

New Staffing Mandates for Long-Term Care Facilities

WRITTEN BY

Callan G. Stein | Rebecca E. Younker | Linnea J. Kelly

Last month, on April 22, the Centers for Medicare & Medicaid Services (CMS) issued its Minimum Staffing Standards for Long-Term Care Facilities final rule, which will apply to any long-term care (LTC) facilities that receive federal funding. According to CMS, the adoption of these minimum staffing standards is meant to address perceived chronic understaffing of LTC facilities that CMS believes may lead to sub-standard patient care. Perceived understaffing of LTC facilities has been a primary concern of CMS for some time, particularly after the LTC sector lost nearly 200,000 jobs in the wake of the COVID-19 pandemic.

This new rule addresses nursing home staffing requirements by setting required “hours per resident per day” (HPRD) nursing staff levels. These HPRD requirements are consistent with the relevant [CMS proposed rule](#), released on September 21, 2023, which reflected the agency’s first concrete proposal for minimum staffing requirements. Although many commenters on the proposed rule cited staffing challenges that may result in noncompliance with the rule, this final rule does not substantially deviate from the September 2023 proposal.

It is estimated that 75% of nursing facilities will have to increase staffing to comply with this new staffing mandate. While the rule’s requirements will be introduced in phases, certain requirements will become effective as early as May 11, 2026.

Nursing Home Minimum Staffing Rule Requirements and Implementation Timing

Under the final rule, LTC facilities that receive any federal funding will be required to have 3.48 HPRD of total nursing staffing, including 0.55 HPRD of direct registered nurse (RN) care and 2.45 HPRD of direct certified nurse aide (CNA) care. The remaining .48 HPRD can be met with any combination of RNs, CNAs, or licensed practical nurses (LPNs). This means, for example, that an LTC facility that has 100 residents would need at least two to three RNs and 10 to 11 CNAs per shift to meet the minimum staffing requirements, with higher numbers required based on the specific residents’ needs. The final rule also requires all LTC facilities to have an RN onsite 24/7 to provide skilled nursing care if the need arises.

Given the impact of this new rule, CMS is implementing its requirements in phases, with longer times being afforded to facilities in rural areas. The first requirement to be implemented is the 24/7 RN requirement, which nonrural LTC facilities must implement by May 11, 2026, and rural LTC facilities must implement by May 10, 2027. LTC facilities will have a longer period to implement the new nursing HPRD requirements, with nonrural facilities becoming compliant with the minimum staffing requirements by May 10, 2027, and rural LTC facilities becoming compliant by May 10, 2028.

Enforcement of the New Final Rule

The new final rule constitutes requirements for an LTC facility's participation in Medicare and Medicaid programs. Thus, facilities should expect CMS to take enforcement actions against any facilities that are not in substantial compliance with the requirements. CMS actions to enforce these staffing mandates may include exclusion from Medicare and Medicaid programs, denial of payment for new admissions, monetary penalties, transfer of residents, and/or facility closure.^[1] CMS has already stated its plans to "survey facilities for compliance with the updated LTC requirements in the rule and enforce them as part of CMS's existing survey, certification, and enforcement process for LTC facilities."^[2]

In addition to direct enforcement by CMS, noncompliance with the staffing mandate may expose LTC facilities to liability under the federal False Claims Act (FCA). Because these new rules are requirements for participation in government health care programs like Medicare and Medicaid, LTC facilities will implicitly certify compliance with them when submitting claims for reimbursement. Therefore, facilities that are not actually in compliance with the staffing mandates but falsely certify compliance by submitting, for example, Medicare claims, can be prosecuted civilly or criminally for violating the FCA. These FCA lawsuits can be brought by the federal government or by individual whistleblowers in a *qui tam* lawsuit. Such *qui tam* suits are frequently initiated by individual employees who observe first-hand violations of the conditions of participation. The new minimum staffing requirements lend themselves to these types of *qui tam* complaints, as a current or former LTC employee could very easily acquire first-hand knowledge that a facility is not satisfying the requirements.

Key Risk Mitigation Steps for LTC Facilities

- 1. LTC facilities should determine when they must comply with the new staffing mandate by familiarizing themselves with the requirements and exceptions to the final rule.** Every facility should review the final rule to determine its status as either a "rural" or "nonrural" facility to determine its date of compliance with the new rules. Facilities should also examine potential eligibility for waiver and hardship exemption provisions that may allow extended, phased implementation for facilities unable to meet the requirements before the applicable effective date.
- 2. LTC facilities should begin focusing on recruitment and retention now, well in advance of the effective dates for 24/7 RN and HPRD requirements.** For any LTC facilities that are not already in the process of hiring new nursing staff, now is the time to start. Although facilities have until at least 2026 to comply with the 24/7 RN mandate and at least until 2027 to comply with the HPRD requirements, compliance with the new staffing requirements is likely to be an uphill battle. This is particularly the case in rural areas, where only 5% of LTC facilities currently comply with the 24/7 RN mandate.^[3] Undertaking bona fide, good faith efforts to hire the necessary staff now will increase the likelihood that facilities will be in compliance and may help demonstrate genuine intent to comply should facilities not meet the compliance deadline and be in the position of needing to seek relief from CMS.
- 3. LTC facilities should consider enhanced supervision practices to monitor the larger number of employees.** Given the influx of new hires as facilities work toward compliance, LTC facilities should examine their existing supervision practices and resources. New hires should be carefully screened for qualifications and trained on facility-specific processes. Facilities should consider their staffing needs to cover the additional supervision new hires will require, as failure to properly train or supervise new staff can leave facilities vulnerable to liability.

4. **LTC facilities should consider contracting with third-party emergency nursing staffing companies or “on-call” requirements for nursing staff.** Understanding that last-minute callouts from work are frequent, LTC facilities should consider ways they can protect themselves when they inevitably drop below the minimum staffing standards due to a last-minute callout from an RN or CNA. LTC facilities can mitigate this risk by having the option to utilize one of these emergency service providers, and by implementing a robust policy that addresses work attendance and encourages longer notice for callouts.

5. **LTC facilities should encourage employees to report issues internally to deter whistleblowers.**

Noncompliance with the new staffing requirements stands to be a very fertile ground for whistleblowers to try to exploit. Health care providers of all types, but especially LTC facilities, have long faced the risk of disgruntled former (or even current) employees seeking a payday by filing a whistleblower or *qui tam*. One of the best ways to guard against this risk is by implementing a robust internal reporting structure to encourage employees to raise potential violations *internally*. This allows the facility to work with legal counsel to investigate the concern (within the protection of the attorney-client privilege) and, if necessary, remediate it before it ripens into a formal legal action.

[1] Centers for Medicare & Medicaid Services (CMS), Final Rule: Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting (2024), <https://federalregister.gov/d/2024-08273>.

[2] *Id.*

[3] See Kimberly Marselas, Providers: Staffing rule a CMS “fairy tale” that will “exacerbate” nursing home access issue, McKnights Long-Term Care News (April 23, 2024), <https://www.mcknights.com/news/providers-staffing-rule-a-cms-fairy-tale-that-will-exacerbate-nursing-home-access-issue/>.

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