

"Long-Term Care Facilities Potentially Face New Minimum Staffing Requirements," by Abbye Alexander, Esq. and Christopher Tellner, Esq., 10-11-2023

The Centers for Medicare & Medicaid Services (CMS) recently issued a proposed rule that would establish for the first time, national minimum staffing standards for Long-term Care (LTC) facilities that participate in Medicare and Medicaid.

The proposed rule, issued on September 1, is meant to "address ongoing safety and quality concerns for the 1.4-million residents receiving care in Medicare and Medicaid certified Long-Term Care (LTC) facilities."

The rule was anticipated given President Biden's announcement last February as part of the Action Plan for Nursing Home Reform to establish staffing minimums.

Since the rule was announced, it has already drawn criticism from groups representing nursing homes concerned about facilities' ability to comply with requirements given staffing shortages within the industry. According to the Bureau of Labor Statistics, nursing homes have lost more than 200,000 workers over the course of the pandemic.

Among provisions, the proposed rule would require LTC facilities to have a registered nurse (RN) on site 24 hours per day, 7 days per week to provide skilled nursing care to all residents in accordance with resident care plans. Existing federal regulations require an RN to be on site eight hours each day, seven days per week.

Facilities must also provide, at a minimum, 0.55 hours (33 minutes) of care from a registered nurse per resident per day and 2.45 hours (2 hours and 27 minutes) of care from a nurse aide (NA) per resident per day.

Under the proposal, 36% of nursing homes would have to hire RNs to meet the hours per resident day (HPRD) standard after accounting for RNs hired for the 24/7 requirement and 68% of nursing homes would have to hire nurse aides to meet this requirement, according to a fact sheet from the White House.

Most facilities would have two years after the publication of the final rule to meet the 24/7 RN on site requirement and three years to meet the 0.55 hours RN HPRD and 2.45 hours NA HPRD requirements. Rural facilities have a three-year and five-year implementation time frame respectively on these requirements.

"The proposal also makes clear that the numerical staffing levels are a floor-not a ceiling-for safe staffing," according to the fact sheet. Under the proposal, nursing homes would have to do a "robust" assessment for their facility to determine whether higher levels of staffing and what staff competences are needed to meet the needs of their resident population, the fact sheet explains. Those facilities caring for residents with more acute needs may have to hire more workers than minimum standards require to provide a safe environment. Further, state laws with higher staffing requirements would not be preempted, the fact sheet states.

Hardship Exemptions

The proposed rule does provide for a hardship exemption in limited circumstances. According to CMS, facilities may qualify for a temporary hardship exemption from the minimum nurse staffing standards only if they met specific criteria demonstrating the following:

- Workforce unavailability based on their location, as evidenced by either a medium (that is, 20% below the national average) provider-to-population ratio for the nursing workforce, as calculated by CMS, by using the Bureau of Labor Statistics and Census Bureau data, or the facility is located at least 20 miles away from another LTC facility (as determined by CMS); and
- Good faith efforts to hire and retain staff through the development and implementation of a recruitment and retention plan; by documenting job postings, and job vacancies, including the number and duration of vacancies, job offers made, and competitive wage offerings, and
- A financial commitment to staffing by documenting the total annual amount spent on direct care staff.

CMS will be accepting comments on the proposed rule until November 6, 2023.

While the proposed rule can still be subject to change given the public comment period, the HHS Office of the Inspector General has already announced new efforts to improve enforcement of existing standards including increasing audits of nursing homes' staffing.

Long-term care facilities should plan accordingly given increased scrutiny.

Kaufman Dolowich Can Help

If you need help staying in compliance with existing standards or have questions about the proposed rule changes, Kaufman Dolowich's team of skilled healthcare attorneys can assist.