



**Assessment of the Use of Non-Registered Nurses in Licensing and Certification
Regulatory Activities
Report to the Legislature**

As required by Senate Bill 857, Chapter 31, Statutes of 2014

Prepared By:

California Department of Public Health
February 2016

Executive Summary

The California Department of Public Health's (Department's) Licensing and Certification (L&C) Program investigated the feasibility of using professional position classifications other than Health Facilities Evaluator Nurses (HFEN) to perform licensing and certification survey and/or complaint investigation work. Based on a review of federal requirements for survey staff, California civil service classification requirements, complaint investigation workload, the Department will initiate a pilot project in 2015-16 to use Associate Governmental Program Analysts (AGPAs) or Special Investigators (SIs) to perform medical information breach investigations currently performed by HFENs.

Statutory Requirement

Senate Bill 857 (Chapter 31, Statutes of 2014) required the Department to provide a report to the Legislature assessing the possibilities of using professional position classifications other than HFENs to perform licensing and certification survey or complaint investigation workload.

Background

Health and Safety Code sections 1254, 1207 and 1417.1 require the Department to license health care facilities that operate in California. Pursuant to that authority, the Department licenses and certifies approximately 30 different types of health facilities, including hospitals, skilled nursing facilities (SNFs), clinics, and home health agencies. The Department is required to certify facilities for participation in Medicare (Title XVIII) and/or Medi-Cal (Title XIX), as well as provisions of California's Medicaid State Plan that describe the nature and scope of the state's Medicaid (Medi-Cal) program. The Department develops and enforces state licensure standards, conducts inspections to assure compliance with federal standards for facility participation in Medicare and/or Medi-Cal, and responds to complaints against licensed and/or certified health care providers and facilities.

The Department maintains a staff of surveyors and consultants to perform periodic state licensing surveys, federal certification surveys, and complaint investigations. The Department is required to prepare an annual staffing and systems analysis to ensure efficient and effective use of the fees collected, proper allocation of Departmental resources to program activities, survey schedules, complaint investigations, entity-reported incidents (ERIs), citations, administrative penalties and enforcement penalties, state civil monetary penalties, appeals, data collection and dissemination, surveyor training, and policy development (Health and Safety Code section 1266).

Licensing and Certification Program Activities

The Department's HFEN surveyors work in 14 district offices located throughout the State. District office work largely comprises two activities: (1) licensing and certification surveys and (2) complaint and ERI investigations. In addition, surveyors investigate reported breaches of medical information and reports of adverse events in hospitals.

Licensing and Certification Surveys – The Department licenses and/or certifies over 7,500 health facilities in California. Federal and state laws mandate that each licensed and/or certified health facility undergo review on a regular basis. Depending on the type of facility and its compliance history, survey frequency ranges from every year to every three years. Surveys help safeguard the welfare of residents or patients by reviewing and assessing the myriad components established to ensure quality patient care. Surveyors assess the following: quality of care, resident rights, admission, transfer, discharge, resident behavior and facility practices, quality of life, resident assessment, nursing services, dietary services, physician services, specialized rehab services, pharmacy services, infection control, physical environment, and general administration.

The Department surveyor workforce consists of professional consultants such as physicians, pharmacists, and registered dietitians and Health Facilities Evaluator Nurses (HFENs), who must possess a current, valid registered nurse (RN) license among other qualifications. HFENs act as the primary surveyors for licensing and certification surveys and complaint and ERI investigations. During surveys, surveyors apply clinical (medically related) principles, practices, and rules to evaluate a facility's compliance with federal and state laws and regulations. These clinical assessments constitute the majority of a survey's components. HFENs, because of their nursing skills, training, and experience, possess the knowledge and understanding necessary to make clinically based determinations.

