Staffing Mandate and Spending Requirements

INTERNAL USE ONLY

New York State

Revised Regulations on Nursing Home Minimum Spending and Minimum Staffing Published

The Department of Health (DOH) published long-awaited revised proposed regulations governing the nursing home minimum staffing hours and minimum direct care spending requirements in the Aug. 10, 2022 *State Register*. The revised proposed regulations make modest changes to the proposed regulations originally published in November 2021 and include the Department's responses to some of the comments they received. LeadingAge NY submitted extensive comments on both regulations when they were first published (available here and here) and will be submitting new comments on the revised regulations.

As LeadingAge NY requested in its original comments, the revised proposed regulations eliminate a mandatory minimum penalty for nursing homes that can demonstrate mitigating factors, such as an acute labor shortage. In addition, the revised regulations include provisions to align with amendments to the underlying direct care spending statute enacted earlier this year. Notably, a provision in the minimum staffing regulations outlining how appropriated funds will be spent to support compliance is not consistent with a recently submitted Medicaid State Plan Amendment (SPA) seeking federal approval of the supplemental payments.

Minimum Staffing Regulation

The revised proposed minimum staffing regulation makes two changes in relation to facilities seeking mitigation of penalties. First, it modifies the standard to qualify for mitigation of penalties based on the existence of an acute labor shortage in a region. Specifically, the revised regulation requires nursing homes that seek mitigation of penalties due to an acute labor shortage to demonstrate that they have taken steps to protect residents, including discontinuing admissions or transferring residents to another facility. The original regulation had included 'closing units' as another step that should be taken to qualify for mitigation. This step was removed, while 'transferring residents' was retained, even though DOH has instructed nursing homes, via a call with associations, *not* to transfer residents in order to comply with the minimum hours requirements.

Second, the revised regulation eliminates a minimum fine of $300 per day for facilities that qualify for mitigation. Instead, the Department would have discretion to determine the amount of the fine.

The revised regulation appears to retain the Jan. 1, 2022 effective date for compliance, even though the Governor issued an executive order (EO) suspending the requirements until April 1, 2022.

The revised minimum staffing regulation also retains a provision governing the allocation of funds to support compliance with staffing requirements. This provision requires facilities to comply with the minimum direct care spending statute (Public Health Law Section 2828) in order to qualify for staffing funds. Interestingly, the proposed SPA submitted at the end of June to secure federal approval of these Medicaid payments does not require compliance with the direct care spending statute.

Minimum Direct Care Spending Regulation

The revised direct care spending regulation makes two changes in the original regulation:

- It pro-rates the amount that may be recouped from non-compliant facilities, based on the suspension of enforcement for the first quarter of 2022 by EO; and
- It aligns with amendments to the minimum direct care spending statute that were enacted in early 2022. Specifically, those amendments revise the definition of "revenue" to exclude reimbursement of provider assessments, capital

reimbursement received by facilities with a four- or five-star rating (provided that the reimbursement is not for an expenditure made to a related entity), and federal grants for pandemic-related expenses.

Oddly, the cost report section of the regulation refers only to the 2019 cost reports, implying that the 2019 cost report will be used as the basis for the first year of enforcement. The proposed SPA for the staffing funds, by contrast, would rely on the 2020 cost report.

LeadingAge NY has reached out to leadership in DOH and the Governor's office with our questions and concerns regarding these and other issues, but has not yet received a response.

Pennsylvania

Concerns with Department of Health Proposed Nursing Facility Regulations

On May 28, 2022, the Department of Health (DOH) published in the Pennsylvania Bulletin a portion of its proposal to update nursing facility regulations. Comments are due by June 27 and should be submitted to: RA-DHLTCRegs@pa.gov; irrc@irrc.state.pa.us Proposed changes in staffing requirements

The proposed regulatory package includes prescriptive RN and LPN ratio increases to include:

