The Law Offices of
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HOSPITALS WITH NURSING UNITS PREPARE FOR FEDERAL MINIMUM NURSE STAFFING REQUIREMENTS

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The Centers for Medicare & Medicaid Services ("CMS") is expected to release a much-anticipated final rule soon that may adopt minimum staffing requirements for long-term care ("LTC") facilities. CMS issued the proposed rule on September 6, 2023, and the comment period closed on November 6, 2023.[1] Based on our review of the proposed rule, the new staffing requirements would apply to freestanding skilled nursing facilities ("SNFs") and nursing facilities ("NFs"), as well as SNF and NF units in hospitals. If finalized, this would be the first time that the federal government has regulated individual minimum staffing levels in SNFs and NFs. CMS says that the proposed requirements were developed based on a 2022 study of nursing home staffing, prior public comments on staffing, academic literature, Payroll-Based Journal System data, and listening sessions conducted with providers, patients, and advocacy groups.

Minimum staffing requirements at the federal level have been debated for years, but the tragic experience of SNF and NF residents during the COVID-19 pandemic renewed concerns surrounding inadequate staffing and motivated CMS' formation of the proposed requirements. There are over 1.2 million residents living in nursing homes and these residents often require time-intensive care for basic daily tasks.[2] In the proposed rule, CMS cites numerous studies that show that staffing levels are closely correlated with the quality of care that LTC facilities provide, and subsequently with improved health outcomes. In fact, commenters responded to a Request for Information in the fiscal year 2023 SNF Prospective Payment System Proposed Rule with examples of quality and safety concerns in understaffed LTC facilities. These concerns included "residents going entire shifts without receiving toileting or days without bathing assistance, increases in falls, residents not receiving basic feeding or changing services, and even abuse," among others.[3] A separate study also concluded that basic care tasks, including bathing, toileting, and mobility assistance, are often delayed due to understaffing. Nurses have also stated that inadequate staffing leads to rushed care, which often results in errors and safety issues.

The COVID-19 public health emergency emphasized these long-standing concerns. The proposed rule explained that one study found that LTC facilities with four or five stars for nurse staffing in the Nursing Home Care Compare Five Star Quality Rating System had fewer COVID-19 cases than their counterpart facilities with one, two, or three stars for staffing. CMS also cited another study which found that a 20-minute increase in registered nurse

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("RN") time for direct care to residents was associated with 22 percent fewer confirmed cases of COVID-19 and 26 percent fewer COVID-19 related deaths.

Who would the rule apply to?

If adopted as proposed, the new minimum staffing requirements would apply to both freestanding and distinct part unit SNFs and NFs. The proposed rule would revise the LTC regulations at 42 C.F.R. Part 483 to add the minimum staffing requirements. Sections 1819(d)(4)(B) and 1919(d)(4)(B) of the Social Security Act ("SSA") require SNFs participating in Medicare and NFs participating in Medicaid to comply with the requirements found in the regulations codified at 42 C.F.R. Part 483, subpart B. The LTC regulations specify that a distinct part SNF or NF must meet the same requirements as freestanding SNFs and NFs. A distinct part unit is defined as a SNF or NF that is "physically distinguishable from the larger institution . . . ."[4]

The proposed rule would amend the nursing services requirements in the LTC regulations. Importantly, the proposed rule does not differentiate between freestanding SNFs and NFs and distinct part SNFs and NF units located in hospitals. Hospital-based SNF unit can be located in general acute care hospitals, long-term acute care hospitals ("LTCHs"), inpatient rehabilitation facilities ("IRFs"), and inpatient psychiatric facilities ("IPFs"). The nursing services regulation that would include the new minimum staffing requirements applies to "facilities" and the LTC regulation's definition of "facility" includes distinct part units. Notably, when discussing the data that influenced the proposed rule, CMS twice explained that data were obtained from nursing homes across all 50 states and the study controlled for several factors, including whether the nursing home was a hospital-based facility. CMS also identified characteristics of LTC facilities that "may need to staff up," and one of the listed characteristics was being a freestanding LTC facility, rather than being a hospital-based facility. These details suggest that CMS intends to apply the proposed rule to hospital-based facilities because they are not excluded from the analysis used to calculate the proposed requirements. Therefore, based on our review of the proposed rule, the new requirements would likely apply to both freestanding and distinct part SNFs and NFs.

What would the rule require?