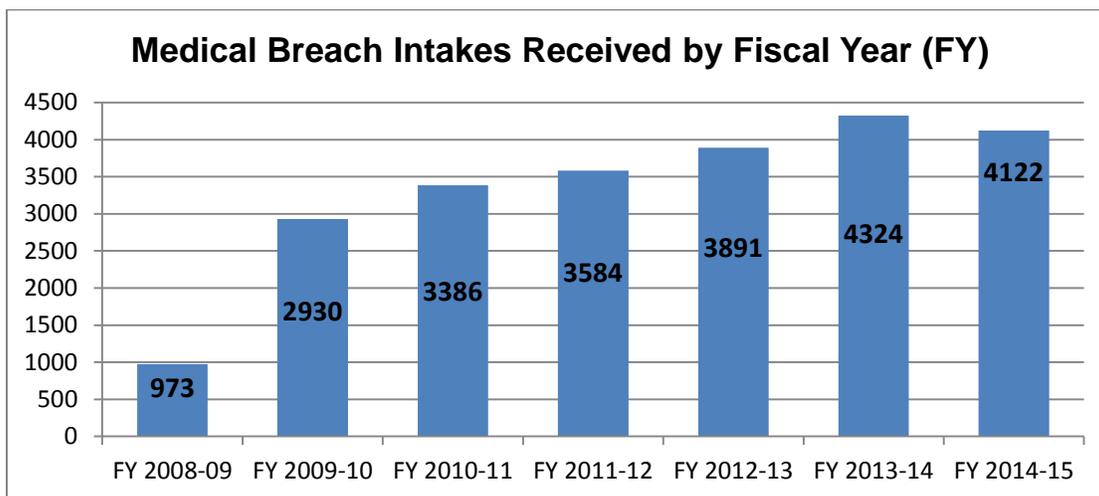
Complaint and ERI Investigations – Complaints are filed by concerned parties such as patients or patients' relatives. ERIs are incidents reported by health facility staff. They range in severity from reports of loss of electricity to alleged or suspected abuse. ERIs also include medical information breach reports. The Department receives approximately 40,000 complaints and ERIs annually for all facility types (including long-term care and non-long term care).

HFE supervisors, who are RNs, review, triage, and prioritize complaints and ERIs within 24 hours of receipt. Either a HFE supervisor or a HFEN investigates every complaint and ERI. Investigations for complaints and ERIs prioritized as the most severe are initiated within 24 hours of receipt. All complaints receive an on-site investigation; however, some ERIs prioritized as lower risk do not require on-site investigation.

Medical Information Breach Investigations – Senate Bill 541 (Chapter 605, Statutes of 2008) authorizes the Department to investigate reported medical information breaches and assess an administrative penalty for such violations. Health care facilities must prevent unlawful or unauthorized access to, use or disclosure of, patients' medical information, and establish safeguards to protect the privacy of patients' medical information. Health care facilities must report medical information breaches to the Department and affected parties. The Department considers many factors when determining the amount of an administrative penalty for a medical information breach; these include the facility's history of compliance, the extent to which the facility detected violations and took preventative action, and factors outside of the facility's control.

As of June 30, 2015, the Department had approximately 5,100 medical information breach cases pending investigation. This includes cases received for FY 2014-15, as well as cases pending completion from prior years.

Medical breach investigations represent about 10 percent of the total annual complaints/ERIs received. As shown in the chart below, the annual number of reported medical information breaches is significant.



Note: FY 2008-09 only required reporting for Quarters 3 and 4.

The Department currently uses HFENs as the primary investigators of medical information breaches. However, this type of investigation does not require the clinical expertise of an RN. As a result of 2014 budget trailer bill (Senate Bill 857, Chapter 31, Statutes of 2014), the Department absorbed three non-RN investigators from the California Office of Health Information Integrity who investigate and impose administrative fines on individuals for unauthorized use or disclosure of medical information. Using more non-RN investigators, such as AGPAs or SIs, to investigate medical information breaches could free HFENs for surveys and complaint and ERI investigations that require their clinical expertise.

Adverse Events – In 2007, Senate Bill 1301 (Alquist, Chapter 647, Statutes of 2006) and Senate Bill 1312 (Alquist, Chapter 895, Statutes of 2006) required investigation of adverse events in hospitals. These adverse events include ongoing threats of danger or serious bodily harm related to the care patients receives in a hospital. Adverse events may lead to immediate jeopardy situations that cause or are likely to cause serious injury or death to patients. The Department receives reports of close to 2,000 adverse events per year and uses HFENs as the primary surveyors to investigate these.

3.2 Nurse Hours per Patient Day (NHPPD) Staffing Audits – SNFs must maintain nurse staffing levels that provide 3.2 NHPPD for patients as required by Health and Safety Code section 1276.5. In 2011, the Department began conducting unannounced on-site staffing audits of all SNFs to verify compliance with the staffing requirement. The

Department uses AGPAs to perform the staffing audits and determine compliance based on review of assignment logs, duty statements, and payroll documents.

Centers for Medicare and Medicaid Services (CMS) Surveyor Requirements

The Department uses a dual enforcement process to verify that health facilities comply with state licensure and federal certification requirements. The Department may inspect for compliance with state licensure requirements while concurrently inspecting for federal certification compliance. The Department must conduct these dual-purpose surveys consistent with federal protocols.

