

Another Critical Item for Long-Term Care Facilities to Add to Their To-Do List — New Staffing Mandates

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On September 1, the Centers for Medicare & Medicaid Services (CMS) released the Minimum Staffing Standards for Long-Term Care (LTC) Facilities and Medicaid Institutional Payment Transparency Reporting proposed rule. This long-awaited staffing mandate was initially expected to be released in the Fiscal Year 2023 Skilled Nurse Facility (SNF) Prospective Payment System final rule, but it was left out as CMS was still processing Requests For Information (RFIs) surrounding the topic. Now, LTC facilities have time to review the proposed rule and weigh in with their concerns, questions, and opinions before the mandate is finalized.

Background

According to a recent study by the Bureau of Labor Statistics, the LTC sector has experienced a decrease of nearly 200,000 jobs since the beginning of the pandemic, and employment in the sector is not expected to grow back to pre-pandemic levels until 2027.^[1] This stark decrease in labor directly impacts an LTC facility's "hours per resident day" (HPRD), which is the total number of nursing hours of care a resident receives in a 24-hour period.

In light of the study's findings, CMS endeavored to draft and implement this mandate establishing minimum staffing standards in LTC facilities. In fact, in early 2022, President Biden acknowledged perceived staffing issues with LTC facilities and, therefore, encouraged CMS to propose minimum staffing standards for the purpose of promoting LTC resident safety and high-quality care.

New Requirements

In 2001, CMS released a study that suggested a mandate of 4.1 HPRDs for LTC facilities; however, this suggestion was never made law.^[2] Now, after much anticipation, CMS has finally released its proposal for LTC minimum staffing requirements.

CMS has proposed minimum nurse staffing standards of 0.55 HPRD for registered nurses (RNs) and 2.45 HPRD for certified nurse aides (CNAs). Given the current staffing shortage, CMS believes these requirements are realistic for LTCs. But, somewhat contradictorily, CMS estimates that 75% of nursing facilities will have to increase facility staffing to meet these new staffing requirements. CMS determined that any higher requirement may have negative impacts, such as forcing these facilities to close their doors, thereby displacing hundreds of thousands of patients from these facilities. CMS is also seeking comments on an alternative total nurse staffing standard of 3.48 HPRD, which would still include the 0.5 RN HPRD and 2.45 NA HPRD minimums.

In addition to these proposed minimum staffing standards, CMS has also proposed a requirement that all LTC facilities must have an RN onsite 24/7, who would be able to provide direct resident care. CMS believes that this will ensure that avoidable resident safety events will decrease.

Key Takeaways

The proposed staffing mandate on LTC facilities is potentially very significant, particularly those facilities that may have to hire new staff members (in a very difficult staffing market) to comply. Here are some key takeaways that all LTC facilities should consider:

- 1. LTC facilities should consider submitting comments on the proposed standards.** The proposed CMS standards are not yet final, so LTC facilities still have the opportunity to make their voices heard and to weigh in on them, and their impact on operations and business. LTC facilities should consider the impact of the proposed rules, particularly with respect to their operations and ability to deliver quality care and consider submitting comments to CMS, whether they are positive or (especially if they are) negative. CMS reviews comments to understand the different perspectives, potential impacts, and overall considerations of stakeholders that CMS may not have previously considered. Depending on the public opinions of the comments, CMS has the opportunity to refine or adjust the proposed rule to better achieve its goals.
- 2. Nonetheless, LTC facilities should prepare for the mandate to go into effect.** Even though the mandate is not yet final, it appears likely that CMS will ultimately impose some mandate (whether it be the same as those that have been proposed, or adjusted based on comments). Thus, LTC facilities should prepare for the mandates. CMS has already expressed its belief that when the mandates ultimately do go into effect, they are likely to result in some LTC facilities needing to hire more staff. There are many potential implications for LTC facilities that end up doing so, including new hiring, credentialing, training, and monitoring obligations. Taking a proactive approach to these mandates will enable LTC facilities to smoothly transition when/if the mandates take effect, and will help ensure that those facilities are well-equipped to comply with the new staffing requirements.
- 3. LTC facilities should consider whether enhanced supervision practices are needed.** LTC facilities should also consider their supervision practices and resources in light of the staffing mandates, which may include the need to ramp up supervision in light of a potential uptick in staffing hires. LTC facilities that need to increase staff to comply with the mandates should be careful to hire only qualified staff, but even qualified staff will have to be trained on facility-specific processes, and supervised carefully to ensure their compliance. Failure to properly or sufficiently supervise staff could open facilities to negligence or other liability in the event of a resident care issue.
- 4. LTC facilities should consider using this as an opportunity to enhance internal policies.** Finally, LTC facilities should also consider taking this as an opportunity to review its internal policies and procedures, with particular focus being given to those that could impact the facility's compliance even in the face of hiring additional staff. These may include, for example, policies that address staff training (new employees will need to be trained according to those policies), evaluation and supervision (to make sure supervisors can still handle evaluating and supervising all of the people assigned to them), and operations monitoring (the more staff members, the more monitoring resources may be needed). Facilities should revise such policies as necessary

to ensure the continued provision of quality care. In fact, considering the general increased interest state attorneys general have had in LTC facilities over the last couple of years, facilities will also want to use this opportunity to ensure their policies and procedures are compliant on all fronts. If an audit is conducted to verify compliance with the staffing mandate, for example, and during this process a regulator discovers noncompliance with other policies, that could potentially attract substantial government scrutiny.

Although these staffing mandate standards are not yet finalized, LTC facilities should begin to take stock of them and begin taking action to prepare to comply with them when they are finalized. Interested parties have until November 6, to submit comments to the Federal Register. If you have any questions, please contact any member of the Troutman Pepper Health Sciences Practice Group.

[1] *Long Term Care Jobs Report*, Bureau of Labor Statistics, Jan. 2023

<https://www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/LTC-Jobs-Report-Jan2023.pdf>.

[2] Centers for Medicare & Medicaid Services (CMS). Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes Phase II Final Report. Baltimore, MD: CMS; 2001.

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