CLIENT ALERT: MINIMUM STAFFING

CMS Final Rule: Minimum Staffing Standards for Long-Term Care (LTC) Facilities and Medicaid Institutional Payment Transparency Reporting Rule (CMS-3442-F)

On April 22, 2024, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services finalized the Minimum Staffing Standards for Long-Term Care (LTC) Facilities and Medicaid Institutional Payment Transparency Reporting rule. The final rule was published in the Federal Register on May 10, 2024, and will become effective June 21, 2024. Myers and Stauffer is providing this client alert to ensure states are aware of several notable provisions specific to the minimum staffing and reporting standards.

For the full finalized rule PDF, see https://www.govinfo.gov/content/pkg/FR-2024-05-10/pdf/2024-08273.pdf

The final staffing and reporting rule primarily focuses on achieving the following CMS goals to:

- Address the importance of staffing to resident health and safety.
- Address the continued insufficient staffing and non-compliance by a subset of facilities.
- Reduce variability in the minimum floor for nurse-to-resident ratios across states.
- Address the need to support nursing home staff.
- Reduce the risk of residents receiving unsafe and low-quality care.

Finalized staffing and reporting regulatory revisions consist of the following primary topic areas:

- Minimum Nurse Staffing Standards.
- Registered Nurse (RN) On-Site Requirement.
- Facility Assessment Requirement.
- Regulatory Flexibility.
- Staggered Implementation.
- Medicaid Institutional Payment Transparency.

CMS will 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 under 42 CFR part 488.

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MINIMUM NURSE STAFFING STANDARDS

To supplement the existing "Nursing Services" requirements at 42 CFR 483.35(a)(1)(i) and (ii), CMS is specifying that facilities must provide, at a minimum, 3.48 total nurse staffing hours per resident day (HPRD). That total includes a minimum of 0.55 RN HPRD and 2.45 nurse aide (NA) HPRD. Facilities may use any combination of nurse staff to account for the additional 0.48 HPRD needed to comply with the total nurse staffing standard. These are minimum standards and CMS expects facilities to base need on resident assessments which may require a higher staffing need based on acuity. CMS is defining "hours per resident day" as staffing hours per resident per day, which is the total number of hours worked by each type of staff divided by the total number of residents as calculated by CMS.

RN ON-SITE REQUIREMENT

CMS is revising § 483.35(b) to require an RN to be on site 24 hours per day and seven days per week (24/7 RN) to provide skilled nursing care to all residents in accordance with resident care plans, with an exemption from eight hours per day of the on-site RN requirement under certain circumstances. The 24/7 RN on site can be the Director of Nursing; however, they must be available to provide direct resident care.

FACILITY ASSESSMENT REQUIREMENT

CMS is revising the existing Facility Assessment requirements at § 483.70(e), and are re-designating the provisions at § 483.70(e) to a standalone section at § 483.71. They are modifying the requirements to ensure that facilities have an efficient process for consistently assessing and documenting the resources and staff the facility requires to provide ongoing care for its population based on the specific needs of its residents. CMS is finalizing the following:

- Facilities must include the input of the nursing home leadership, including, but not limited to, a member of the governing body and the medical director; management, including but not limited to, an administrator and the director of nursing; and direct-care staff, including, but not limited to, RNs, licensed practicing nurses/licensed vocational nurses, and NAs, and representatives of direct-care staff as applicable. The LTC facility must also solicit and consider input received from residents, resident representatives, family members, and representatives of direct-care staff.
- Facilities must use the facility assessment to evaluate the specific needs of each resident and make adjustments, as necessary, based on any significant changes in the resident population. This includes making staffing decisions, developing and maintaining a plan to maximize recruitment and retention of direct-care staff, to inform contingency planning for events that do not necessarily require activation of the facility's emergency plan.
- Facilities must use evidence-based methods when care planning for their residents, including consideration for those residents with behavioral health needs.

REGULATORY FLEXIBILITY

CMS acknowledges that, in some instances, external circumstances may temporarily prevent a facility from achieving compliance despite the facility's demonstrated best efforts and some LTC facilities may still be experiencing challenges in hiring and retaining certain nursing staff because of local workforce unavailability.

Therefore, CMS is allowing for hardship exemptions, to apply in limited circumstances, to the HPRD and 24/7 on-site RN requirements.

LTC facilities may qualify for a temporary hardship exemption from the minimum nurse staffing HPRD standards and the 24/7 RN requirement only if they meet the following criterion at § 483.35(h):

- The facility is located in an area where the supply of RN, NA, or total nurse staff is not sufficient to meet area needs as evidenced by the applicable provider-to-population ratio for nursing workforce (RN, NA, or combined licensed nurse and nurse aide), which is a minimum of 20 percent below the national average, as calculated by CMS using data from the U.S. Bureau of Labor Statistics and the U.S. Census Bureau.
- The facility may receive an exemption from the total nurse staffing requirement of 3.48 HPRD if the combined licensed nurse and nurse aide to population ratio in its area is a minimum of 20 percent below the national average.
- The facility may receive an exemption from the 0.55 RN HPRD requirement, and an exemption of eight hours a day from the RN on-site 24-hours per day for seven-days-a-week requirement, if the RN to population ratio in its area is a minimum of 20 percent below the national average.
- The facility may receive an exemption from the 2.45 NA HPRD requirement if the NA to population ratio in its area is a minimum of 20 percent below the national average.

