

Assisted Living and the Law — Preparing for CMS Staffing Mandates**Hosts: Cal Stein and Emma Trivax****Recorded: September 12, 2024****Aired: November 20, 2024****Cal Stein:**

Hello, and welcome to *Assisted Living and the Law*, the podcast series that discusses legal considerations within the long-term care sector. I am your host, Cal Stein, and I'm a litigation partner in the Health Sciences Department at Troutman Pepper. I work with a broad variety of clients in the healthcare space in matters involving litigation and government investigations. I also do quite a bit of counseling work where I advise clients in advance so issues can be avoided altogether or resolved so they do not ever ripen into litigation or an investigation. In my career, I have represented a number of nursing home and skilled nursing facility clients, as well as executives at both. I am joined by my co-host, Emma Trivax.

Emma Trivax:

Hello, all, and thank you for joining us today. I am an attorney in Troutman's Health Sciences Department, and I practice transactional and regulatory law. I represent a wide range of healthcare providers, including, of course, long-term care facilities. You will often see me advising on multistate licensure matters, HIPAA, fraud and abuse analysis, and large-scale mergers and acquisitions.

Today, Cal and I will be diving into the new staffing mandates issued by the Centers for Medicare & Medicaid Services, or CMS. These mandates are set to change the landscape of long-term care facilities significantly. Cal, can you start us off with some basic background on these mandates?

Cal Stein:

Sure thing, Emma. So, these new mandates are known as the minimum staffing standards for long-term care facilities. The key component of the minimum staffing standards is that, they now set required hours per residence per day or HPRD nursing staff levels for short. We're going to discuss those in more detail later on in this episode. The other key component of these minimum staffing standards is that they now require all long-term care facilities to have a registered nurse or an RN on site 24/7.

What's behind these standards and why did CMS come out with them? Well, based on what CMS has said, I think a fair interpretation is that CMS believes that these mandates are going to increase accountability for nursing homes and long-term care facilities. Specifically, accountability for providing safe and high-quality care to the nearly 1.2 million residents currently living in Medicare or Medicaid certified long-term care facilities.

Emma Trivax:

CMS thinks that these mandates will solve the staffing crisis we're seeing at long-term care facilities. I remember a recent study by the Bureau of Labor Statistics showed that the long-term care sector has experienced a decrease of nearly 200,000 jobs, just since the beginning of the pandemic. And employment in the sector is not really expected to grow back to pre-pandemic levels until maybe 2027.

Cal Stein:

Yes. I mean, I think that's right. I mean, it's a real, real problem in the industry right now and likely going forward. I mean, I do think that CMS introduced these mandates as its way of addressing what it perceives as chronic understaffing in long-term care facilities and nursing homes. But with that said, I'm not really sure, I'm not convinced this is the way to do it. Forcing nursing homes and long-term care facilities to hire more people, as most facilities will have to do to comply with these new staffing mandates, that's only going to work if the workforce has enough qualified candidates to fill those positions. It really remains to be seen if that is going to be the case.

There are a lot of facilities out there that believe it is not going to be the case. As we know, before finalizing these staffing mandates, CMS solicited and received nearly 50,000 public comments on that. So, there were a lot of thoughts swirling around about this topic, including many comments on this exact issue, and whether increasing the minimum staffing levels would have the desired positive effect on patient care. But when all was said and done, CMS decided to implement the mandate, so they certainly believe that it will be a positive effect remains to be seen if that's the case.

Emma Trivax:

All right. We're talking a lot about what everyone is thinking about the mandates, how there are various opinions going back and forth. Do we have time to form more opinions, what's going on with these mandates? More specifically, when do these mandates go into effect?

Cal Stein:

Yes. As I mentioned just briefly, the majority of nursing homes and long-term care facilities out there are going to need to make changes to their present workforce and hire more people to comply with these new staffing mandates. Because of that, and somewhat fortunately, CMS has opted for what it calls a phased implementation of these mandates. First, for nursing homes and long-term care facilities that are not classified as rural facilities, the 24/7 registered nurse requirement must be met by May 11th, 2026, so more than a year from now. For rural facilities, that same RN requirement must be met by May 10th, 2027. It's more than two years from now. For the HPRD requirements, which are the ones where facilities are really going to have to hire more staff to meet non-rural facilities must meet them by May 10th, 2027, and rural facilities must meet them by May 10th, 2028.