The proposed rule would require an RN to be on site at SNFs and NFs 24 hours per day, seven days per week.[5] This is significantly more time required than the existing requirement that an LTC facility have an RN on site for eight consecutive hours, seven days per week. The proposed rule would also impose individual minimum staffing requirements by revising the nursing services regulation at 42 C.F.R. § 483.35(a)(1) to require "facilities [to] provide, at a minimum 0.55 RN hours per resident day ('HPRD') and 2.45 nursing aid ('NA') HPRD."[6] The proposed regulations define HPRD as "staffing hours per resident per day which is the total number of hours worked by each type of staff divided by the total number of residents as calculated by CMS."[7] Each of these requirements must be met separately. CMS notes that these levels would constitute a floor for staffing, and that facilities would still be "required to provide staffing that meets the needs of the individual residents they serve, and may require higher levels of staffing above the proposed minimum standards."[8]

The proposed regulations include a temporary hardship exemption that would apply when external circumstances, including difficulties surrounding hiring and retention, prevent a facility from achieving compliance despite its best

efforts. Exempted facilities still must maintain compliance with the requirement to provide services with a sufficient number of staff on a 24-hour basis to all residents. However, LTC facilities may be temporarily exempted from the minimum staffing HPRD standards if they are able to meet the following three criteria:

(1) Workforce unavailability based on their location, as evidenced by either a medium (that is, 20 percent below the national average) or low (that is, 40 percent 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);
(2) Good faith efforts to hire and retain staff through the development and implementation of a recruitment and retention plan; and
(3) A financial commitment to staffing by documenting the total annual amount spent on direct care staff.[9]

LTC facilities would not be eligible for the exemption if:

(1) They have failed to submit their data to the Payroll-Based Journal System;
(2) They have been identified as a special focus facility; or
(3) They have been identified within the preceding 12 months as having widespread insufficient staffing with resultant resident actual harm, a pattern of insufficient staffing with resultant resident actual harm, or have been cited at the immediate jeopardy level of severity with respect to insufficient staffing as determined by CMS.[10]

CMS proposed a three-step timeline for implementation of the new requirements. Urban facilities would have two years after the publication date of the final rule to meet the 24/7 RN requirement. Three years after publication of the final rule, urban facilities would need to meet the two HPRD requirements for RNs and NAs, and rural facilities would need to begin complying with the 24/7 RN requirement. Finally, beginning five years after publication of the final rule, rural facilities must meet the two HPRD requirements for RNs and NAs.

When finalized, CMS will have the ability to enforce the new staffing requirements through the termination of provider agreements, denial of payment for all Medicare and Medicaid claims, and/or civil money penalties.

What would be the impact of the rule?

CMS estimates that the proposed staffing minimums would cost about $40.6 billion over ten years, and would require about 75% of all nursing facilities to increase their nursing staff hours. CMS identified the following facilities that "may need to staff up," based on current staffing below the proposed levels: for-profit facilities; larger facilities; freestanding LTC facilities; facilities that are part of a Continuing Care Retiring Community; facilities with higher shares of Medicaid residents; facilities that are Special Focus Facilities; and rural facilities. These estimates may have been based on a study that CMS completed in June 2023 that found that "staffing levels for freestanding nursing homes (3.71 HPRD) are much lower than staffing levels for hospital-based nursing homes (5.24 HPRD), particularly for RNs (0.63 HPRD compared to 1.60 HPRD)."[11] These data suggest that freestanding SNFs and NFs would be impacted more than hospital-based SNFs and NFs because they will need to increase staff, which will inevitably lead to higher staffing costs.

These added staffing costs for hospitals with SNF and NF units would exacerbate the staffing challenges that hospitals are already facing. The American Hospital Association ("AHA") compiled a report that found that hospital labor expenses are up 20.8% from 2019 to 2022.[12] Labor expenses on average account for about 50% of a hospital's budget. Accordingly, the new minimum staffing requirements would have a significant impact on hospitals with distinct part SNF units, at time when the healthcare industry is still experiencing record staffing shortages. Existing shortages were exacerbated in early 2022, due to COVID-19 surges, new RSV outbreaks, and deferred care from the early days of the pandemic. As a result of the staffing shortages, hospitals have been forced to hire contract labor from health care staffing agencies that took advantage of the need and increased their rates by a record high 56.8%. Because of the increases, hospital contract labor expenses increased by 257.9% from 2019 to 2022.

Congress is currently grappling with how to address the staffing shortages and elevated labor costs during hearings. However, the new Medicare staffing requirements would contribute to higher nurse staffing costs for facilities that currently do not meet the proposed requirements.

