

THE CAT IS OUT OF THE BAG: CMS ANNOUNCES PROPOSED RULE TO MANDATE STAFFING LEVELS IN NURSING HOMES

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On September 1, 2023, the Centers for Medicare & Medicaid Services (CMS) announced plans to move forward with a much-anticipated [Proposed Rule](#) (the “Proposed Rule”) mandating staffing levels for nursing homes participating in Medicare. The Proposed Rule is scheduled to be officially published in the [Federal Register](#) on September 6, 2023. The announcement follows several months of speculation and noted concerns among nursing home providers, associations, and industry advocates regarding what might be required under such a mandate and its consequences. These concerns culminated in a dramatic turn of events last week when research organization Abt Associates inadvertently released [a CMS-commissioned study](#) suggesting there was “no single staffing level that would guarantee quality of care.” Ironically, [a 2001 study by the same organization](#) recommended 4.1 hours per patient day as a desired staffing level and served as a basis for the Biden administration and CMS proposing to mandate staffing levels for nursing homes. Industry advocates seized on the recent study as further evidence that while a staffing mandate for nursing homes may improve quality of care, it could threaten the continued operation of nursing homes that have been unable to recruit and retain staff despite consistent, ongoing efforts, particularly in rural areas. The Proposed Rule has been subject to a cold reception from the industry, with many expressing concerns over its potential impact and others raising skepticism that the rule will go into effect in the form proposed. Hancock Daniel will continue monitoring this development but in the interim, the following is a summary of the Proposed Rule pending official publication:

KEY ELEMENTS OF THE PROPOSED RULE

The Proposed Rule includes the following two key requirements:

- Registered Nurse (“RN”) presence onsite 24-hours-a-day, 7-days-a-week. This requirement will update regulations at 42 C.F.R. § 483.35(b) that currently only require RN presence for 8-hours-a-day, 7-days-a-week.
- Nursing services for residents consisting of, at a minimum, 0.55 RN hours per resident day (“HPRD”) and 2.45 Nurse Aide (“NA”) HPRD. With respect to this requirement, CMS specifically noted that “meeting the 24/7 [RN presence] requirement [above] does not also count as meeting the 0.55 RN HPRD and 2.45 NA HPRD [requirements] and vice versa.” CMS also noted that these are minimum requirements, and that higher acuity needs among residents may require greater levels of staff.

Notably, the above staffing levels are less than the 4.1 HPRD referenced in Abt Associates’ 2001 study, referenced above. Nonetheless, industry advocates have raised concerns for several months that any “one size fits all” staffing mandate will pose significant risks among facilities struggling to keep their doors open. With respect to the above staffing mandates, CMS has proposed limited exemptions if four criteria are met. These include:

- (1) where workforce is unavailable, or the facility is at least 20 miles from another long-term care facility, as determined by CMS;
- (2) the facility is making a good faith effort to hire and retain staff;
- (3) the facility provides documentation of its financial commitment to staffing; and
- (4) the facility has not failed to submit PBJ data in accordance with re-designated 42 C.F.R. § 483.70(p), is not a Special Focus Facility; has not been cited for widespread insufficient staffing with resultant resident actual harm or a pattern of insufficient staffing with resultant resident actual harm, as determined by CMS; and has not been cited at the “immediate jeopardy” level of severity with respect to insufficient staffing within the 12 months preceding the survey during which the facility’s non-compliance is identified.

Beyond the above staffing mandates, CMS is also proposing to move and update the facility assessment requirements at 42 C.F.R. § 483.70(e) to a new regulation at 42 C.F.R. § 483.71. In particular, facilities will be required under the Proposed Rule to consider input from various categories of staff as part of the assessment process, including nursing home leadership, management, direct care staff and their representatives, and staff providing other services.

With respect to timing, CMS proposes to implement the above requirements in phases, with different phases to apply for non-rural and rural facilities. For non-rural facilities: Phase 1 would require facilities to comply with the facility assessment requirements 60 days after the publication date of the final rule. Phase 2 would require facilities to comply with the requirement for an RN onsite 24 hours a day, 7 days a week, 2 years after the publication date of the final rule. Phase 3 would require facilities to comply with the minimum staffing requirement of 0.55 and 2.45 HPRD for RNs and Nas, respectively 3 years after the publication date of the final rule. For rural facilities: Phase 1 would require facilities to comply with the facility assessment requirements 60 days after the publication date of the final rule. Phase 2 would require facilities to comply with the requirement for an RN onsite 24 hours a day, 7 days a week, 3 years after the publication date of the final rule. Phase 3 would require facilities to comply with the minimum staffing requirement of 0.55 and 2.45 HPRD for RNs and Nas, respectively 5 years after the publication date of the final rule.

WHAT THIS MEANS FOR PROVIDERS

Providers are encouraged to review the [Proposed Rule](#) in detail and to revisit the [Federal Register](#) to view the published version once issued on September 6, 2023. Comments to the Proposed Rule may be submitted once it is officially published. It is anticipated that comments will be accepted until November 6, 2023, but providers are encouraged to review the Federal Register for updates on comment deadlines. If you have any questions or need further guidance regarding the Proposed Rule, or would like assistance with developing comments, please contact a member of Hancock Daniel’s [Long-Term Care & Post-Acute Care](#) team.

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