Emma Trivax:

Okay. So, there's a decent amount of time before these mandates go into effect. So, maybe by the time the mandate is actually in effect, staffing will be back up to those pre-pandemic levels like the Bureau of Labor Statistics is predicting. So, let's now pivot and get into the nuts and bolts of these mandates. What are the specific HPRD levels that facilities need to meet?

Cal Stein:

Okay. I want to go through these a little bit slowly because they can actually be a little bit tricky to follow. Under the new staffing mandates, nursing homes and long-term care facilities must have 3.48 HPRD, which again is hours per resident per day of total nursing staffing. That 3.48 total HPRD of nursing staffing is actually further broken down by the mandates as follows. 0.55 HPRD must be of direct registered nurse care, 2.45 HPRD must be of direct certified nurse assistant, or CNA care, and the remaining 0.48 HPRD can be met with any combination of RN, CNAs, or licensed practical nurses, sometimes called LPNs.

Emma Trivax:

That was a lot of numbers. Can you give us an example to illustrate this?

Cal Stein:

Yes, I sure can. Unfortunately, those numbers, CMS didn't pick nice round numbers, which would have been, I think a little bit easier. But let me give an example to see if I can hopefully crystallize this. Let's think about a nursing home or a long-term care facility that has a nice round number of 100 residents. With 100 residents, 3.48 hours per resident per day comes out to 348 total hours. Fifty-five hours of which must be RN care, 245 hours of which must be CNA care, and the other 48 hours can be RN, CNA, or LPN care.

So, let's start with the RNs. To get to 55 hours per day, a facility is likely to need two or three RNs per shift. If we assume a day is three shifts, each of eight hours, that means the 100-resident facility would need just over 18 hours per shift, which means the minimum is more than two RNs per shift. The math for the CNAs is the same, but for 245 hours. Again, using three shifts per day, that means the 100-resident facility would need over 81 hours per shift, which means the minimum is just over 10 CNAs per shift. That's the two or three registered nurses per shifts, 10 or 11 certified nursing assistants per shift.

Since the facility is not going to hire a fraction of a person, the remainder of those staff can contribute to the remaining 48 hours required by the staffing mandates. Of course, even in this example, these are just the minimum requirements. The needs of the facility actually may dictate more staff than the minimum.

Emma Trivax:

Okay. So, I will just put my calculator away now. Moving on, how will CMS enforce these mandates? Because, I realize that there is a lengthy implementation period, but I think a lot of long-term care facility stakeholders are concerned, nonetheless, that they won't be able to meet this mandate.

Cal Stein:

Yes. Enforcement of these mandates is something that facilities should be concerned about. Look, we're not really sure what CMS is actually going to do when these mandates go into effect to enforce them. But what we do know, at least, is what CMS has said it's going to do about enforcing these mandates.

First, CMS has said, it plans to enforce these mandates as part of its existing survey certification and enforcement process. Now, for those who may not be familiar with this process, I mean, it could be a whole separate podcast episode itself. But basically, state surveyors go out and conduct unannounced surveys of facilities to look at a whole host of things that have long been required of nursing homes and long-term care facilities.

Now, those same surveyors are going to be tasked with examining the staffing levels as well, to make sure that facilities are in compliance with these minimum staffing mandates. Now, doing these reviews as part of the existing survey process as opposed to hiring new surveyors to schedule and execute dedicated surveys, to manage compliance with the mandates. I mean, it makes a lot of sense for CMS to do it this way. The logistics of doing dedicated surveys, not to mention the cost of doing dedicated surveys would be extremely difficult.

Second, it also appears that these staffing mandates are going to be a condition of participation for Medicare. What that means is that, every time a facility submits a claim to Medicare, it is going to be certifying its compliance with the staffing mandates. If it turns out that a facility was not actually in compliance when it certified that it was, that can result in criminal or civil liability under the False Claims Act. That is the statute that federal regulators typically use to enforce CMS conditions of participation. I would expect they will use it to enforce these minimum staffing mandates as well.

