

Waivers to Hire Licensed Professionals

Until recently, New York did not allow a licensed professional (such as a social worker or therapist) to offer their professional services as an employee of a not-for-profit organization. A recent amendment to the New York State Education Law allows the State Education Department's (SED) Office of the Professions to issue waivers allowing not-for-profit and educational corporations to employ certain licensed professionals and to credit hours worked in those settings towards experience qualifications for licensure.

This waiver must be applied for by February 1, 2012. If a corporation is already authorized under an operating certificate or license to employ licensed professionals it would not need a waiver for programs covered by the authorizations.

The applications, instructions, and frequently asked questions are available on the web at <http://www.op.nysed.gov/waiver-corporate-practice.htm>.

Waiver to Employ Licensed Professionals

Section 6503(a) of the Education Law of New York provides not-for-profit corporations and education corporations the opportunity to employ licensed professionals to practice their professions. If the waiver is obtained, the licensed professions eligible to practice their profession in a not-for-profit setting would be: licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts and licensed psychologists.

In order to provide these services, the organization must apply for a waiver from SED by no later than February 1, 2012. Entities eligible to apply for the waiver are those entities that are incorporated under the New York Not-for-Profit Corporation Law or chartered under the New York Education Law and were in existence prior to June 18, 2010¹.

An entity established after June 18, 2010, or an entity that does not apply by February 1, 2012, can receive a waiver after July 1, 2012.² SED will grant waivers to entities applying after July 1, 2012, if there is a demonstration of need and applicants may be asked to submit additional information regarding the need for services.³

Employing a licensed professional to practice their profession without the appropriate operating certificate, license or waiver could be the unauthorized practice of a profession which is a Class E felony.⁴

¹ NYS Education Law §6503-a(1)(a)

² NYS Education Law §6503-a(1)(b)

³ Form CE

⁴ NYS Education Law §6512

Which Organizations Should Apply for the Waiver

Organizations that hire professional staff to provide services within the scope of practice must apply for the waiver⁵. Additionally, organizations that accept interns or employ staff seeking to satisfy their experience qualifications for licensure will have to apply for waiver to establish that the organization is an appropriate setting for such training. The only exemptions are:⁶

- Organizations which receive authorization through an operating certificate from the state, federal, or local government, such as certificates issued under the Public Health Law and Mental Hygiene Law;
- University faculty practice corporation;
- Institution of higher education authorized to provide program leading to licensure in medicine, nursing, psychology, social work or mental health professions;
- Institution of higher education providing counseling only to their students, staff, or family members of students and staff; and
- Entities otherwise authorized by law to provide such services.

If an organization has an operating certificate or license for a particular program it must⁷ still obtain a waiver for programs that fall outside the scope of the authorization.

There is an additional exemption through June 1, 2013, to allow the employment of licensed professionals by organizations operated, regulated, funded or approved by the Department of Mental Hygiene, the Office of Children and Family services, the Department of Correctional Services, the State Office of the Aging, the Department of Health or a local government unit. This exemption does not allow the use of a professional designation by the individual employee.⁸ Because the exemption expires in June 2013 covered entities should consider apply for the waiver now.

Included within the scope of practice for LMSW and LCSW are functions that can be performed by laypersons including case management and community organizing.⁹ If, however, an organization hires a LMSW or LCSW to perform these functions they are practicing within the scope of their profession and it is necessary to get a waiver. This is especially true if they hold themselves out to the public as a licensed professional, for example by including licensed credentials on a business card.

General waiver information

Waiver applications must be submitted by February 1, 2012. Entities may continue to operate and provide services while waiting for the application to be approved.¹⁰ Entities must stop providing services if the application is denied or approval is not obtained by July 1, 2012.¹¹

⁵ See, NYS Education Law §7600 (psychology); NYS Education Law §7701 (social work); and NYS Education Law §8401 (mental health practitioners).

⁶ NYS Education Law §6503-a(3)

⁷ Correspondence between State Education Department and NASW.

<http://www.naswnyc.org/displaycommon.cfm?an=1&subarticlenbr=197>

⁸ Section 9 of chapter 420 of the Laws of 2002, as amended by section 1 of chapter 433 of the Laws of 2004, as amended by chapter 132 of the laws of 2010.

⁹ NYS Education Law §7702

¹⁰ NYS Education Law §6503-a(1)(c)

¹¹ NYS Education Law §6503-a(1)(c)

Once SED determines that all necessary information has been received, a determination about the waiver application will be made within 90 days.¹²

An entity must apply for a waiver renewal every three years.¹³ If the entity changes locations, they must notify SED within 30 days of any change in the name or address of the entity.¹⁴ Any other changes to the information included in the waiver application should be made within 60 days.¹⁵

The main application, **Form CE** [<http://www.op.nysed.gov/swmhpcorpce.pdf>], requires background information about the entity, information about the individual submitting the application, a description of those services the entity will provide, and attestations concerning the lawful provision of professional services. A certificate of incorporation or charter, a copy of the certificate of good standing from the relevant agency¹⁶, and a copy of any negative action by an authorizing agency (if appropriate), must be attached to the application.

The Certificate of Incorporation should be reviewed to determine whether the services to be provided under the waiver are within the organization's corporate purposes. If the corporate purposes are not broad enough it will be necessary to amend the certificate of incorporation.¹⁷ Prior to filing the certificate of amendment, most not-for-profit corporations will be required to secure the consent of any governmental agency that approved the certificate of incorporation¹⁸ as well as the Office of the Attorney General and the Supreme Court in the judicial district in which it is headquartered.¹⁹

Each director, trustee and officers of the entity must complete a **Form CE-1** [<http://www.op.nysed.gov/swmhpcorpce-1.pdf>] attesting to their moral character. The form includes disclosure of whether:

- The individual has been found guilty after trial or pleading guilty, no contest, or *nolo contendere* to a crime (felony or misdemeanor) in any court;
- The individual has criminal charges (felony or misdemeanor) pending in any court;
- Any licensing or disciplinary authority has acted adversely with regard to a professional license held by the individual or otherwise disciplined the individual;
- Any pending charges exist against the individual for professional misconduct;
- The individual has willfully failed to provide records to any State licensing authority or to Federal, State or Local law enforcement officials that are required by Federal, State or Local laws; and
- A hospital or licensed facility has restricted or terminated the individual's professional training, employment or privileges, or have ever voluntarily or involuntarily resigned or withdrawn from such association to avoid imposition of such measures.

¹² NYS Education Law §6503-a(1)(c)

¹³ NYS Education Law §6503-a(1)(g)

¹⁴ <http://www.op.nysed.gov/waiver-corporate-practice.htm#forms>

¹⁵ NYS Education Law §6503-a(1)(g)

¹⁶ A Certificate of Good Standing can be ordered from the New York State Department of State

http://www.dos.state.ny.us/corps/faq_certificates_under_seal.page.asp

¹⁷ New York Not-for-Profit Corporation Law (N-PCL) §801(b)(2).

¹⁸ N-PCL §404.

¹⁹ N-PCL §804(a)(ii).

If there are any changes in the directors, trustees and officers of the entity, an updated listing must be provided to the Office of the Professions and the new director, trustee or officer should complete and submit the required attestation [Form CE-1].

Form CE-2 [<http://www.op.nysed.gov/swmhpcorpce-2.pdf>] is used to request a waiver for additional sites. A waiver is needed for each site professional services will be provided.

This alert is meant to provide general information only, not legal advice. Please contact Linda Manley, Legal Director at Lawyers Alliance at (212) 219-1800 ext. 239, lmanley@lawyersalliance.org or visit our website www.lawyersalliance.org for further information.

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