NUHW NATIONAL UNION OF HEALTHCARE WORKERS

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September 9, 2022

Mary Watanabe, Director
Dan Southard, Chief Deputy Director
Sarah Ream, General Counsel
Sonia Fernandes, Deputy Director, Office of Enforcement
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725

Dear Ms. Watanabe, Mr. Southard, Ms. Ream, and Ms. Fernandes:

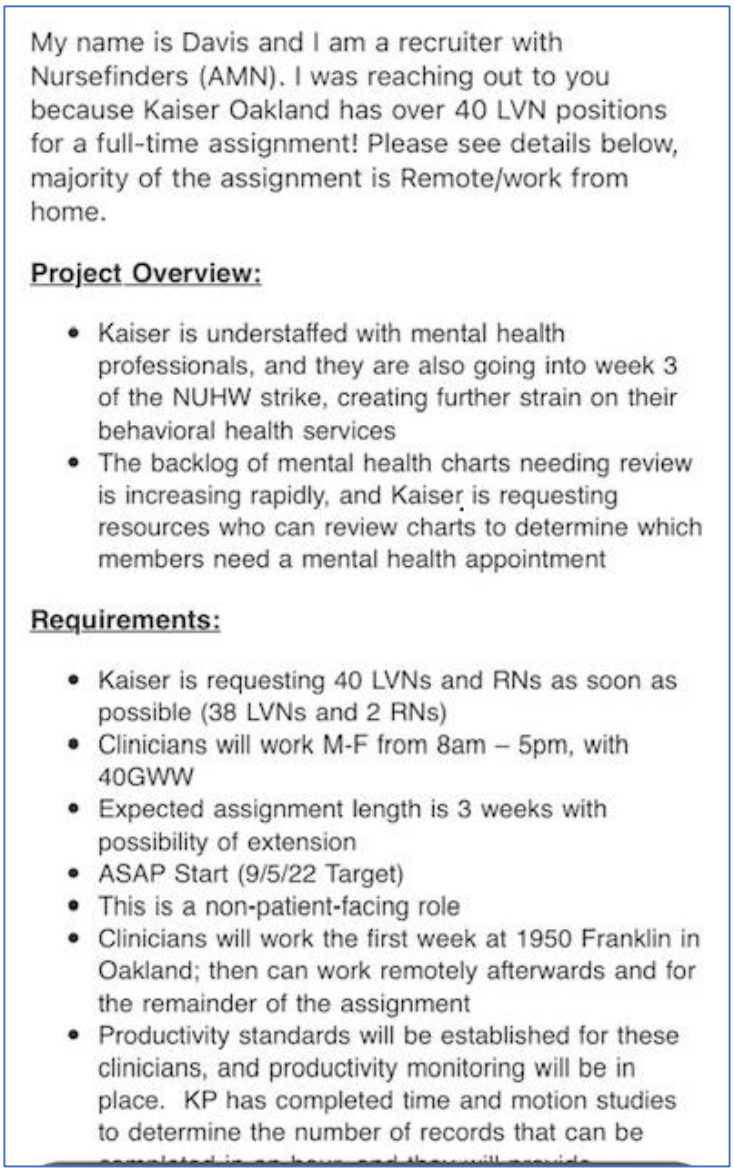
I am writing to supplement NUHW's complaint to DMHC dated August 11, 2022 by providing additional documentary evidence of Kaiser Foundation Health Plan's illegal practices during the ongoing work stoppage by licensed non-physician behavioral health clinicians.

Due to a "backlog of mental health charts needing review," Kaiser is directing dozens of temporary Licensed Vocational Nurses (LVNs) to "review charts to determine which members need a mental health appointment," even though LVNs lack the licensure, training, competence, and most importantly—legal authority—to perform such work. Kaiser has directed the LVNs to perform this illegal activity from inside the headquarters of Kaiser Foundation Health Plan of Northern California and The Permanente Medical Group in Oakland at 1950 Franklin Street in Oakland.