Title 42 Code of Federal Regulations section 488.314 requires that survey teams include an RN. In addition, the federal regulation lists the following as examples of professionals that can be part of the interdisciplinary team used to conduct surveys:

- Physicians;
- Physician Assistants;
- Nurse Practitioners;
- Physical, Speech, or Occupational Therapists;
- Registered Professional Nurses;
- Dietitians;
- Sanitarians;
- Engineers;
- Licensed Practical Nurses (Licensed Vocational Nurses in California), or
- Social Workers.

Although CMS does not require that all health facility surveyors be RNs, section 5070 of Chapter 5 of the State Operations Manual states that an assessment of each intake received by the State Agency must be made by an individual who is professionally qualified to evaluate the nature of the problem based upon his or her knowledge and/or experience of current clinical standards of practice and federal requirements. CMS requires that, in addition to basic investigative skills, surveyors must have the “necessary knowledge, skills, and abilities to carry out survey functions,” including meeting the academic education requirements necessary to qualify in one of the following professions:

- Hospital administrator;
- Industrial hygienist;
- Laboratory or medical technologist, bacteriologist, microbiologist, or chemist;
- Medical record librarian;
- Nurse;
- Nursing home administrator;
- Nutritionist;
- Pharmacist;
- Physical Therapist;
- Physician;
- Qualified Intellectual Disabilities Professional;

- Sanitarian;
- Social worker; or
- Any other professional category used within state merit systems for health professional positions, provided the state has determined the position-classification skill level to be commensurate with any of the above professions. (State Operations Manual (SOM) Chapter 4, Section 4009 – Federal Surveyor Qualifications Standards, Subsection 4009B – Health Professional Qualifications and 4009C – Education, Training and Experience).

CMS has additional requirements for surveyors of long-term care facilities. Newly employed surveyors must be oriented to the nursing home survey process, successfully complete the Basic Long-Term Care Health Facility Surveyor Training Course, and receive a passing score on the Surveyor Minimum Qualifications Test. The Surveyor Minimum Qualifications Test addresses the knowledge, skills, and abilities needed to conduct surveys in nursing homes.

Other States' Surveyor Workforce

In fall 2014, the Department queried the Association of Health Facility Survey Agencies to identify staffing models used for state and federal surveys in other states. The Department received responses from 35 states. The survey did not identify respondent states by name, but a few states self-identified in the comments section of the survey.

Eighty percent of the 35 states responding indicated they use non-RN personnel as members of an investigative team during surveys, and 16 respondents reported that non-RN personnel conducted independent investigations of varying subjects. Of the 35 respondents, 15 reported that their state employs surveyors who do not have health care-related experience or education (hereinafter referred to as non-health care professionals). Respondents indicated these personnel have experience as life safety code inspectors, qualified intellectual disabilities professionals, public health advisors, regulatory officers, environmental health specialists, and generalists.

Respondents also reported using staff without health care experience to perform survey and complaint investigation within a limited scope of duties and/or a limited scope of facility types. These duties included:

- Review of patient's rights and patient abuse, neglect, and mistreatment protocols;
- Personnel and credentialing review;
- Review of physical environment and physical plant standards;
- Review of basic custodial care and services;
- Inspection of food service and preparation facilities;
- Resident council interviews in long-term care facilities;
- Sterilization and disinfection practices;
- Testing dialysis water quality;
- Investigation of medical information breaches; and
- Other supportive roles and tasks during hospital surveys.

Via follow-up phone call or through survey comments, Arizona, Connecticut, and Michigan state survey agencies confirmed they use non-RN surveyors to perform limited activities as part of a team that includes RNs, and all surveyors participate in the full scope of surveyor training required by the state and CMS.

Below is a discussion of survey results by activity type: state licensing surveys, federal certification surveys, federal complaint and ERI investigations, and medical breach investigations.

State Licensing Surveys – All 35 respondents indicated their state performs state licensing survey activities. Thirty-three of the 35 respondents (94 percent) indicated their state uses RNs to perform state licensing surveys, with 21 respondents (60 percent) also using dietitians, 23 (66 percent) also using other health care professionals, and 17 (49 percent) also using non-health care professionals on the teams.

Federal Certification Surveys – Most respondents use multidisciplinary survey teams, including at least one RN, to conduct federal certification surveys. Twenty-five of the 35 respondents (71 percent) also use dietitians, and 24 (69 percent) use other health care professionals on the survey team with an RN. Nineteen respondents (54 percent) use non-health care professionals in some capacity on federal certification surveys.

