

A hand in a dark suit jacket is shown from the wrist up, pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent. The background is a blurred outdoor scene with trees and a bright sky.

BUSINESS IN 2024

WEEKLY WEBINAR SERIES



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TODAY'S AGENDA

G. Oberfield (12:00 p.m. – 12:05 p.m.)

- Welcome / Agenda

Natalie Vogel (12:05 p.m. – 12:15 p.m.)

- NLRB General Counsel Issues Memorandum on Non-Compete Agreements and 'Stay-or-Pay' Provisions

G. Oberfield (12:15 p.m. – 12:25 p.m.)

- Updates to 504 Standards Affect Federal Funding
- New Standards Apply to Hospitals' Cybersecurity in New York State

Alyssa Christian (12:25 p.m. – 12:35 p.m.)

- FTC Announces 'Click-to-Cancel' Final Rules

Paige Roseman (12:35 p.m. – 12:45 p.m.)

- Employer Use of GPS Tracking in Unionized and Non-Unionized Workplaces

G. Oberfield (12:45 p.m.)

- Your Questions
- Adjourn

NLRB GC Issues Memorandum on Non-Compete Agreements and Stay-or-Pay Provisions



Natalie C. Vogel

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NLRB General Counsel Memorandum 25-01

- Dated October 7, 2024
- Discusses Two Topics:
 - Penalties for Unlawful Non-Compete Agreements
 - Stay-or-Pay Provisions
- Note – the GC memo does not represent the law. Serves as guidance to the NLRB and regional offices

Potential Penalties for Unlawful Non-Competes

- In addition to rescission, the memo calls for **make-whole remedies**
- Suggests the Region should seek make-whole relief in following manner:
 - Permit employees to come forward during notice-posting period and demonstrate that they were deprived of a better job opportunity as a result of the non-compete provision
 - Employees may also be entitled to make-whole relief for additional harms or costs associated with complying with the non-compete during the post-employment period, until those restrictions expired

How Can An Employee Show They Were Deprived a Better Opportunity?

- Employee must show:
 - There was a vacancy available for a job with a better compensation package;
 - They were qualified for the job; and
 - They were discouraged from applying for or accepting the job because of the non-compete provision
- Employer must compensate employee for the difference (pay and benefits) between what they would have received and what they did receive during the same period

Stay-or-Pay Provisions

- GC's opinion that “**Stay-or-Pay**” provisions are presumptively unlawful
 - Defined as “any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain time frame”
 - Training repayment agreements
 - Educational repayment contracts
 - Retention bonuses
 - Sign-on bonuses
 - Relocation bonus

Stay or Pay Provisions (cont.)

- Employer may rebut presumption of unlawfulness by providing that the provision advances a legitimate business interest and is narrowly tailored to minimize infringement on Section 7 rights
- To meet this burden, the provision must be:
 - Voluntarily entered into in exchange for a benefit
 - Has a reasonable and specific repayment amount
 - Has a reasonable “stay” period
 - Does not require repayment if the employee is terminated without cause

Penalties for Unlawful Stay-or-Pay Provisions

- If provision was voluntarily entered into, but not narrowly tailored, the employer should rescind the unlawful provision and replace it with a lawful one
- If not voluntarily entered into:
 - The GC will seek an order that includes cancelation of debt to the employer
 - Employee has opportunity to show they were deprived a better employment opportunity (same standard as non-compete)
 - If employer attempted to enforce unlawful non-compete, additional remedies may be ordered such as legal fees or compensation for damage to credit

Next Steps

- The GC memorandum offers employers until December 6, 2024 to “cure” pre-existing unlawful stay-or-pay provisions
 - Again, not binding, but can be used as guidance by NLRB
- Consult with legal counsel to assess the risks of implementing or enforcing non-compete and/or stay-or-pay agreements

Updates concerning:

- Section 504 of the Federal Rehabilitation Act, and
- Hospital Cybersecurity Standards in New York State



