



INSTITUTE FOR JUSTICE

April 13, 2020

Via Email and USPS

Director Kimberly Kirchmeyer
Department of Consumer Affairs
1625 North Market Blvd.
Sacramento, CA 95834
Kimberly.Kirchmeyer@dca.ca.gov

Re: California's restrictions on nurse practitioners volunteering during Covid-19

To Director Kirchmeyer:

The Institute for Justice has learned that the state is barring nurse practitioners from working in hospitals to assist with the Covid-19 pandemic, unless they are supervised by a physician. This supervision requirement is effectively banning many nurse practitioners from offering their services to overburdened hospitals, even as volunteers. Not only is this requirement hurting the state's emergency response efforts, but it is also completely unnecessary and likely unconstitutional. We thus request that you lift this requirement as soon as possible.

The Institute for Justice (IJ) is a national nonprofit organization that has worked to remove and reduce licensing restrictions for 30 years, including in medical professions. For example, IJ has sued several states regarding their unduly burdensome regulations for certificates of need, telemedicine, and medicine dispensing. In addition, IJ drafts model legislation and advises state legislatures on licensing matters nationwide.

We understand that your Department has approved several measures to ease barriers to licensure of health professionals during the pandemic, including measures relating to clinical hours, license reinstatement, and continuing education. These measures are extremely welcome and speak highly of the Department's ability to act quickly during a crisis.

However, there is still more to be done—especially when it comes to nurse practitioners. Under state law, nurse practitioners can only practice under the supervision of a physician. *See* Cal. Bus. & Prof. Code Div. 2, Ch. 6, Art. 8. Yet Governor Newsom's Executive Order N-39-20, paragraph 5, gives the Department authority to waive these requirements to facilitate the state's response to the current emergency. We request that the Department does so now.



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The supervision requirement is preventing many nurse practitioners from volunteering to help care for Covid-19 patients. Some physicians are unable to supervise nurse practitioners because of limitations in their medical malpractice insurance, while others cannot take on additional supervisory responsibilities during this chaotic time. Article 8 also limits physicians to supervising only four nurse practitioners at once. Nurse practitioners want to volunteer now, but they are getting caught in red tape.

The supervision requirement is also unnecessary. According to the American Association of Nurse Practitioners, California has one of the strictest regulatory regimes for nurse practitioners in the country, and most states do not require nurse practitioners to have career-long supervision. In fact, many states do not require nurse practitioners to have any supervision at all.¹ In addition, research has found that physicians' supervision of nurse practitioners does not increase quality or safety but just raises the prices of medical services.² During the Covid-19 pandemic, it may also cost lives.

The evidence suggests that the only reason for the supervision requirement is to protect doctors from competition. Not only is such economic protectionism harmful to public health during the pandemic, but several federal courts have held that licensing laws that exist to protect others from competition are unconstitutional. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994).

We thus respectfully recommend that you lift the physician supervision requirement for nurse practitioners during the pandemic, which would allow them to help overburdened hospitals and needy patients. I can be reached at 631-383-5302 or esmith@ij.org if you have any questions.

Sincerely,

Erica Smith
Institute for Justice Senior Attorney

¹ American Association of Nurse Practitioners, State Practice Environment, <https://www.aanp.org/advocacy/state/state-practice-environment>.

² *See, e.g.,* Institute for Justice, The Costs of Occupational Licensing (Nov. 2018), <https://ij.org/report/at-what-cost/costs-of-occupational-licensing/>.