- Nursing services personnel on each resident floor
- A minimum of two nursing services personnel on duty at all times
- A minimum of one nursing services personnel on duty, per 20 residents
- A minimum of one nurse aide per ten residents during the day and evening shifts and one nurse aide to fifteen residents overnight.
- A minimum of 2 RNs and 1 LPN during days, 1RN and 1LPN on evenings, and 1 RN overnight, per 60 residents – demonstrated in the table below:
- Facilities may substitute the use of higher credentialed positions for lesser credentialed positions- for example an RN can be counted as a CNA, so long as that is the sole capacity in which they are serving.
- All facilities will be required to employ a full time social worker.
- Additions to orientation and other administrative tasks related to resident welcome activities; these additional policies and procedures in the package include:
    - Introduction of residents to at least one member of the nursing staff for the unit in which the resident will be living and to direct care staff who have been assigned to care for the resident, while also reviewing orders of the health care practitioner prior to introductions.
    - Orientation of the residents to the facility and location of essential services and key personnel.
    - A description of facility routines, including nursing shifts, mealtimes, and posting of menus.
    - Discussion and documentation of the resident's customary routines and preferences to be included in the care plan developed for the resident.
    - Assistance to the resident, if needed, in creating a homelike environment and settling personal possessions in the resident's room.
    - The coordination of introductions, orientation and discussions will be the responsibility of the facility's social worker or a delegee, and must occur within two hours of a resident's admission. As you compose your comments, consider:
        - Introduce yourself and your community including the size of your NF, current challenges to operating at capacity, and information on the quality of your care. 1PA Department of Health. (May 27, 2022). Proposed Regulations No. 10-224 Long-Term Care Nursing Facility Regulations. Retrieved from: http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=3355 Accessed June 14, 2022
        - How implementing the above staffing pattern would:

- Affect your staff scheduling and possible use of agency staff

Discuss preferences you may have towards staffing exclusively with your own staff and why, as well as the importance of including all staff providing resident care in any staffing requirement, not simply clinical care (e.g., resident wellbeing is a function of adequate clinical care coupled with exceptional person-centered programming like music and occupational therapies, games and activities, and meal experiences).

This is also a good opportunity to emphasize the need for continuing the temporary nurse aide (TNA) path given the current workforce crisis and any challenges you are experiencing with getting TNAs tested and certified in a timely manner with the state's contractor, Credentia

- Require maintenance of staffing minimum compliance for facilities at a shift level
- Limit your ability to accept new admissions depending upon staffing on any given shift
- Cause significant financial hardship (include the total projected cost, if able, for implementing such staffing requirements); include a statement regarding the need for commensurate and sustainable funding
- Personalize your letter to include any proposed suggestions to help the department meet their goal of promoting high quality care.

Illinois

TITLE 77: PUBLIC HEALTH
CHAPTER I: DEPARTMENT OF PUBLIC HEALTH
SUBCHAPTER c: LONG-TERM CARE FACILITIES
PART 300 SKILLED NURSING AND INTERMEDIATE CARE FACILITIES CODE
SECTION 300.1230 DIRECT CARE STAFFING

Section 300.1230 Direct Care Staffing

a) For purposes of the minimum staffing ratios in Section 3-202.05 of the Act and this Section, all residents shall be classified as requiring either skilled care or intermediate care. (Section 3-202.05(b-5) of the Act)

b) For the purposes of this Section, the following definitions shall apply:

1) "Direct care" − the provision of nursing care or personal care as defined in Section 300.330, therapies, and care provided by staff listed in subsection (i). Direct care staff are those individuals who, through interpersonal contact with residents or resident care management, provide care and services to allow residents to attain or maintain the highest practicable physical, mental and psychosocial well-being. Direct care staff does not include individuals whose primary duty is maintaining the physical environment of the facility (e.g., housekeeping).

2) "Skilled care" – skilled nursing care, continuous skilled nursing observations, restorative nursing, and other services under professional direction with frequent medical supervision. (Section 3-202.05(b-5) of the Act) Skilled nursing services are either nursing or therapy care services, furnished pursuant to physician orders, that require the skills of a licensed nurse to treat, manage, and observe a resident's condition and evaluate a resident's care. The skilled nursing services may be provided by a CNA, under the supervision of a licensed nurse to ensure the safety of the patient and to achieve the medically desired result. A resident in a skilled nursing facility is classified as receiving skilled care if:

A) The resident is receiving care covered by Medicare under any arrangement allowed by Title XVIII of the Social Security Act;
B) The resident is receiving care that would be covered by Medicare, but the resident has exhausted his or her Medicare benefits; or
C) The resident is not Medicare eligible, but is receiving care that would be covered by Medicare if the resident were eligible.