Federal Complaint Investigations and ERIs – All 35 respondents use RNs to perform federal complaint and ERI investigations. In addition to RNs, 21 respondents (60 percent) use dietitians, 9 respondents (26 percent) use pharmacists, 23 respondents (66 percent) use other health care professionals, and 15 respondents (43 percent) use non-health care personnel in complaint and ERI investigations. Only 4 respondents (11 percent) use licensed vocational nurses (LVN) or licensed practical nurses for these investigations.

Medical Information Breach Investigations – Of the 35 respondents, 23 (66 percent) use RNs to investigate medical information breaches. Fifteen respondents (43 percent) use other health care professionals, and 10 (29 percent) use non-health care professionals for these investigations. It is unclear from the survey data whether respondents use these other professionals instead of, or on a team with RNs. Eleven respondents selected 'not applicable' to all of the survey options for medical information breach investigations.

History of Use of RNs as Surveyors in California

The Health Facilities Evaluator (HFE) series was established in 1971 to provide consultation to health facility administrators in connection with the operation of the health facilities and to provide supervision and consultation in the review, evaluation, inspection, and certification of health care facility operations and procedures. In 1972, the State added a nursing classification in response to increased pressure from the federal government to improve patient care in health facilities. Civil service classifications for the HFE series include Health Facilities Evaluator Trainee (HFET),

Health Facilities Evaluator (HFE) I, Health Facilities Evaluator Nurse (HFEN), HFE II, HFE II Supervisor, and Health Facilities Manager (HFEM) I and II. Of these, only the HFEN classification consists of RNs conducting survey and inspection activities.

Due to difficulties in recruiting RNs, in fiscal year 2006-2007 the Department proposed 23 new surveyor positions using non-RNs. The Legislature ultimately established all of the new positions as RNs. Also during the 2006 and 2007 legislative sessions, the Legislature added 127 RN positions in response to public concerns and complaints regarding the quality of care in health care facilities.

In 2007, because of salary compaction resulting from bargained salary increases for RNs that did not extend to supervisory classifications not aligned with the RN unions, a temporary pay differential was put in place for all HFE II Supervisor, HFEM I, and HFEM II incumbents who are currently RNs. Pending a final solution in revising the classification specification, the Department requested and the California Department of Human Resources (CalHR) approved a pay differential to address the salary compaction issues that were negatively affecting the recruitment, retention, and stability of the HFE workforce.

Beginning in 2011, the Department and CalHR worked together to conduct a study on the HFE classification series. The study included statewide audits of work performed by all eight classifications in the HFE series, interviews with incumbents, observation of survey activities, analysis, and comparison of similar function in private industry and other states, and analysis of appropriate solutions within the California civil service system.

One of the elements of the classification study involved determining whether clinical nursing skills were necessary at the supervisory levels of the class series. Based on extensive review and analysis of the classification issues, in 2013 CalHR and the Department concluded that the ability to apply clinical knowledge and decision making and possession of a RN license is required to conduct survey/investigation activities as well as the supervision, review, and management of the survey/investigation function.

The HFE classification study also determined that the HFET and the HFE I classifications were performing work other than clinical nursing-related duties and do not require clinical nursing skills or possession of a nursing license. The duties for these classifications typically include inspections regarding the safety systems and physical environment at licensed healthcare facilities (i.e., fire repression systems, ventilation systems, back-up generators, means of egress, etc.). CalHR and the Department have proposed the eliminating the HFET and HFE I classifications and establishing a new classification series designed to appropriately examine, recruit, and hire staff for these roles.

The HFE classification series revision comprehensively addresses compaction, recruitment, and entrance requirements for the various classifications. The proposal requires all persons in the HFE series to possess a valid RN license, adjusts salary

ranges to incorporate past pay differentials for various HFE classes to address salary equity and recruitment issues, eliminates the HFET and HFE I classifications, and creates a new, non-clinical classification series to perform the body of work currently performed by those classifications.

The proposal is currently under review with the affected unions. When CDPH obtains union concurrence, CalHR will calendar the reclassification proposal for State Personnel Board review.

RN Staffing Levels

As of June 30, 2015, the Department had 484 Health Facilities Evaluator Nurse (HFEN) positions. For fiscal year 2014-2015, the Department averaged a HFEN vacancy rate of 4.75 percent. The table below displays historical HFEN vacancy rates.

L&C Program HFEN Vacancy Rates

Date	Vacancy Rate
June 2009	8.81 percent
June 2010	22.30 percent
June 2011	20.86 percent
June 2012	18.19 percent
June 2013	10.19 percent
June 2014	6.46 percent
June 2015	4.75 percent

As of June 30, 2015, the Department employed 50 consultants, including physicians, pharmacists, occupational therapists, dieticians, and medical records consultants. This medical specialty staff augments the HFEN surveyor workforce and provide expertise on surveys and complaint investigations.

