



May 12, 2020

Hon. Andrew Cuomo
Governor of the State of New York
Executive Chamber
State Capitol
Albany NY 12224

Re: Executive Order 202.30- May 10, 2020

Dear Governor Cuomo:

We, the undersigned, are the CEOs of the five major trade associations in New York that represent nursing homes, adult care facilities (ACF), and assisted living facilities. We write to convey the urgent concerns of our member facilities with respect to certain aspects of the above referenced order which we will elaborate on later. Before doing so, however, we wish to preface this letter with an expression of thanks, admiration and appreciation for the herculean efforts of you personally, your staff, the Department of Health and all other State personnel in managing a public health crisis of unprecedented proportions that has no easy solutions and forces you to make some extremely difficult choices which cannot possibly please everyone. We are sensitive to the fact that you will inevitably be second-guessed and criticized no matter what you do. We know, however, that despite the inevitable criticism from some quarters, you have not backed away from making those difficult decisions and have confronted the challenge head-on.

With that in mind, please consider the following in the spirit it is offered. The May 10th Executive Order issued this past Sunday requires nursing homes and ACFs to submit a plan to the Department of Health by 5:00 pm Wednesday May 13th setting forth how they will test or arrange for the twice weekly testing for COVID-19 of all their employees, contract staff, medical staff, operators and administrators. Further, on May 15th, they must certify that they are in compliance with the testing mandate and all other Executive Orders and DOH directives. Our member facilities are fearful that unless there is a realistic deadline for compliance with the testing requirements set forth in the order, they will be unable to comply despite their best good faith efforts. This concern is magnified by the harsh penalties that could result from non-compliance, including the ultimate sanction of licensure revocation and criminal penalties for false certifications pursuant to Penal Law 210.45. Despite the short three-day notice, we have urged our members to submit a plan by that deadline. The order did not, thankfully, impose a deadline by which all individuals must be

tested, and before your office does so, we urge that you or your staff and representatives from the Department of Health meet with us to discuss this critical issue.

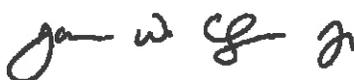
There are some very practical concerns about the ability of our members to access the necessary testing supplies, and it is very important to keep in mind that across the State there are currently approximately 140,000 staff employed in over 600 nursing homes and another 45,000 in ACF and assisted living facilities such that for these people alone approximately 370,000 tests will have to be administered weekly. We have heard from members around the State that there are not sufficient testing supplies to accommodate this new demand. In some case there will be some genuine geographical impediments as well. Simply put, the State must take "ownership" of ensuring that sufficient testing materials will be made available to all facilities to enable them to meet any deadline.

We are also concerned that some staff will refuse testing and, of course, the likelihood that some will test positive and the ensuing work exclusion period will exacerbate the already critical staffing shortage for the long-term care industry that antedated the COVID-19 pandemic. Notably, the State's testing and work exclusion requirements exceed the Centers for Disease Control and Prevention recommendations for nursing homes.

In addition, we understand the costs of testing staff twice weekly will be prohibitive and we question whether an individual's insurance coverage will cover testing twice weekly for work clearance purposes, as opposed to diagnostic purposes. We have heard quotes that the cost will be \$150/test. In short, there are a myriad of practical problems that will make it impossible to comply, especially with an unrealistically short deadline. Accordingly, our members have bluntly informed us that under the current conditions they simply cannot sign a certification that they are in compliance with a requirement which, if not met, will subject them to criminal penalties.

For all the foregoing reasons and others too numerous to mention, we would very much appreciate having the opportunity to discuss this requirement prior to its implementation. Needless to say, we want to help you in every way we can to get through this crisis, and at the same time we ask that you be aware of some of the legitimate concerns we have raised and which we wish to discuss. Thank you for your attention.