The Medicare Payment Advisory Commission ("MedPAC") also has been considering minimum staffing requirements in SNFs and NFs, but it has not yet made a recommendation on the matter. In its October 5, 2023 public meeting, the Commission reviewed data surrounding the long-standing concerns about staffing adequacy, which showed that the median SNF HPRD was 3.6 in 2022.[13] The data also confirmed that freestanding SNFs had lower staffing ratios than hospital-based SNF units, and for-profit SNFs had lower staffing ratios than nonprofit and government SNFs. The Commissioners discussed the need for further analysis of the issue, particularly on the potential benefits and consequences of the proposed rule. The Commission included some analysis of the staffing data in the SNF payment adequacy chapter of its March 2024 report. It will include an informational chapter with an updated staffing analysis in its June 2024 report.

On March 6, 2024, the House Committee on Ways and Means passed the Protecting America's Seniors' Access to Care Act, which would prohibit the Secretary of Health and Human Services from finalizing the proposed minimum staffing rule.[14] On the same day, the White House released a Fact Sheet in which it expressed support for the proposed rule.[15] The Fact Sheet explained that "[a]s President Biden pledged to do two years ago in the State of the Union, Biden-Harris Administration is 'set[ting] higher standards for nursing homes and mak[ing] sure your loved ones get the care they deserve and that they expect.'"[16] Moreover, the Fact Sheet states that "for too long, many facilities have not had the staff required to give residents safe, high-quality care. That is changing." These communications make it unlikely that the President would sign H.R. 7513, even if it were to pass the Senate. Moreover, the final rule was recently submitted to the Office of Management and Budget for regulatory clearance, which means it should be released soon. The White House's messaging is likely a sign that, despite the more than 46,000 submitted public comments, new minimum staffing requirements for SNFs and NFs will be adopted.

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We work with clients on a regular basis on federal and state requirements and approvals necessary to establish and operate hospital-based SNF units in LTCHs, IRFs, and IPFs, among other settings. We are available to help providers navigate any new staffing requirements adopted at the federal or state level.

[1] Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting, 88 Fed. Reg. 61352 (Sept. 6, 2023).
[2] CMS, *HHS Proposes Minimum Staffing Standards to Enhance Safety and Quality in Nursing Homes*, Press Release (Sept. 1, 2023), https://www.cms.gov/newsroom/press-releases/hhs-proposes-minimum-staffing-standards-enhance-safety-and-quality-nursing-homes.
[3] 88 Fed. Reg. at 61356.
[4] 42 C.F.R. § 483.5.
[5] 88 Fed. Reg. at 61353, 61428.
[6] *Id.* at 61353.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 61428.
[10] *Id.*
[11] Alan J. White et al., *Nursing Home Staffing Study: Comprehensive Report* (June 2023), https://edit.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf.
[12] AHA, *The Financial Stability of America's Hospital and Health Systems is at Risk as the Costs of Caring Continue to Rise* (Apr. 2023), https://www.aha.org/system/files/media/file/2023/04/Cost-of-Caring-2023-The-Financial-Stability-of-Americas-Hospitals-and-Health-Systems-Is-at-Risk.pdf.
[13] Kathryn Linehan, MEDPAC, *Examining staffing ratios and turnover rates in nursing facilities* (Oct. 5, 2023), https://www.medpac.gov/wp-content/uploads/2023/03/NF-staffing-MedPAC-Oct-2023-SEC.pdf; MedPAC Public Meeting Transcript (Oct. 5, 2023), https://www.medpac.gov/wp-content/uploads/2023/03/October2023_MedPAC_meeting_transcript_SEC.pdf.
[14] Protecting America's Seniors' Access to Care Act, H.R. 7513, 118th Cong. (2024).
[15] *FACT SHEET: President Biden Takes New Steps to Lower Prescription Drug and Health Care Costs, Expand Access to Health Care, and Protect Consumers*, whitehouse.gov (March 6, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/06/fact-sheet-president-biden-takes-new-steps-to-lower-prescription-drug-and-health-care-costs-expand-access-to-health-care-and-protect-consumers/.
[16] *Id.*

About Us

The Law Offices of Jason M. Healy PLLC is a Washington, D.C. based law firm serving national and local clients. We focus primarily on legal issues affecting health care providers under Medicare and Medicaid laws and regulations. We represent health care providers in reimbursement audits, appeals, litigation, and transactions. Located in Washington, DC, just minutes from the Department of Health and Human Services, Congressional offices, and the White House, we are well positioned to provide legal support for advocacy efforts. Our Principal, Jason M. Healy, is a health care lawyer with over 25 years of experience with the array of legal issues facing health care providers.