Gabriel S. Oberfield

Senior Counsel

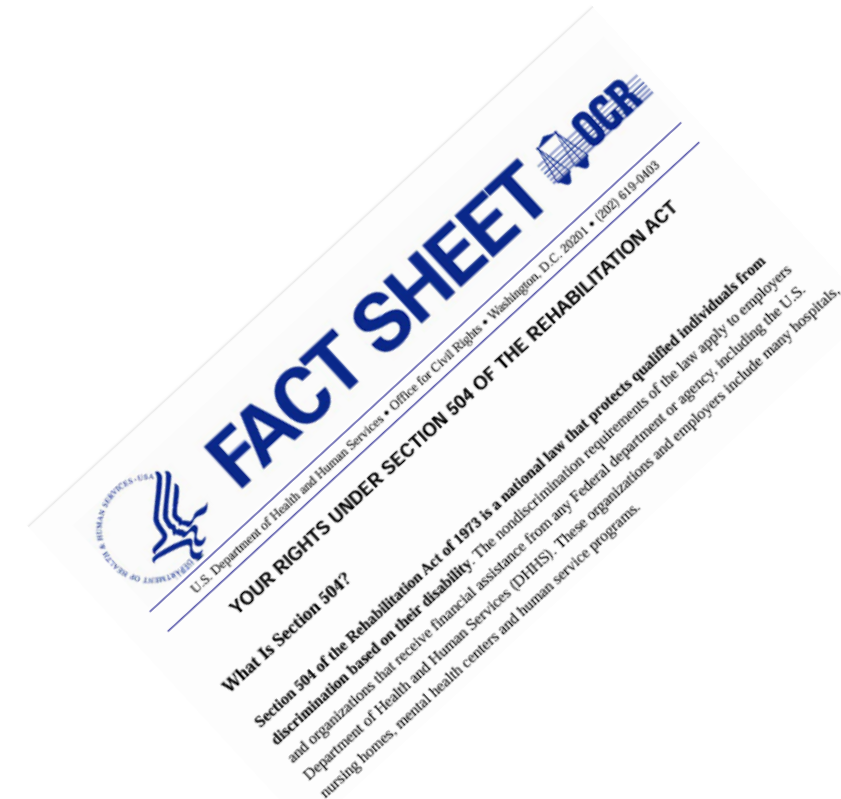
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Section 504 of the Rehabilitation Act

Reform Affecting Section 504

- New rule became effective on July 8, 2024, modifying Section 504 of the Rehabilitation Act
 - Prohibits entities that receive Federal financial assistance from discriminating against disabled individuals in areas including opportunities to participate in or benefit from Federally funded programs and in employment opportunities, including advancement and training.
- Those subject to 504 include:
 - hospitals, healthcare providers, public schools, higher education institutions, and certain nonprofit organizations, as just a few examples.



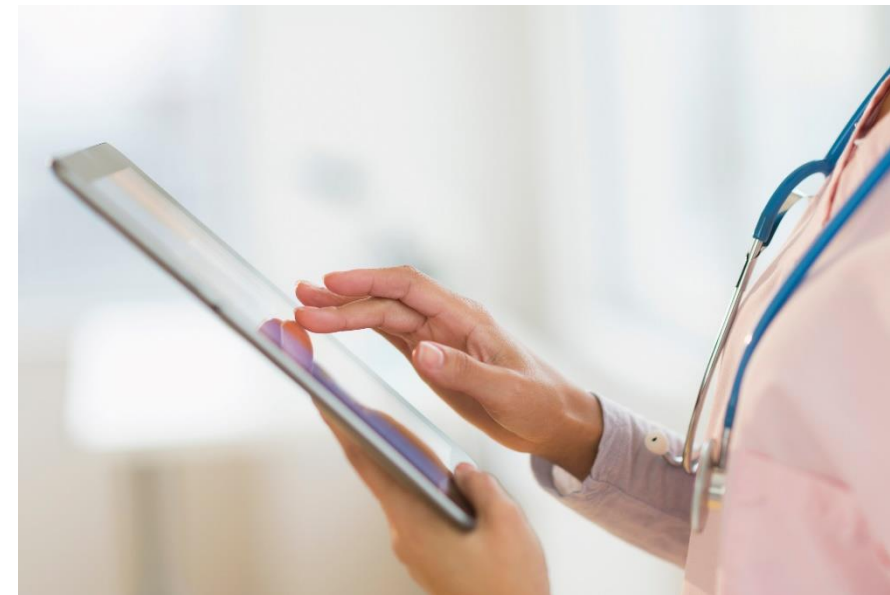
New Healthcare Requirements

- Covered Entities (a ‘term of art’ under 504) now are prohibited from ***denying or limiting treatment due to biases or stereotypes arising from a person’s disability.***
- HHS offered examples of such prohibited behavior:
 - Denial of a heart transplant because the provider does not believe the patient, who lives with autism, can manage postoperative care; and
 - Refusal to order a ventilator for a patient living with Alzheimer’s disease, because the provider believes the patient’s cognitive status should preclude the intervention.