Kaiser's actions endanger patients and violate multiple provisions of state law. Furthermore, they place the temporary LVNs at risk of criminal violations. Evidence of the aforementioned was supplied by a temporary staffing agency hired by Kaiser to recruit and deliver 38 LVNs to perform the illegal work.

I. Evidence

Exhibit A is an advertisement circulated electronically by "AMN Nursefinders," aka AMN Healthcare Services, Inc. Headquartered in Dallas, Texas. AMN Healthcare is a publicly traded firm that "provides healthcare workforce solutions and staffing services to hospitals and healthcare facilities in the United States." It supplies temporary staffing to hospitals, physician groups, clinics, and other healthcare settings.[1] AMN Healthcare is the second largest healthcare temporary staffing firm in the United States, according to "Staffing Industry Analysts." [2] AMN Healthcare's advertisement states the following:



My name is Davis and I am a recruiter with Nursefinders (AMN). I was reaching out to you because Kaiser Oakland has over 40 LVN positions for a full-time assignment! Please see details below, majority of the assignment is Remote/work from home.

Project Overview:

- Kaiser is understaffed with mental health professionals, and they are also going into week 3 of the NUHW strike, creating further strain on their behavioral health services
- The backlog of mental health charts needing review is increasing rapidly, and Kaiser is requesting resources who can review charts to determine which members need a mental health appointment

Requirements:

- Kaiser is requesting 40 LVNs and RNs as soon as possible (38 LVNs and 2 RNs)
- Clinicians will work M-F from 8am – 5pm, with 40GWW
- Expected assignment length is 3 weeks with possibility of extension
- ASAP Start (9/5/22 Target)
- This is a non-patient-facing role
- Clinicians will work the first week at 1950 Franklin in Oakland; then can work remotely afterwards and for the remainder of the assignment
- Productivity standards will be established for these clinicians, and productivity monitoring will be in place. KP has completed time and motion studies to determine the number of records that can be

Bill/Pay Rates:

- RN = $78/hour (Pay)
- LVN = $55/hour (Pay)

Training:

- 1 week training on-site
- 2 weeks remote work
- Laptop included

KP will need 4-5 days to initiate access, Health Connect, and Email for cln so expect a 4-5 day start date after clinician has been 100% confirmed for assignment.

Please let me know if you are interested, you will have to go through an onboarding process to clear you for the facility

Davis Pae

Senior Recruiting Manager

Reply...

AMN Healthcare | Nursefinders an AMN Healthcare company

Notably, the advertisement states the following:

- "Kaiser is understaffed with mental health professionals, and they are also going into week 3 of the NUHW strike, creating further strain on their behavioral health services."
- "The backlog of mental health charts needing review is increasing rapidly"
- "Kaiser is requesting resources who can review charts to determine which members need a mental health appointment."
- Kaiser is requesting 38 LVNs and 2 RNs as soon as possible with a target start date of 9/5/22.
- Clinicians will work the first week at 1950 Franklin in Oakland.

II. Analysis and Laws

Since Kaiser's non-physician behavioral health clinicians began their work stoppage on August 15, 2022, Kaiser has canceled thousands of behavioral health appointments without arranging for enrollees to receive care from out-of-network providers. NUHW documented these appointment cancellations in internal telephone scripts, email messages, TEAMS Chat messages, appointment records, and audio recordings, all of which NUHW has provided to DMHC.

California law requires health plans to provide timely initial and follow-up treatment appointments unless referring or treating clinicians determine that longer wait times will not have a detrimental impact on patients' health. Such clinical determinations must be noted in patients' charts. The timeframe for providing non-urgent appointments with a non-physician behavioral health provider is 10 business days.

According to Kaiser's temporary staffing agency, Kaiser has a "backlog of mental health charts… needing review… to determine which members need a mental health appointment." It also reports that the backlog "is increasing rapidly."