Prior to being considered, the LTC facility must be surveyed for compliance with the LTC participation requirements. CMS will coordinate with state survey agencies to determine if the facility meets the criteria for a hardship exemption, and the facility must provide sufficient documentation of efforts and commitments to hiring staff. Facilities must also prominently post their exemption status and provide to residents and Office of the State LTC Ombudsman. Facilities are not eligible for an exemption if any one of the following is true:

- They have failed to submit their data to the Payroll Based Journal System.
- They have been identified as a special-focus facility.
- They have been identified within the preceding 12 months as having: widespread, or a pattern of, insufficient staffing that resulted in actual harm to a resident; or an incident of insufficient staffing that caused or is likely to cause serious harm or death to a resident.

STAGGERED IMPLEMENTATION

CMS provides a staggered implementation time-frame of the minimum nurse staffing standards and 24/7 RN requirement based on geographic location as well as possible exemptions for qualifying facilities for some parts of these requirements based on workforce unavailability and other factors.

Phases	Non-Rural	Rural
Phase 1 § 483.71	Within 90 days of final rule publication date: meet facility assessment requirements.	Within 90 days of final rule publication date: meet facility assessment requirements.
Phase 2 § 483.35(b)(1) and (c)(1)	Within two years of final rule publication date: meet 3.48 HPRD total nurse staffing requirement and the 24/7 RN requirement.	Within three years of final rule publication date: meet 3.48 HPRD total nurse staffing requirement and the 24/7 RN requirement.
Phase 3: § 483.35(b)(1)(i) and (ii)	Within three years of the final rule publication date: meet the 0.55 RN and 2.45 NA HPRD requirements.	Within five years of the final rule publication date: meet the 0.55 RN and 2.45 NA HPRD requirements.

CMS will use the Office of Management and Budget (OMB) definition to define "rural" status. OMB designates counties as Metropolitan (metro), Micropolitan (micro), or neither. "A Metro area contains a core urban area of 50,000 or more population, and a Micro area contains an urban core of at least 10,000 (but less than 50,000) population. All counties that are not part of a Metropolitan Statistical Area (MSA) are considered rural."

MEDICAID INSTITUTIONAL PAYMENT TRANSPARENCY

CMS is finalizing reporting requirements to promote public transparency related to the percentage of Medicaid payments for services in nursing facilities (NFs) and intermediate-care facilities for individuals with intellectual disabilities (ICFs/IID) that is spent on compensation to direct-care workers and support staff.

States will be required to report to CMS the percentage of Medicaid payments for services in NFs and ICFs/IID that is spent on compensation for direct-care workers (such as nursing and therapy staff) and support staff (such as housekeepers and drivers providing transportation for residents). Compensation includes benefits, however excludes costs of travel, training, and personal protective equipment from the calculation of the percent of Medicaid payments going to compensation. These requirements apply regardless of whether a state's long-term services and supports delivery system is fee-for-service or managed care.

Both states and CMS will be required to make the payment information available on public-facing websites. Indian Health Service and Tribal health programs subject to 25 U.S.C. 1641 are exempt from the reporting requirements.

Reporting requirements finalized at § 442.43 begin four years from the publication date of this final rule.

NEXT STEPS

This final rule will have significant implications on NF providers and state Medicaid programs, as this staffing mandate is largely unfunded by CMS. Providers will need to assess hiring needs based on the minimum requirements and will have challenges competing for resources in the current market. NFs will likely lobby for state Medicaid agencies to help fund the staffing minimums, which will be a challenge for states that often struggle to find additional dollars for Medicaid budgets. State Medicaid agencies will also assume the administrative burden of collecting Medicaid payment information and reporting to CMS and on state websites.

Of note: there are existing federal bills currently in committee to monitor, that, if enacted, could negate the implementation of this rule.

Myers and Stauffer partners with more than 30 states to establish NF Medicaid rates, perform NF cost report reviews, process minimum data set (MDS) case-mix information, and consult on NF Medicaid reimbursement and financing issues. We are available to assist with fiscal analysis of the impacts this rule may have on Medicaid NF programs, assist with cost and payment reporting requirements, and are available for general consulting or other long-term care reimbursement needs.

FOR MORE INFORMATION

Myers and Stauffer is available to discuss any issues in the finalized rule. If you have questions or need assistance in assessing the impact of these changes on your long-term care program please contact the following members of our NF and MDS Engagement Team.

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