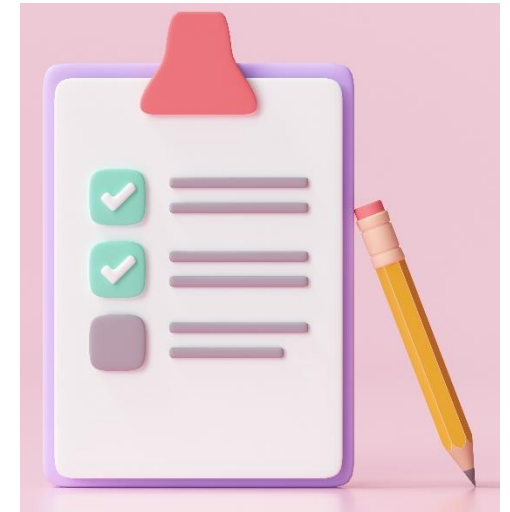
Accessibility Obligations – Kiosks, Websites, and Apps

- Self-service kiosks should ensure that their kiosks are accessible to individuals with disabilities or implement alternative procedures that allow those who cannot use the kiosks to access their programs.
- Beginning on May 11, 2026, CEs with 15 or more employees must ensure that all web and app content complies with technical standards established by the widely recognized Web Content Accessibility Guidelines 2.1 levels A and AA (“WCAG”).



Compliance Requirements

- Designate an individual to serve as an organization's Section 504 compliance coordinator;
- Create a formal grievance process;
- Assess current nondiscrimination policies to determine what updates need to be made; and
- Analyze websites and mobile apps against the WCAG standards to ensure all web content is compliant by May 11, 2026.



NYS Hospital Cybersecurity

Hospital Cybersecurity Regs in NYS

- New York State Dept. of Health Notice of Adoption issued on October 2, 2024
- New Section 405.46 of Title 10 (Health) regulations
- Hospitals must have a cybersecurity program
- Most compliance will be slated for one year from adoption – 10/2/25
- Notwithstanding – identified cyber incidents must be reported to DOH within 72 hours of discovery – immediately binding
- Does not usurp / supersede requirements under HIPAA, SHIELD, etc.

NYS Register/October 2, 2024

Rule Making Activities

Possible rural concerns are not distinct from the concerns of other stakeholders, and stakeholders who participated in the discussions represent stakeholders in rural areas as well as other demographic and geographic areas of the State. NEDPA, the New York Farm Bureau, the Long Island Farm Bureau, local Soil and Water Conservation Districts, various county health departments, Environmental Justice communities and the general public were notified in advance of an informational webinar on the proposed revisions that was held on October 27, 2022. The Notice of Proposed Rule Making will be published in the State Register and in the Environmental Notice Bulletin, and at least one virtual public hearing will be held.

Job Impact Statement

It is apparent from the nature and purpose of the proposed rules, as set forth in the Summary of Express Terms, that they will not have a substantial adverse impact on jobs and employment opportunities. The proposed rules will have no positive or negative impact on jobs and employment opportunities at all, except that the proposed rules are expected to result in a slight decrease in the need for consulting services that is not substantial for facilities that obtain pumping test waivers or that qualify for a permit exemption based upon the rule making revisions. The Department made this determination based on an analysis of the consulting services that would be needed after the rule making compared to those services currently needed.

Section 405.46(m) defines the requirements for an incident response plan in the event of a cybersecurity incident.

Section 405.46(n) defines the reporting requirements for a general hospital during a cybersecurity incident.

Section 405.46(o) refers to confidentiality and the applicability of State and federal statutes.

Section 405.46(p) provides general hospitals one (1) year from the date of adoption to comply with the new regulatory requirements, except that general hospitals must immediately begin reporting to the Department as required by subdivision (n) of this section.

Section 405.46(q) states that if any provisions of the section are found to be invalid, it shall not affect or impair the validity of other provisions of the section.

Final rule as compared with last published rule: Nonsubstantial changes were made in section 405.46(b)(7), (8), (e)(3)(v), (g)(2), (h)(1), (n)(1) and (p)(1).

Revised rule making(s) were previously published in the State Register on May 15, 2024.

