



INSTITUTE FOR JUSTICE

April 16, 2020

Via Email and UPS

Governor J. Kevin Stitt
Chief of Staff Michael Junk
Office of the Governor
Oklahoma State Capitol
2300 N Lincoln Blvd.
Oklahoma City, Oklahoma 73105
Michael.junk@gov.ok.gov

Re: Oklahoma's restrictions on nurse practitioners during the COVID-19 pandemic

Dear Governor Stitt and Chief of Staff Junk:

The Institute for Justice has learned that Oklahoma is barring nurse practitioners from working in hospitals and prescribing medications 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 efforts, but it is also completely unnecessary and likely unconstitutional. We thus request that you lift this requirement as soon as possible.

We understand that you have approved several measures to ease barriers to licensure of health professionals during the pandemic, including allowing emergency license reactivation and temporary licenses for out-of-state nurses. These measures are extremely welcome and speak highly of the State'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 and regulations, nurse practitioners cannot prescribe even basic medication without the supervision of a physician. *E.g.*, 59 Okl. Stat. Ann. § 353.1a. Although Executive Order 2020-13 allows physicians to supervise more nurse practitioners than usual, the supervisory requirement is still in effect. This requirement is preventing many nurse practitioners from working with COVID-19 patients in all areas of the state, especially rural and underserved regions. 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. Nurse practitioners also must often pay a substantial fee to physicians for supervision. Nurse practitioners want to help now, but they are getting caught in red tape.



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For all these reasons, United States Secretary of Health and Human Services Alex Azar recommended that states relax physician supervision requirements for nurse practitioners during this health crisis.¹ Many states have already done so, including Kentucky, Louisiana, Massachusetts, Michigan, New Jersey, New York, and Wisconsin.²

Indeed, the supervision requirement is completely unnecessary. Oklahoma has one of the strictest regulatory regimes for nurse practitioners in the country.³ Even before COVID-19, 28 states did not require career-long supervision of nurse practitioners, and fourteen states and the District of Columbia did not require supervision at all.⁴ In addition, multiple studies, including an extensive 2018 report from the Brookings Institute, have found that physicians' supervision of nurse practitioners does not increase quality or safety but just restricts competition, raises prices, and reduces patient access to care.⁵ During the COVID-19 pandemic, it may also cost lives.

The evidence suggests that the only reason for the supervision provision is to protect doctors from competition. Not only is such protectionism irrelevant during the pandemic, but several courts have already held that licensing laws that exist to protect others from competition are unconstitutional. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *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).

¹ *HHS Sends Letter, Guidance to States Encouraging State Licensing Waivers, Relaxation of Scope of Practice Requirements*, NCSBN (March 27, 2020), <https://www.ncsbn.org/14566.htm>.

² American Association of Nurse Practitioners, *COVID-19 State Emergency Response: Temporarily Suspended and Waived Practice Agreement Requirements*, <https://www.aanp.org/advocacy/state/covid-19-state-emergency-response-temporarily-suspended-and-waived-practice-agreement-requirements>.

³ *E.g.*, American Association of Nurse Practitioners, *State Practice Environment*, <https://www.aanp.org/advocacy/state/state-practice-environment>.

⁴ Becker's Hospital Review, *28 states with full practice authority for NPs* (Dec. 28, 2019), <https://www.beckershospitalreview.com/hospital-physician-relationships/28-states-with-full-practice-authority-for-nps.html>.

⁵ *E.g.*, E. Kathleen Adams & Sara Markowitz, *Improving efficiency in the health-care system: Removing anticompetitive barriers for advanced practice registered nurses and physician assistants* (June 2018), <https://www.brookings.edu/research/improving-efficiency-in-the-health-care-system-removing-anticompetitive-barriers-for-advanced-practice-registered-nurses-and-physician-assistants/>; Institute for Justice, *The Costs of Occupational Licensing* (Nov. 2018), <https://ij.org/report/at-what-cost/costs-of-occupational-licensing/>.



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

Sincerely,

Erica Smith
Senior Attorney
Institute for Justice