Very truly yours,



James W. Clyne, Jr.
President and CEO
LeadingAge NY



Stephen B. Hanse, Esq.
President & CEO
NYSHFA/NYSCAL



Neil Heyman
President
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Michael Balboni
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cc: Hon. Howard Zucker, M.D.
Paul Francis
Megan Baldwin
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Executive Order 202.30 - Nursing Home and Adult Care Facility Staff Testing Requirement

FAQ #1 – May 12, 2020

- 1. If a staff member has a positive test, should the individual be re-tested at the end of the furlough before returning to work?**

The diagnostic test is a polymerase chain reaction (PCR) test that detects viral nucleic acid. Even after there is no remaining live virus present capable of causing an infection, there still might be remnant viral nucleic acid present that can be detected by PCR and cause a positive result. The Centers for Disease Control and Prevention (CDC) has described studies using viral culture which found live virus capable of causing infection for only 9 days after the onset of symptoms.

Facilities may, but are not required to, have staff test negative before returning to work. CDC points out that more stringent requirements than those for the general community might be appropriate for some individuals, such as those who live or work in settings with vulnerable persons. New York State has adopted more stringent requirements that nursing home personnel must be furloughed until 14 days from the onset of illness (and at least 3 days have passed since resolution of fever without use of fever-reducing medication and respiratory symptoms are improving) for symptomatic staff and for 14 days from the first positive test for asymptomatic staff.

- 2. How frequently will personnel have to be tested?**

Executive Order No. 202.30 requires twice per week testing of all personnel of all nursing homes and adult care facilities, including all adult homes, enriched housing programs and assisted living residences.

- 3. Will personnel have to be excluded from work while waiting for test results?**

If personnel are asymptomatic and being tested solely for the purpose of meeting the requirements of Executive Order No. 202.30, then they do not have to be excluded from work while waiting for test results.

- 4. Who is included in the testing requirement for personnel?**

The requirement includes but is not limited to employees, contract staff, per diem staff, medical staff, operators, administrators, and volunteers. Staff who are working from home, on leave, or otherwise not at the same site as residents do not need to be tested as long as they remain offsite. Staff who work at a facility on three days per week or less only need to be tested one time per week. Staff of home health (LHCSA, CHHA) and hospice agencies which serve patients residing in the facility are not personnel who must be tested pursuant to EO 202.30.

- 5. Are staff who have had a positive diagnostic test for COVID-19 or a positive serologic test for IgG against SARS-CoV-2 in the past included in the requirement to be tested twice per week?**

At this time, staff who have documentation of a positive diagnostic test for COVID-19 or a positive serologic test for IgG against SARS-CoV-2 are currently exempt from this testing requirement. This exemption might change as more is learned about immunity following COVID-19.

6. Who is responsible for paying for the testing required of personnel of nursing homes and adult care facilities?

Facilities are responsible for providing testing for their employees, including assuming responsibility for the costs of testing. One option that some facilities may be able to access includes the drive-through and walk-in sites that are operated by New York State at no charge to the individual. Testing is by appointment only. Individuals who would like to be tested can either register online at: <https://covid19screening.health.ny.gov/> or by calling the COVID-19 hotline at 888-364-3065. The locations of these sites are attached as Attachment 1.

7. What laboratory should nursing homes and adult care facilities use to perform testing to meet the new requirement?

Facilities are responsible for establishing relationships with laboratories, including local hospitals or commercial laboratories, to perform the required testing for their employees. Wadsworth Center is currently performing testing for other priority specimens, including those collected from nursing home residents.

8. How should testing be conducted for personnel who work at multiple facilities?

Personnel who work at multiple facilities only need to be tested twice per week. Those results may be used to meet the testing requirements at any facility, as long as documentation of the test result is provided to each facility. Each employer facility must maintain appropriate documentation of the test results.

9. How do facilities obtain collection kits and personal protective equipment for required testing?

If facilities are unable to obtain supplies needed for the testing requirement through normal distributors, they should request these supplies through their local Office of Emergency Management.

10. Can nurses in adult care facilities be used to collect specimens for testing?

Executive Order 202 made changes to the scope of practice laws concerning the collection of throat or nasopharyngeal swab specimens from individuals suspected of being infected by COVID-19, for purposes of testing. Accordingly, during the course of this emergency, nurses employed by an adult care facility (ACF) are permitted to collect swab specimens for ACF staff and residents. Additionally, other clinical staff who have received appropriate training regarding specimen collection may collect such specimens. More information relating to specimen collection is available on the Department of Health's website at <https://coronavirus.health.ny.gov/covid-19-testing>.