Text of rule and any required statements and analyses may be obtained from: Katherine Carvalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsga@health.ny.gov

Revised Regulatory Impact Statement

Public Health Law (PHL) § 2803(2)(a) authorizes the Public Health and Health Planning Council (PHHC) to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health (Commissioner), to implement PHL Article 28 and establish minimum standards for health care facilities, including general hospitals.

Legislative Objectives:

The legislative objectives of PHL Article 28 include the protection of the health of the residents of the State by promoting the efficient provision and proper utilization of high-quality health services at a reasonable cost.

These regulations fulfill this legislative objective by ensuring that general hospitals within New York State implement minimum cybersecurity controls to safeguard protected health information (PHI) and personally identifying information (PII) from being publicly disclosed or used for identity theft.

Needs and Benefits:

The healthcare industry is one of the most targeted communities for cybersecurity scams and breaches due to the significant amount of sensitive and financially lucrative information healthcare facilities collect. Currently in New York State there are no cybersecurity requirements for the safeguarding and security of patients' protected health information (PHI) and personally identifying information (PII). As a result, New Yorkers seeking medical care have no guaranteed minimum levels of protection of their information. As a result of this, there have been several high-profile cybersecurity breaches at facilities across the state which have resulted in not only a loss of patient financial and health data, but in some cases has also delayed care.

Additionally, cybersecurity events at hospitals can have significant, far-reaching, and long-term impacts to the provision of patient care and operation of the facility. Governor Hochul has been focusing on cybersecurity and ensuring that New Yorkers data stays safe no matter where they go. The promulgation and implementation of cybersecurity focused regulations supports this initiative. These regulations will create all hospitals develop, implement, and maintain minimum cybersecurity standards, including cybersecurity staffing, network monitoring and testing, policy and program development, employee training and remediation, incident response, appropriate reporting protocols and records retention.

There will be multiple benefits to the adoption of these regulations. Given the significant differences in preparedness statewide against cybersecurity attacks, these regulations will ensure hospitals are required to maintain a minimum level of readiness to prepare for, respond to, and quickly recover from cybersecurity incidents.

Costs:

The costs associated with the implementation by regulated facilities will vary significantly due to the varying levels of cybersecurity programs and policies hospitals currently have in place. Some facilities may have mature monitoring, training and response programs, whereas others may not. Therefore, the costs could vary from tens of thousands to tens of millions. Hospitals will be allowed to sub-contract for cybersecurity services and this may reduce the overall cost of program implementations. It is estimated that effective cybersecurity programs can cost between \$250,000 and \$10 Million to develop and implement initially and anywhere from \$50,000 - \$2 Million or more to maintain on a yearly basis depending on the facility size. For small hospitals (of which there are 15 and are defined as less than 10 acute care or ICU beds), ongoing annual

Federal Trade Commission Announces Final “Click-to-Cancel” Rule



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Negative Option Plans

In a negative option plan, a consumer's silence or failure to act is considered to be acceptance of an offer for goods and services.

There are four categories:

1. Prenotification Plans
2. Continuity Plans
3. Automatic Renewals
4. Free Trial Conversion Offers

Click-to-Cancel/ Mirror Cancellation

The goal of this Rule is to make sure there is always a way for consumers to cancel that is as quick and easy as it was to sign up.

- Cancellation online must be easy to find and not require the assistance of a live or virtual representative.
- Sellers must offer either an online or telephonic method of cancelling for consumers who enrolled in person.
- Cancellation must be immediate.

Disclosures and Consent

- Prohibits misrepresentation when selling through a negative option
 - Must disclose negative option, date and frequency of charge, amount, and how to cancel
- Requires “unambiguous affirmative consent” to the negative option feature separate from the rest of the transaction
 - Standalone consent
- Record of affirmative consent must be kept for at least three years

FTC's Negative Option Rule

- 16 CFR Part 425
- Portions of the Rule go into effect at various times
 - 180 days for the Standalone Consent Requirement
 - 60 days for the prohibition on misrepresentation
- Applies to business-to-business transactions as well

Things to Review

- Disclosures/ advertising of subscription and membership plans
- User sign-up processes
- User cancellation experiences
- Customer service and refund policies

Do's and Don'ts Concerning Employer Use of GPS Tracking



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Questions?



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Sexual Harassment Prevention Training

To combat harassment in the workplace, every New York State employer must provide harassment prevention training for all employees annually.

For more information on Bond’s online sexual harassment training [click here](#) or email bondonline@bsk.com

New York Employment Law: The Essential Guide

Purchase through Amazon [here](#).

Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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