo a change in control. Such companies must comply with this new law to ensure the continuity of employees during a four(4) month transition period following such a change in control.

Definition of Change in Control

The new law broadly defines a “change in control” as (1) any sale, assignment, transfer, contribution or other disposition of (a) all or substantially all of the assets used in a health care entity’s operation or (b) a controlling interest in the health care entity, including by consolidation, merger or reorganization of the entity or any person who controls the entity, or (2) any event that causes a change in the identity of the health care entity employer, including the purchase, sale or termination of a management contract or lease. (Note: Based on the definition, the new law appears to apply to intra-company changes in control through buy-sell arrangements among the company and the owners of the company, such as redemptions and cross-purchases.)

Before the Change in Control

Thirty (30) days before the change in control, the health care entity employer undergoing the change of control must provide its successor health care entity employer (and any collective bargaining representatives of the employees) with a list containing the name, address, date of hire, phone number, wage rate, and employment classification of its eligible employees. It must also inform such employees, and post a notice in a conspicuous location, about their rights under this new law. (Note: A “successor health care entity employer” includes a health care entity

involved in an intra-company change of control; in other words, a separate entity is not required to trigger the requirements of the law.)

“Eligible employees” are defined to include any person employed during the ninety (90) days prior to a change in control, but does not include managerial employees or former employees discharged with cause during this 90-day period. “Managerial employees” are those employees exempt from the overtime requirements pursuant to the executive exemption of New Jersey’s wage and hour laws.

Requirements During Transition Period

Any change in control requires an agreement or contract addressing the requirements noted below for a successor employer during a transition period of at least four (4) months following the execution of the documents effectuating the change of control. (Note: Although not addressed in the statute, presumably the 4-month period actually begins as of the closing date, which is when the change in control becomes effective, and not upon execution of the documents.)

1. The successor employer must offer employment for the 4-month period to all eligible employees, with no reduction of wages, paid time off, or the total value of benefits, including health care, retirement, and education benefits. In this regard:
 - a. The offer must be in writing and remain open for ten (10) business days from the date of the offer.
 - b. All available employment positions must be offered to eligible employees until all available positions are filled or no more eligible employees are available.
 - c. If the total number of employment positions available is less than the number of eligible employees, employment decisions must be based on seniority and experience.

2. Such retained employees shall not be

discharged without cause during the transition period. However, the successor employer may lay off employees if it reduces the number of positions, but the employees selected for the layoff must be based on seniority and experience and such employees must be offered the positions if such positions are restored.

3. At end of the transition period, the successor employer must perform a written evaluation of each retained employee. If the employee's performance was "satisfactory" during the transition period, then the successor employer must offer continued employment to such employee. The law does not define the term "satisfactory."

4. For a period of at least three (3) years, the successor employer must retain a written record of each offer of employment and each evaluation, which record must include the employee's name, address, phone number, date of hire, wage rate, and employment classification. Upon request, the successor employer must provide such records to the employee or such employee's representative.

Notably, the new law does not apply to any action taken pursuant to, and in compliance with, a collective bargaining agreement entered into between an exclusive representative of employees of a health care entity subject to a change of control.

Penalties and Remedies

A successor employer who fails to comply with this new law will be subject to sanctions, and an employee affected by the violation will have statutory remedies, including the right to sue. A failure to pay wages, paid time off, or the value of benefits is regarded as the failure to pay the full amount of wages. Remedies for the failure to pay paid time off, the value of benefits or unpaid wages includes liquidated damages of up to 200 percent and attorney's fees. A failure to offer employment or a discharge of an employee in violation of the new law will be regarded as retaliation against the employee. The court may order equitable relief, including injunctive relief and the immediate reinstatement of an employee discharged or not retained.

While successor health care entities usually assume the employees of the former health

care facility in order to maintain the customary standard of care for patients and residents, they must take appropriate action to ensure that they comply with the requirements of this new law.

If you have any questions about this new law, please contact Natalie Brennan at 856-673-7155 or nbrennan@archerlaw.com, or Robert Fogg at 609-580-3702 or rfogg@archerlaw.com.

DISCLAIMER: This client advisory is for general information purposes only. It does not constitute legal or tax advice, and may not be used and relied upon as a substitute for legal or tax advice regarding a specific issue or problem. Advice should be obtained from a qualified attorney or tax practitioner licensed to practice in the jurisdiction where that advice is sought.

