

## Final Rule Summary

### Minimum Staffing Standards for Long-Term Care Facilities

On Monday, April 22, 2024, the Centers for Medicare & Medicaid Services (CMS) released the long-awaited [final rule](#) implementing a minimum staffing standard in nursing homes. The culmination of a two-year process, including a request for information, a study, and a comment period, CMS has introduced a staffing rule designed to address the poorest-performing homes in the United States.

The final total staffing rule is well below the 4.2 hours of direct care per resident per day (HPRD) supported by Consumer Voice<sup>1</sup>, and includes numerous waivers and delays in implementation for some areas for at least five years. While Consumer Voice recognizes the rule as an important first step in obtaining adequate staffing in nursing homes, continued advocacy is necessary to ensure all residents receive high-quality nursing care.

**Below is a detailed summary of the rule by section of the Federal Code.**

#### 42 C.F.R. § 483.35 Nursing Services

**(b)(1)** This section implements the new requirement that nursing homes must provide 3.48 HPRD. To meet this standard, a facility must meet or exceed at least:

- (i)** .55 HPRD of Registered Nurse (RN) care; and
- (ii)** 2.45 HPRD of Nurse Aide (NA) care.

To meet the remaining .48 HPRD of care, CMS is giving facilities the flexibility to use RNs, NAs, or Licensed Practical Nurses (LPNs).

Critical language is included under **(b)(3)**, which is included here in its entirety:

Compliance with minimum total nurse staffing hours per resident day as set forth in one or more of the hours per resident day requirements of paragraph (b)(1) of this section should not be construed as approval for a facility to staff only to these numerical standards. **Facilities must ensure there are a sufficient number of staff with the appropriate competencies and skills sets necessary to assure resident safety and to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments, acuity and diagnoses of the facility's resident population in accordance with the facility assessment at § 483.71.** (Emphasis added)

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<sup>1</sup> Consumer Voice in its comments on the proposed rule relied heavily on a recent staffing study conducted by CMS that documented better health outcomes at staffing levels higher than in the proposed rule. In fact, the study showed that to keep delayed and omitted care below 10%, 4.2 HPRD, composed of 2.8 CNA HPRD and 1.4 HPRD of licensed nurse care was necessary. Consumer Voice's comments here: <https://bit.ly/3UtgcwY>

The language makes clear that the total staffing standard is a minimum and not a ceiling. All facilities will continue to be required to staff to each resident's needs. Many nursing home residents will likely need care that far exceeds the 3.48 HPRD.

**(c)(1)** Implements a new requirement that all nursing homes must have an RN onsite and available to provide direct care twenty-four hours per day (24/7), seven days per week. CMS states in the preamble to the rule that it plans to allow the Director of Nursing to count towards this requirement, if the DON is available to provide direct care. Prior to this rule, nursing homes were only required to have an RN present in the facility eight consecutive hours per day.

**(c)(2)** Contains a new requirement that if the 24/7 RN requirement is waived under Section (h)(which will be discussed below) a facility must have an RN, Nurse Practitioner, Physician Assistant, or physician available to respond immediately to phone calls from the facility.

## Waiver of Requirements to Provide Adequate Staffing

CMS provides facilities with numerous opportunities to qualify for waivers of some or all of the staffing requirements.

**Below is a summary of all the waiver opportunities in the final rule.** The first two waiver opportunities (483.5(f) and (g)) are based on statutory waivers that pre-existed the final rule, while the waivers created in 483.5(h) are brand new.

### *Waivers of Licensed Nurse, 24hr RN, and/or .55 RN HPRD Requirements – Nursing Facilities*

**483.5(f)** – The State may waive the requirement that a Nursing Facility provides licensed nurses, a registered nurse on a 24-hour basis, and/or the requirement that a resident receive .55 RN HPRD if:

- The facility demonstrates it has been unable to recruit appropriate personnel despite diligent efforts;
- The State determines the health or safety of the residents is not endangered;
- An RN or physician is obligated to respond immediately to telephone calls from the facility;
- Notice of a waiver must be provided:
  - By the State agency granting the waiver to the State LTC Ombudsman and the Protection and Advocacy System;
  - By the facility to residents and their representatives.

This waiver is subject to annual State review.

### *Waiver of Requirement to Provide RN Services for More Than 40 hours a week – Skilled Nursing Facilities*

**483.5(g)** – The Secretary may waive the requirement that a SNF provide RN services for more than 40 hours per week if –

- The facility is in a rural area and the supply of SNF services is not sufficient to meet the needs of individuals living in the area;
- The facility has 1 full-time RN who is regularly on duty 40 hours a week; and

- The facility only has patients who, as indicated by their physicians, do not require RN or physician services for a 48-hour period, or the facility has made arrangements for an RN or physician to spend time at the facility when the regular full-time RN is not on duty.
- Notice of a waiver must be provided:
  - By the Secretary to the State LTC Ombudsman and the Protection and Advocacy System;
  - By the facility to residents and their representatives.

This waiver is subject to annual renewal by the Secretary.

### *Waivers of the Total Minimum Staffing HPRD, NA and RN HPRD, and/or 24/7 RN Requirements*

**483.5(h)** – the Secretary may exempt a facility from meeting one or more of the minimum nurse staffing requirements (3.48 total; .55 RN; 2.45 NA) and eight hours of the 24/7 RN requirement if a verifiable hardship exists prohibiting them from complying.

