

"Crackdown": Proposed Nursing Home Minimum Staffing Rule to Cost the Industry \$4.23 Billion and Would Directly Impact For-Profit Facilities

Authors: Thomas H. Barnard

September 18, 2023

According to President Biden's recently published column, the Administration's proposed rule, published on September 6, 2023, mandating that nursing homes begin to staff facilities so that registered nurses (RNs) and nurse aides (NAs) provide a minimum number of hours per resident day (HPRD) of care is a "crackdown" designed to "[deliver] a clear message to the nursing home industry: no more padding profits on the backs of residents and nurses." The President's column clarifies that the Administration is focused on for-profit facility staffing, particularly in those facilities owned by private equity firms, although the rule would apply to both non-profit and for-profit facilities. The Centers for Medicare & Medicaid Services (CMS) and the U.S. Department of Health and Human Services (HHS) estimate that facilities' total cost to satisfy the proposed minimum staffing requirement would cost the industry approximately \$4.23 billion. Furthermore, CMS and HHS acknowledge that the proposed requirements would require approximately 79 percent of long term care (LTC) facilities to increase their staff levels to ensure full compliance with the proposed requirements.

The rule suggests a comprehensive staffing approach requiring Medicare and Medicaid-certified LTCs to: 1) abide by a new minimum nurse staffing standard based on case-mix; 2) increase their on-site RN presence; and 3) consider new factors in their facility assessments. Specifically, the proposed rule would mandate that facilities maintain an RN staffing requirement of 0.55 HPRD, which is higher than any current RN staffing requirement in any state, except for the District of Columbia. The proposed rule would also require that NAs be staffed at a minimum of 2.45 HPRD, higher than the current minimum in any state or the District of Columbia. Hours staffed by other licensed nurses, such as licensed practical nurses (LPNs) and licensed vocational nurses (LVNs), would not be included in the minimum requirement. In addition, LTC facilities would be required to have an RN onsite 24 hours per day, seven days a week.

Critically, the rule makes clear that the minimum established HPRD is a floor, not a ceiling. Facilities must ensure that their staffing levels consider patient acuity and are based on the results of a facility assessment conducted at least annually, the extensive requirements for which are set out in the proposed rule. The facility assessment is to be developed using evidence-based, data-driven methods that consider both the needs of the facility's residents and the facility staff's competencies. The proposed rule emphasizes that it is not incentivizing facilities currently staffing at higher levels than proposed in the rule to decrease numbers, but rather to ensure that "a LTC facility's staffing decisions should be based on the specific needs of its resident population and not motivated by cost-savings."

The proposed rule does include a hardship exemption from the minimum HPRD requirements for RNs and NAs, under certain circumstances. To qualify, the facility must be located either in an area where the supply of RNs and/or NAs is insufficient to meet geographic needs, as determined by CMS and HHS, or be 20 or more miles from the next closest LTC facility. In addition, the facility must also be able to document that it has made a good-faith effort to hire and retain staff. Lastly, the facility must be surveyed and cited as noncompliant with the minimum staffing requirement, then demonstrate through documentation the financial resources that the facility expends annually on nurse staffing relative to revenue. However, facilities can negate a potentially available exemption from the staffing requirement if they fail to submit payroll-based journal system data, are

classified as a Special Focus Facility (SFF), or based on survey history and other criteria. The proposed rule would implement the final requirements in three phases over a three-year period for facilities located in urban areas, and over a five-year period for facilities located in rural areas.

CMS and HHS state that the types of LTC facilities that may need to increase staffing to meet the minimum requirements include for-profit facilities, as compared to government and non-profit facilities. Also expected to be impacted are larger facilities, freestanding LTC facilities (relative to hospital-based facilities), facilities that are part of a continuing care retirement community, facilities with higher shares of Medicaid residents, SFF facilities or candidates, and rural facilities.

The proposed rule also emphasizes the need for increased efforts to recruit and retain direct care workers into the industry. The proposal includes a new provision that would specify requirements for states to report, annually by delivery system and by facility, the percentage of Medicaid payments that nursing facilities spent on compensation for direct care workers and support staff.

Analyses of the proposed mandates, to date, have noted a number of issues with the proposed rule, as it is currently drafted, that would significantly increase the investment and oversight involved in operating a nursing home. For specific guidance or more information regarding the provisions and impact of this proposed rule, please contact any member of [Baker Donelson's Long Term Care Team](#).