3) "Intermediate care" – basic nursing care and other restorative services under periodic medical direction. (Section 3-202.05(b-5) of the Act) Services not classified as skilled care will be classified as intermediate care.

c) A minimum of 25% of nursing and personal care time shall be provided by licensed nurses, with at least 10% of nursing and personal care time provided by registered nurses. Registered nurses and licensed practical nurses employed by a facility in excess of these requirements may be used to satisfy the remaining 75% of the nursing and personal care time requirements. (Section 3-202.05(e) of the Act)

d) The minimum staffing ratios shall be 3.8 hours of nursing and personal care each day for a resident needing skilled care and 2.5 hours of nursing and personal care each day for a resident needing intermediate care. (Section 3-202.05(d) of the Act) For the purpose of this subsection, "nursing care" and "personal care" mean direct care provided by staff listed in subsection (i).

e) The facility shall schedule nursing personnel so that the nursing needs of all residents are met.

f) The number of staff who provide direct care who are needed at any time in the facility shall be based on the needs of the residents, and shall be determined by figuring the number of hours of direct care each resident needs per day.

g) Each facility shall provide minimum direct care staff by complying with subsection (f) and meeting the minimum direct care staffing ratios set forth in this Section.

h) The direct care staffing calculations in this Section shall include only the number of staff actually on duty on site. The following shall not be included in direct care staffing calculations:

1) Meal and break times (paid or unpaid);
2) Scheduled training; and
3) When a facility is utilized as a clinical site for nurse aide training, if the facility is not paying the employee for the services provided.

i) For the purpose of computing staff to resident ratios, direct care staff shall include the following:

1) Registered professional nurses;
2) Licensed practical nurses;
3) Certified nurse assistants;
4) Psychiatric services rehabilitation aides;
5) Rehabilitation and therapy aides;
6) Psychiatric services rehabilitation coordinators;
7) Assistant directors of nursing;
8) 50% of the Director of Nurses' time;
9) 30% of the Social Services Directors' time (Section 3-202.05 of the Act); and
10) Licensed physical, occupational, speech and respiratory therapists.

j) Facilities subject to Subpart S may utilize specialized clinical staff, as defined in Section 300.4090(c) and (f), to count towards the staffing ratios. (Section 3-202.05(a) of the Act)

k) To determine the direct care staffing required to meet daily minimum staffing ratios for skilled care and intermediate care, the following staffing formula shall be used:

1) Determine the number of residents requiring skilled care and the number of residents requiring intermediate care.
2) Calculate the total daily required nursing and personal care hours for each level of care:

A) The number of residents requiring skilled care shall be multiplied by the required number of hours (3.8) per resident.

B) The number of residents requiring intermediate care shall be multiplied by the required number of hours (2.5) per resident.

3) Add the total number of hours of direct care required for each level of care to determine the total number of hours required to provide direct care for all residents in the facility.

4) Multiplying the total minimum hours of direct care hours required for all residents, determined under subsection (k)(3), by 25% results in the minimum amount of licensed nurse hours that shall be provided during a 24-hour period.

5) Multiplying the total minimum hours of direct care time required for all residents, determined under subsection (k)(3), by 10% results in the minimum amount of registered nurse hours that shall be provided during a 24-hour period.

6) The remaining 75% of the minimum required direct care hours may also be fulfilled by other staff identified in subsection (i) as long as it can be documented that those staff provide direct care, and that nursing care and nursing delegation is in accordance with the Nurse Practice Act.

7) The amount of time determined in subsections (k)(4), (5) and (6) is expressed in hours.

8) See Appendix A for an example of staffing calculations.

l) A written work schedule shall be posted at least 10 days prior to the first day on the schedule. The work schedule shall be posted in a location conspicuous and accessible only to employees.

1) This work schedule shall contain the employee's name, job title, (identifying the job title or titles listed in subsection (i), if applicable), shift assignment, hours of work, and days off.

2) If an employee works in more than one job during the same week, specifically including those job duties listed in subsection (i), if applicable, the facility shall separately state the hours of work for each job duty.

3) The work schedule, whether a hard copy or in an electronic format, shall be kept on file in the facility in the administrator's office for a minimum of three years after the week for which the schedule was used.

m) Time spent in scheduled breaks and mealtimes, and scheduled training, when staff are not providing direct care shall be documented.

n) A facility operating under a waiver from the minimum registered professional nurse staffing requirements (see Section 300.1232) shall provide written documentation of the waiver to the Department upon request.

(Source: Amended at 45 Ill. Reg. 1134, effective January 8, 2021)