NUHW estimates that thousands, if not tens of thousands, of Kaiser enrollee appointments have been canceled and that the overwhelming majority of these enrollees' treatment plans for ongoing care have not been reviewed by ***treating*** clinicians during the work stoppage.

Under SB221, non-urgent behavioral health appointments for ongoing treatment with non-physician clinicians that exceed intervals of 10 business days are presumed untimely in the absence of specific annotations to the contrary by ***treating*** providers. Cal. Health & Safety Code § 1367.03(a)(5)(C). While California law permits a "health professional providing ***triage*** or ***screening services***" to extend non-urgent appointments beyond 10 business days, triage screeners cannot override treating provider prescriptions for ***ongoing*** care set in treatment plans for patients who have already been subjected to Kaiser's protracted intake process, thoroughly assessed, and prescribed ongoing care. "Triage or screening" do not refer to cosmetic re-do's of treating providers' determinations during the presence of a work-stoppage. Rather, "triage or screening" refer to preliminary assessments of urgency (i.e., such as during a crisis). *See* Cal. Health & Safety Code § 1367.03(e)(5).

Furthermore, SB221 specifies that licensed health professionals may only extend appointment waiting times when "acting within the scope of their practice and consistent with professionally recognized standards of practice."

> **(H)** The applicable waiting time for a particular appointment may be extended if the ***referring or treating licensed health care provider, or the health professional providing triage or screening services***, as applicable, ***acting within the scope of their practice and consistent with professionally recognized standards of practice***, has determined and noted in the relevant record that a longer waiting time will not have a detrimental impact on the health of the enrollee.
>
> **(I)** Preventive care services, as defined in subdivision (e), and periodic followup care, including standing referrals to specialists for chronic

> conditions, periodic office visits to monitor and treat pregnancy, cardiac, mental health, or substance use disorder conditions, and laboratory and radiological monitoring for recurrence of disease, may be scheduled in advance consistent with professionally recognized standards of practice as determined by the ***treating licensed health care provider acting within the scope of their practice***.

Cal. Health & Saf. Code § 1367.03(a)(5)(H) & (I). *See* also Cal. Health & Saf. Code § 1367.03(a)(8) and (e)(5) (requiring "triage" or "screening" to be performed by qualified health professionals acting within their scope of practice).

"Review[ing] charts to determine which members need a mental health appointment" (as opposed to determining which members may have urgent needs) ***may not be undertaken by non-treating clinicians*** in the case of ongoing care (though may be appropriately performed by ***referring*** clinicians in the case of care that has not yet begun). This is because SB221 does not authorize health plans or their non-treating designees to override existing treatment plans (i.e., appointment frequency) through chart audits. In fact, SB221 is crystal clear that only referring or treating providers (and in limited circumstances, triage screeners evaluating urgency) may extend statutory timeframes for appointments. Moreover, only suitably ***licensed providers acting within their scope of practice*** may engage in "triage" or "screening." Cal. Health & Saf. Code § 1367.03(e)(5). Such evaluations are inherently clinical and require sophisticated and nuanced considerations of individuals' mental health, substance use, and medical conditions as well as generally accepted standards of care in the behavioral health field.

Undoubtedly, LVNs may not engage in "triage" or "screening" under California law. Cal. Business and Professions Code (BPC) § 2840 et. seq. ("Vocational Nursing Practice Act") identifies the "permissible practices" that LVNs may undertake in providing medical care to Californians. (See BPC sections 2860.5, 2860.7 and 2518.5) None of these includes assessing, triaging or screening individuals' health concerns and symptoms; making clinical determinations regarding the medical necessity of individuals' mental health and substance use conditions; diagnosing patients' medical, mental health or substance use disorders; prescribing treatment for medical, mental health or substance use disorders; or performing treatment planning for patients including determining the type, frequency, extent, site and duration of treatment interventions.

Rather, LVNs' scope of practice is limited to performing a narrow range of medical procedures while under the direction and supervision of a licensed physician, surgeon or a registered nurse, according to BPC. For example, under such direction and supervision, LVNs may administer medications via hypodermic injection, withdraw blood, start and superimpose intravenous fluids, and perform skin tests. Cal. Business & Professions Code § 2860 ("Unauthorized Practices") states the following:

> This chapter confers no authority to practice medicine or surgery or to undertake the prevention, treatment or cure of disease, pain, injury, deformity, or ***mental*** or physical condition in violation of any provision of law. (Added by Stats. 1951, Ch. 1689.)

The education and training requirements of LVNs are distinct from those of licensed non-physician mental health clinicians. Per California law, LCSWs, LMFTs and Clinical Psychologists are required to possess master's or doctoral degrees to qualify for

licensure. (BPC section 4980.36). LVNs must have completed high school as well as a prescribed course of study from an approved school of vocational nursing. (BPC section 2866).

BPC section 2887 specifies the criminal penalties for violating any of the provisions of the Vocational Nursing Practice Act. These penalties include imprisonment in the county jail for up to a year.

In order to confirm our understanding of state law with respect to LVNs' scope of training and practice, NUHW contacted the California Board of Vocational Nursing and Psychiatric Technicians (BVNPT). Earlier this week, I spoke with Jessica Gomez (Nursing Education Consultant) who stated that LVNs' licensure and scope of practice prohibits them from making determinations of medical necessity; assessing patients' medical or mental health conditions; diagnosing patients' conditions; or writing care plans for patients. She noted that LVNs **cannot** specialize in psychiatric care or obtain certifications that enables them to provide psychiatric care. She also stated that it is impermissible for LVNs to perform duties "under the license of an RN." LVNs can work under the direction of an RN, however they can only perform care duties that fall within the scope of their license.

Kaiser's recruitment of LVNs to perform medical assessments and treatment planning for its enrollees is not the first time in recent weeks that Kaiser has assigned such duties to inadequately licensed and trained staff. The following is Kaiser's response to inquiries from DMHC contained in its comment table of August 14, 2022.

#	Date/ Amend No.	DMHC Comment	Plan Response/Comment	Plan Resp. Date/Amend #
9.	8/8/2002	Prior to the cancellation or rescheduling of any enrollee appointments, or asking the enrollee to consent to a change, is an appropriately licensed provider reviewing the enrollee's medical records and documenting in the relevant record that an appointment beyond the SB 211 timely access requirements will not have a detrimental impact on the enrollee's health? If so, describe the process of chart review. If the Plan is not performing chart review prior to cancelling or delaying appointments or asking the enrollee to consent to a change in appointment, furnish a detailed explanation of the clinical appropriateness of such omission.	If there is a need to reschedule an appointment, the scheduler will look at the enrollee's scheduling history to see if the enrollee is scheduled to be seen within 10 business days from the prior appt. If so, and if there is a need to look beyond that period, the scheduler will seek a review by a qualified medical group clinician to review whether an appointment beyond the time periods provided for in SB 221 (e.g., 10-business days) will have a detrimental impact on the enrollee's health. If the medical group clinician determines the enrollee needs to be seen within the time periods provided for in SB 221, the Plan will endeavor to procure an available appointment with an in-network provider. If an appointment with an in-network provider cannot be procured, the Plan will authorize and work with the member to facilitate access to an out-of-network non-contracted provider with an available appointment. Coverage for such services will be under the same terms as in-network providers (e.g., no added cost-share).	8/14/22 / 20222903-4

Source: Exhibit Miscellaneous Documents/Attachments - Conf 22-303A Ex. MSCO1_ Response to Depts 8.5.22 Letter_No.9.pdf