#### **The facility must meet 4 criteria to qualify for and receive a hardship exemption:**

1. **Location** – the facility is in an area where the supply of applicable healthcare staff is not sufficient to meet area needs. The supply of staff is determined not to be sufficient if the provider to population ratio for the nursing workforce is at least 20 percent below the national average (calculated by CMS using Bureau of Labor Statistics and Census Bureau data).

The provider to population ratio is to be evaluated for each requirement – 3.48 total staff, .55 RN, 2.45 NA, 24/7 RN – to determine if a hardship exemption for that requirement may be granted. For example, the facility may receive an exemption from the 3.48 HPRD requirement if the combined licensed nurse (RN, LPN/LVN) and nurse aide to population ratio is at least 20 percent below the national average.

2. **Good faith efforts to hire** – the facility demonstrates an inability to recruit and retain appropriate personnel despite diligent efforts (including offering prevailing wages). Facilities will have to document that they posted jobs, made offers, documented average local wages, and shared their staffing plan.
3. **Demonstrate financial commitment** – the facility is required to document the amount of financial resources it spends on staffing relative to revenue.
4. **Disclosure of exemption status** – Must be –
  - a. Posted in a prominent location in the facility, in a manner that is accessible and understandable by residents and representatives. The exemption disclosure must include the extent to which the facility does not meet the minimum staffing requirements and the timeframe during which the exemption applies;
  - b. Provided to each current and prospective resident and representative; and
  - c. Sent to the State LTC Ombudsman.

#### **Facilities are Excluded from exemptions if any of the following exist. They–**

- Are a Special Focus Facility
- Have been cited for immediate jeopardy, widespread or a pattern of insufficient staffing with resultant resident actual harm,
- Have failed to submit Payroll Based Journal data.

Hardship exemptions may be extended on each standard recertification survey, if the facility continues to meet the criteria.

CMS has created a complex web of waivers that allow nursing homes to avoid some, if not all of the new staffing requirements. CMS has stated that nursing homes will have the “regulatory flexibility” to choose which waiver for which they want to apply.

## Implementation Timelines

CMS has staggered the implementation of the new staffing requirements and has also provided rural areas<sup>2</sup> significantly more time to meet the new requirements, despite the fact there is little evidence that rural facilities will have a more difficult time meeting the standards than non-rural facilities. The new facility assessment requirements (discussed below) must be implemented by all facilities within 90 days of the posting of the final rule. The other implementation timelines are as follows:

### Rural Facilities:

- The 3.48 total HPRD requirement and 24/7 onsite RN requirement must be met three years after the publication of the final rule
- The .55 RN HPRD and 2.45 NA requirement must be implemented five years after the publication of the final rule.

### Non-Rural Facilities

- The 3.48 total HPRD requirement and 24/7 onsite RN requirement must be met two years after the publication of the final rule
- The .55 RN HPRD and 2.45 NA requirement must be implemented three years after the publication of the final rule.

## Enforcement of Staffing Requirements

CMS shared little information on how it plans to enforce the new staffing standard. CMS promises to release more information but stated that it plans to rely on a combination of data and in-person surveys. Facilities will be automatically considered for a waiver, if during an annual survey they are found non-compliant with the staffing regulations.

## Facility Assessment

In the final rule, “facility assessment” has been pulled out of the section on administration (483.70) and established as its own section 483.71. The facility assessment is intended to help determine what resources are needed for a facility to care for its residents. It is required to be updated annually. In this rule, CMS enhanced the language of the facility assessment, requiring facilities to incorporate evidence-based, data-driven methods for determining the care required by its residents that is consistent with and informed by individual resident assessments. CMS also added language requiring involvement of nursing home leadership and direct care staff in the development of the facility assessment; and also to solicit and consider input from residents, their representatives, and family

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<sup>2</sup> CMS will use United States Census Bureau data to determine whether a facility is in a rural area.

<https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html#:~:text=Rural%20encompasses%20all%20population%2C%20housing,and%20For%20population%20density%20requirements>

members. The final rule also establishes how the facilities are to use the facility assessments, including to inform staffing decisions, consider specific staffing needs for each unit and each shift, to maximize recruitment and retention of staff, and to inform planning for contingencies that could affect resident care (other than emergencies).

## Medicaid Transparency

CMS is requiring States to report annually, by facility, the percentage of Medicaid payments spent on compensation for direct care workers and for support staff in nursing facilities and intermediate care facilities for individuals with intellectual disabilities (ICFs/IID). Similar reporting is required for payments from managed care organizations (MCO) or prepaid inpatient health plans. Additionally, each State must operate a website that provides the information reported under this section to CMS. The information on the website must be clear and easy to understand and must be verified at least quarterly. CMS will also report the information submitted by the States under this section on its website.

The implementation of a minimum staffing standard was the culmination of decades of advocacy by nursing home residents, their families, and advocates. While the total minimum standard and the required components fall short of the recommended levels supported by Consumer Voice, it is an important step to achieving adequate and safe staffing in nursing homes. **Importantly, the 3.48 HPRD is a minimum.**

In fact, CMS's own study<sup>3</sup> showed that the average total staffing level in nursing homes was 3.76 HPRD, well above the final 3.48 HPRD minimum standard, so most nursing homes will continue to need to staff well above the 3.48 HPRD. Facilities are still required to meet the staffing needs of every resident. CMS should rigorously enforce the standard, issue waivers in only the most extreme cases, and ensure that facilities are meeting the needs of all residents.



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<sup>3</sup> <https://www.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf>