

UPDATE ON STATE HEALTHCARE WORKER BONUS PAYMENTS

Background

The final State Budget for FY2022-2023 includes a requirement that healthcare providers pay a bonus to eligible direct care nurses and other healthcare workers in recognition of their service during the COVID-19 pandemic. The bonus is intended as a financial reward to those workers and as a recruitment and retention incentive.

The new law covers the period from October 1, 2021 to March 31, 2024 and requires payments of up to \$3,000 for nurses and other direct care workers who make up to \$125,000 per year.

Employer payments to eligible workers will be made on a sliding scale based on the average number of hours worked during a series of six-month vesting periods.

The legislation applies very broadly and covers all types of NYSNA employers. The bonus payments are not optional – employers are required track the hours worked, submit reimbursement claims to the state and make bonus payments to all eligible employees.

The law requires the Commissioner of the Department of Health to issue a schedule of six-month vesting periods and create processes and forms tracking time worked and submitting reimbursement claims to the state.

The state DOH has not yet issued regulations to set definitions and clarifications of the bonus payment process, so some details remain unknown. NYSNA will be monitoring the process and will provide additional updates as DOH issues specific regulations and the process is clarified.

Here is a more detailed summary of what the new bonus payment law says and what we know so far:

Covered Healthcare Employers

The law covers a very expansive range of healthcare providers, including:

- All public and private institutions that participate in the Medicaid program that employ one or more workers providing healthcare services;
- Healthcare providers and organizations that contract with government agencies to provide health or mental hygiene services;
- Any health care organization or institution or facility covered by the Certificate of Need approval process;

- Private physicians or practice groups that have a patient population that is 20% or more Medicaid; and private physician practices if they have a patient population that is at least 20% Medicaid;
- Public and private schools, charter schools and institutions of higher learning that provide health services;
- Public “municipal corporations” that provide health services, including all counties, the City of New York, towns, villages, and school districts;
- Programs funded by the state OMH, OASAS, OPWDD and Aging departments.
- Any “other provider types determined by the [DOH] commissioner and approved by the director of the budget.”

Covered Healthcare Workers

The law requires payment of the bonus to front-line health and mental hygiene workers who “provide hands on health or care services to individuals,” including full-time, part-time, temporary, and contracted workers, whether they are paid on a salaried or hourly basis.

The law specifically includes the titles of Registered Nurse, Nurse Practitioner, Nurse Anesthetist, Nurse Midwife, as well as LPNs/LVNs, nursing aides, respiratory and other therapists, laboratory and imaging technologists, EMTs and other first responders, and a wide range of other non-nursing direct care staff.

The law also grants discretion to the DOH commissioner and/or individual agency directors to include other titles in addition to those specifically named in the statute.

Employee Eligibility Is Capped at \$125,000

The original budget proposal included a cap limiting payment of the bonus only to workers in eligible titles that made \$100,000 or less. NYSNA and other unions pushed the legislature to make the bonus available to all workers regardless of their annual salary. The final budget legislation increased the cap to \$125,000 or less.

As a result of the cap, nurses and other healthcare workers making an “annualized base salary” more than \$125,000 are not eligible for the bonus payments.

The law defines “base salary” as an “employee’s gross wages with the employer during the vesting period, excluding any bonuses or overtime pay.”

Based on this definition, the salary cap will include base salary, experience pay, and other differentials (such as shift, education and certification pay). It will not include overtime and any other hazard pay or other types of bonuses.

It is our opinion that any payments that are in the form of reimbursements for costs or expenses (i.e., uniform allowance, tuition reimbursement, continuing education classes, conference pay, etc.) will not be counted as salary for the purposes of calculating the eligibility cap.

In addition, while the law prohibits an employer from claiming reimbursement from the state for bonus payments to those making more than the \$125,000 cap, it does not preclude an employer from making bonus payments to ineligible employees if the employer pays for it out of its own funds.

Because the cap will unfairly and arbitrarily end up excluding some higher paid nurses (i.e., nurses working night shifts, nurses in higher-paid titles and senior nurses at the high end of the experience scale), we will be urging employers to voluntarily provide equivalent bonus payments to all nurses in NYSNA-represented facilities that are over the cap.

Amount of Bonus Payments

Each eligible employee is entitled to a maximum bonus payment of \$3,000 under this state program.

The law provides for a sliding scale based on the average number of hours worked for an employer during a particular six-month vesting period.

Eligible employees will receive the following payments based on the average hours worked for an employer during each vesting period:

- 35 or more hours per week on average - \$1,500
- 30 or more hours per week, but less than 35 hours - \$1,000
- 20 or more hours per week, but less than 30 hours - \$500
- Less than 20 hours per week - Not eligible

For New York State agencies and hospitals, the thresholds are the same, except that eligibility for full-time bonuses requires an average of 37 ½ hours per week instead of 35.

For the purposes of meeting the thresholds for hours worked, the law provides that “the use of accruals or other leave time, including but not limited to sick, vacation, or time used under the family and medical leave act shall be credited towards and included in the calculation of the average number of hours worked over the course of the vesting period.”

Employees will be eligible for bonuses for “no more than two vesting periods per employer, in an amount equal to but not greater than \$3,000 per employee across all employers.” This will allow workers who work part-time for more than one employer to receive partial payments from multiple employers, up to the \$3,000 maximum. It will also allow employees who did not meet the threshold for hours worked in one vesting period to be paid if they meet the threshold in subsequent vesting periods before the expiration of the program in 2024.

Bonus payments are exempt from state and local income tax and will not count as income for the purposes of determining eligibility for government services or benefits.

Schedule of 6-Month Vesting Periods

The new bonus payment law will be in effect for the period from October 1, 2021 to March 31, 2024.

The law requires the DOH to issue a schedule of six-month vesting periods that will be used to determine eligibility and the amount of the bonus payment due to nurses and other eligible workers.

The DOH has not yet issued the schedule of vesting periods, but there are exactly five six month vesting periods between October 1, 2021 and March 31, 2024. This means that the DOH is likely to create the following vesting periods for implementing the law: October 1, 2021 to March 31, 2022, April 1, 2022 to September 30, 2022, October 1, 2022 to March 31, 2023, April 1, 2023 to September 30, 2023, and October 1, 2023 to March 31, 2024.

It should be noted that the law allows the DOH discretion to issue alternative vesting periods, so long as no employee receives more than the maximum of \$3,000.

Process for Calculating and Paying Employee Bonuses

When the DOH issues the schedule of vesting periods, it will also “develop such forms and procedures as may be needed to identify the number of hours employees worked and to provide reimbursement to employers for the purposes of funding employee bonuses in accordance with the hours worked during the vesting period.”

The employer is then required to determine the correct amount owed to each employee, file a claim with the state and to pay the required amount to each eligible employee.

Timing of Bonus Payments To Employees

The law states that “upon completion of a vesting period with an employer, an employee shall be entitled to receive the bonus and the employer shall be required to pay the bonus.”

Employers are required to submit their bonus payment claims to the state “no later than thirty days after an employee’s claim for a bonus payment vests.” The employee must then receive the payment no later than 30 days after the employee receives the reimbursement payment from the state.

Taken together these two clauses mean that after each six-month vesting period, the employer must submit its claims to the state within 30 days. Once it receives the funds from the state, it then has 30 days to make payment to its employees. The timing of the bonus payment will thus depend on how long it takes the state to forward the reimbursement funds to the employers.

Employees who are eligible for a bonus payment after any vesting period must remain in employment until the payment is made. If the employee resigns or stops showing up at work after the completion of a vesting period, but before payment is made, the employee will forfeit the bonus for that vesting period.

Enforcement of the Bonus Payments

As previously noted, all covered employers are mandated to determine eligibility, calculate the amount of time worked, and submit bonus payment claims to the state for each eligible employee. Employers cannot refuse to participate in the bonus payments.

Employers who fail to submit claims, pay the bonus to eligible employees, or pocket the bonus money will be subject to restitution, fines, suspension from participation in the Medicaid program, and/or criminal fraud charges. In addition, employers will be required to make the full payment of any amounts owed to their employees.

Employers will be required to maintain all records for six years and will be subject to audit and review by state agencies and the Office of the Medicaid Inspector General.

NYSNA members who are not paid the bonus or are not paid correctly will be able to follow-up with the employer and NYSNA staff to report any issues to the DOH or other state agencies.

Issues In Need of Further Clarification by the Department of Health

- **Applicability to RNs employed in case management, care management, discharge planning, quality assurance and utilization review, supervisory, head nurse, administrative, and other support roles:** The law is clear about which employers are covered by the law and which job titles are eligible for bonuses, but there is no definition of the term “hands on health or care services to individuals.” We believe that the law applies to all RN titles that directly or indirectly support the provision of patient care. We also note that the list of state employee titles in the law includes various supervisory and support titles (i.e., social workers, case managers, clinical coordinators, intake/screening staff, and “other support staff”). The inclusion of these roles for state facilities lends support to inclusion of all indirect care nurses in the bonus program.
- **Payment of bonuses to RNs who are laid off or terminated by the employer after completion of the vesting period but before payment is received:** The law clearly states that nurses who resign after vesting but before payment will not receive the bonus. It is silent, however, about what happens if an employee is involuntarily terminated by their employer. We believe that the law’s silence on this issue means that the employee should still receive the payment.
- **Effect of changes in circumstances of employment during different vesting periods:** The law sets criteria for eligibility and the amount of the bonus payment based on annual salary and average workweeks in each vesting period. Because there will be at least five separate vesting period over the life of the bonus program, a change in employer, in salary levels or in the full-time or part-time status of an employee may raise issues about which vesting periods should be looked at and who decides. If, for example, an employee works part-time for two vesting periods but is full-time for the others, will the employee be able to request that an employer look only at the more favorable vesting periods and ignore the less favorable ones?

As the Department of Health begins to issue regulations and procedures to clarify and implement the bonus payments, NYSNA will provide more updates and guidance on enforcing members’ rights under the law.

A copy of Social Services Law Section 367-w can be found at the following site:

<https://www.nysenate.gov/legislation/laws/SOS/367-W>