Under SB221, only a properly licensed referring or treating provider (and in limited circumstances described above, licensed triage screeners) may determine that an appointment may be extended beyond the statutory period. Yet DMHC's question suggests that "an appropriately licensed provider reviewing the enrollee's medical records" may document "in the relevant record that an appointment beyond the SB221 timely access requirements will not have a detrimental impact"—regardless of whether that licensed provider is a referring or treating clinician. This is simply **NOT** permitted by the statute. Capitalizing on DMHC's imprecision,

Kaiser responded that “schedulers” will review “the enrollee’s scheduling history” to determine “if there is a need” to look beyond that [10 business day] period. But as DMHC knows, the “scheduling history” is not necessarily reflective of the treatment plan or what was prescribed. In fact, it could very well be based on appointment availability (and lack thereof). Moreover, “schedulers” are unlicensed and may not make any clinical determinations impacting the type/frequency of treatment without committing a crime. And of course, Kaiser’s “qualified medical group clinician[s]” may not override treatment plans for ongoing care if they are not treating providers.

III. Request

Kaiser’s representations to its staffing agency about its internal care-delivery capacities as reflected in Exhibit A (i.e., Kaiser’s behavioral health services are “understaffed,” under “further strain,” and experiencing a “backlog” of unreviewed patient charts that is “increasing rapidly”) are dramatically different than those Kaiser has made to DMHC. From every evidence available, Kaiser is misinforming DMHC about its capacity to deliver behavioral health services to its enrollees. Such circumstances require DMHC to employ more aggressive and effective investigatory methodologies. DMHC, rather than using desk-audit procedures, should conduct site visits of Kaiser’s clinical sites including, but not limited to, on-site record collection, data retrieval, chart audits, and interviews with site staff.

With respect to Kaiser’s recruitment of LVNs and Schedulers to “review charts to determine which members need a mental health appointment,” we request that DMHC immediately order Kaiser to cease and desist from such illegal practices.

Second, DMHC should request that Kaiser immediately provide a detailed accounting of its “backlog” of enrollees’ unreviewed medical charts including how long enrollees’ charts have gone without review and how long enrollees have waited since they last received treatment.

Third, for all of the enrollees whose charts are held in a backlog, DMHC should order Kaiser to arrange for these enrollees to receive out-of-network care in order to ensure that enrollees are not denied their right to receive timely and appropriate care from their health plan.

Fourth, DMHC should establish an ongoing system by which it monitors Kaiser’s performance of the chart review/treatment planning/appointment scheduling processes. It appears that DMHC was unaware that thousands of enrollees’ medical charts are stuck in a backlog that is increasing rapidly prior to NUHW’s report. Given its responsibility to defend consumers’ rights, DMHC should be more carefully and aggressively monitoring Kaiser’s practices and compliance with state law.

Fifth, DMHC should impose fines on Kaiser on a per-enrollee, per-day basis for each timely access and other violation associated with Kaiser’s backlog of unreviewed medical charts. Such penalties are necessary to incentivize Kaiser to immediately correct the problems affeccting enrollees.

Sixth, DMHC should clarify to Kaiser that only referring and treating clinicians (and in limited circumstances, licensed behavioral health triage screeners) may extend appointment times, and that Kaiser may not lawfully rely on chart reviews to delay ongoing care impacted by the work stoppage.

Lastly, given the sharp disparities between Kaiser's services-replacement plan submitted to DMHC and the current circumstances, we request that DMHC request more detailed information from Kaiser regarding its services-replacement plan in order to more carefully assess and interrogate Kaiser's capacity to comply with California law during the ongoing work stoppage.

Please contact me should you have any questions or concerns.

Sincerely,

Fred Seavey

cc: Rob Bonta, California Attorney General
Toni Atkins, Senate President Pro Tempore
Anthony Rendon, Speaker of the Assembly
Sen. Scott Wiener, Chair, Senate Select Committee on Mental Health
Sen. Richard Pan, Chair, Senate Committee on Health
Assemblymember Jim Wood, Chair, Assembly Committee on Health
Don Moulds, CalPERS
Dr. Julia Logan, CalPERS

EXHIBIT A

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