Violating the False Claims Act carries some very harsh penalties. It can include things like exclusion from Medicare and Medicaid programs, denial of payment for new admissions, monetary penalties, transfer of residence. And even facility closures on top of the criminal exposure, which can lead to jail time in certain circumstances.

Emma Trivax:

Okay. This sounds like it could have a very significant impact on the industry. But you know, I do recall that the rule provides for some exemptions. It looks like there are five criteria that these facilities have to meet. First, the nursing workforce in the facility's labor category must meet at least 20% below the national average for the applicable nurse staffing type.

Second, the facility has to show that it's made a good faith effort to hire and retain staff. Third, they need to provide documentation proving their financial commitment to staffing. Fourth, the facility must post a notice of its exemption status in a prominent and publicly viewable location within each resident facility. And finally, they have to give individual notice of their exemption status and the degree of non-compliance with the HPRD requirements to each current and prospective resident, and also send a copy of this notice to a representative of the Office of the State Long-Term Care Ombudsman.

Cal Stein:

Emma, I'm really glad you brought up this issue because there's actually a pretty large conversation happening right now about the exemptions. There are a lot of stakeholders out there who actually are concerned that there are too many facilities that are going to qualify for these exemptions. As a result of that, it may end up minimizing or significantly mitigating the intended impact of the staffing mandates. Of course, there are also other stakeholders who are criticizing the exemptions for being too arbitrary, and ultimately, too difficult for facilities to meet.

While these exemptions are out there, really kind of seems like nobody's all that happy with them. That is before we even get to the confusion that exists about how to go about applying for one of these exemptions.

Emma Trivax:

Okay. Well, exemptions aside, what are some potential challenges that long-term care facilities should expect?

Cal Stein:

Yes. I'm glad we got to this, because when facilities ask us about these mandates, we spend a lot of time going through the nuts and bolts of them with them as we've done so far. But I think the practical impact of these mandates is just as important, if not more important. First and foremost, at least from my perspective, is the impact the mandates are going to have on facility's ability to hire qualified personnel. We touched on this a little bit before, but in my view, the mandates are very likely to make finding and hiring qualified staff, and even retaining your own qualified staff, it's going to make that harder than ever.

This is significant, as we have discussed, the nursing home and long-term care facility industry is already facing staffing issues and these mandates threaten to exacerbate those issues. The mandates are likely to mean higher demand for staff, which means higher costs for facilities looking to hire the best people. It also may mean that facilities have to rely more on staffing agencies, which can likewise be expensive. The same goes for staff retention. Higher demand means that facilities will have to do more and pay more to retain their best people who will now have a lot of options elsewhere.

Emma Trivax:

That does sound difficult. It makes me also think that this mandate will have impacts on operations and patient care, as well as the facility level hardships you just described. It sounds like, because this mandate is based directly on resident numbers, facilities struggling to maintain the mandated staffing levels may have to turn away residents, which would prevent people from getting the care they need.

Also, going back to what you just said about costs increasing for facilities, this would lead to increase costs to residents, which could price many out of care, and there could be a potential negative impact on the quality of care, leading to more investigations and more lawsuits. Given these challenges, what are some risk mitigation strategies that facilities can adopt?

Cal Stein:

Yes. Emma, before I get to the risk mitigation, I do want to respond to what you just said about increased costs for facilities, which I think is a real issue. The risk with increased costs is that these mandates end up having the opposite effect on patient care than CMS intended. We know and we've heard that profit margins for nursing homes and long-term care facilities are pretty thin to begin with, even under the current staffing models. These staffing mandates threaten to increase staffing costs, thereby stretching the margins even thinner.

You mentioned the possibility of facilities passing the increased costs on to their customers, which are the patients, their families. And in the case of Medicare and Medicaid patients, the government. That's a real possibility, in my view, and really could lead to nursing home care being less accessible, which we would all agree is a bad thing.

There's another possibility as well, which is that, these facilities are going to look to save the costs elsewhere to keep their margin flat in the face of increased staffing costs. This presents even more risk for patient care depending on where the facility cuts those costs. Could a facility use, for example, a lower cost cleaning company or less frequent cleaning? Could a facility hire less experienced nurses and technicians? These are real conundrums that facilities are going to face, and they present real risks to patients, but also, to the facilities themselves.

I expect facilities to face increased government scrutiny. Yes, we know that. But also increased litigation risks, could be from residents, or their families who bring actions based on what they perceive to be substandard care or corners being cut. Could also be a whistleblower, a current, or former employee of a facility that wants to get a payday making a report like that to a federal regulator or even in a qui tam lawsuit.

That all segues nicely, I think, into your question about risk mitigation strategies. One thing that facilities really should start with is evaluating their compliance timeline and understanding their status as either a rural or non-rural facility. As we discussed earlier, that is going to dictate the date by which the facility must comply, and from that, is going to flow a compliance strategy and timeline. Facilities should really begin focusing on recruitment and retention right now, and look to be hiring new nursing staff well in advance of the effective dates for them, whatever those dates are.

On top of that, I know we've also recommended that facilities work on enhancing their existing supervision practices and policies. Again, as we've noted throughout, the ripple effect of these mandates is very likely to be that less and less experienced staff will be asked to handle more and more responsibility. And it makes good sense for facilities in those situations to lean more heavily on their experienced employees. The way to do that is by enhancing the supervision they have over the less experienced ones.

Also, facilities should consider contracting with third-party staffing companies. I know this is not something that facilities love to do, because they can be expensive, but really, they may become a necessity with these staffing mandates. Consider a situation when an employee calls out sick, or just doesn't show up for work, and a facility all of a sudden isn't just understaffed for a day, but now it's not in compliance with a CMS condition of participation.

Finally, we always talk to facilities about implementing a robust internal reporting structure to encourage employees to report potential violations internally. I know that sounds counterintuitive. Why would you want to encourage employees to report things? But by doing that, it allows facilities to address the issues before they escalate externally, either into litigation or an investigation.

Emma Trivax:

Those are all really great strategies, Cal. Just to add to that last strategy with a quick anecdote. I had a client without an internal reporting structure in place, and it resulted in an employee filing several formal complaints against them. Once my client implemented an internal reporting structure, that same employee only complained internally. Any issues were resolved speedily and without issue.

I know, like you said, a lot of people are afraid to allow for this kind of direct communication with their employees. But yes, it ultimately saves a lot of heartburn down the road. So, anyways, it's clear that while these mandates present challenges, there are ways for facilities to navigate them effectively.

Cal Stein:

Absolutely, Emma. That's such a good example you gave. It's one that we've seen over and over again. With careful planning and by taking proactive measures, facilities can comply with these mandates, and they can continue to provide high quality care to their residents while mitigating the risk of government investigations or these whistleblower lawsuits that we've talked about. All of that said though, look, anytime there are new regulations or new requirements, that always creates an environment that is ripe for these things.

Nursing homes and long-term care facilities are going to have to work with internal and external legal counsel to avoid pitfalls, and hopefully, to avoid litigation and government investigations altogether. As you noted, it really is, in my opinion, the most important thing to do, is to keep these issues internal for as long as you can, hopefully until you resolve them. The best way to do that is to create a culture of compliance and to give your employees who are on the front lines and are going to be seeing, for example, violations of the staffing mandate or issues with care that result from lower experienced people in more prominent roles. You have to give those people a voice to raise their concerns.

When they do, facility has to do something in response, including investigating and taking remedial action. That's how you show your employees that you're serious about compliance. The best way to do that is to do it in a privileged setting. So, be sure to work closely with counsel. That is the best way to mitigate all of these risks.

Emma Trivax:

Thanks, Cal. You've shared a lot of great insights today. You know, as a fellow attorney and someone who's been really reading up on this stuff, it's always quite interesting to hear another perspective on this kind of topic. Again, thank you for your insights today.

Cal Stein:

Thank you, Emma. It's always a pleasure to be on with you and to work with you. I also want to thank all of the listeners for tuning in to Assisted Living and the Law podcast. If anyone has any thoughts, comments, or questions about this series or about this episode, please, feel free to contact either me or Emma. Please subscribe and listen to this podcast and other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening. As always, stay informed and stay healthy.

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