The 2015-16 Budget Act included an additional 237 positions for the Department, 144 of which are HFENs. The Department developed a statewide recruitment effort to fill these new positions. Working with its Human Resources Branch, the Department contacted over 550 individuals on the HFEN eligibility list and scheduled interviews with over 130 candidates. Interviews began the week of July 27, 2015.

The Department contracts with Los Angeles County to perform licensing and certification activities in that county. Approximately 145 HFEN equivalent positions are included in the current Los Angeles County contract. Los Angeles County currently uses non-RNs to perform certain survey activities. For example, registered environmental health specialists inspect food preparation areas within health care facilities and conduct environmental tours. In addition, Los Angeles County uses some non-RNs to supervise and manage surveyors. Per the contract, as vacancies occur in these positions, Los Angeles County must make a good faith effort to fill the vacancies with RNs.

Importance of Using RNs as Surveyors

The Department surveyors inspect health care facilities to ensure they are following state and federal requirements. These requirements support the Department's core mission of protecting vulnerable patients, clients, and residents receiving care in California's licensed and certified health care facilities. The majority of the Department's surveying and investigation workload requires the application of clinical principles, practices, and rules.

The Department believes RNs possess the technical, professional, and clinical expertise needed to appropriately evaluate patient care and safety, assess health facility operations in a highly regulated environment, interpret regulations, interact with patients and facility staff, and apply the clinical judgment needed to perform licensing and certification surveys and complaint investigations. This includes serious patient care events that occur in health care settings, and the potential for those events to lead to situations that cause or are likely to cause serious injury or death (immediate jeopardy).

In the Department, RNs normally investigate a complaint or ERI. Most complaint and ERI investigations involve clinical or clinically related questions and issues. The investigations are multifaceted and include medical record reviews, interviews, and observations related to the allegations in the complaint or ERI. These activities include interviews with facility clinicians and patients whose physical and mental condition may be clinically compromised.

Using RNs allows the survey staff to respond to shifting circumstances that may occur during the course of an investigation. During a survey or an investigation, a surveyor may identify a patient safety issue that requires them to stop what they are doing to investigate, or an investigation may require more clinical judgment than was initially anticipated. Because RNs are competent to perform any survey task, they have the ability to fulfill any role on the survey team at any time. This allows the Department to address shifting and immediate workload demands. Further, the increasing level of acuity of residents in general acute care hospitals and skilled nursing facilities requires a higher level of clinical skill among surveyors. Filling most surveyor positions with RNs reflects the nature of the Department's workload, and the requisite background required to perform capably as a surveyor in all relevant situations.

Potential for Using LVNs to Perform Surveys or Complaint investigations

In the past, the Department has hired LVNs in the HFE I classification to perform survey and investigation work. This is the only classification in the HFE series performing survey and investigation work for which an LVN could meet the minimum qualifications. The current minimum qualifications for the HFET and the HFE I is a four-year degree in specified medical fields. Each two years of LVN experience can substitute for one year of education. Thus, an LVN would require eight years of experience to meet the minimum qualifications.

When the pending HFE reclassification proposal becomes effective, the HFET and HFE I classifications will be eliminated.

The Department explored the use of other existing civil service classifications (apart from the HFE series) for LVNs and identified the following:

- Licensed Vocational Nurse
- Licensed Vocational Nurse, CDCR
- Licensed Vocational Nurse (Safety)
- Licensed Vocational Nurse Departments of Mental Health and Developmental Services

These classifications are all exclusively designed for the direct provision of nursing care, which is not a component of health facility evaluation duties.

Using information from the Department of Consumer Affairs, the Department determined that approximately 130,339 LVNs are licensed in California, compared with over 500,000 RNs licensed in California. Given the education or experience requirements needed in addition to an LVN license, the lack of an appropriate civil service classification, and the small number of LVNs compared with RNs, the Department determined that limiting the applicant pool to LVNs would likely not yield enough viable candidates to result in a notable impact on workload.

Potential for Using Other Classifications to Perform Medical Information Breach Investigations

As noted above, the Department had approximately 5,100 medical information breach cases pending investigation as of June 30, 2015. Medical breach investigations represent about 10 percent of the total annual complaints/ERIs received.

Currently, the Department uses HFENs as the primary investigators of medical information breaches. However, this type of investigation does not require the clinical expertise of an RN. Since July 1, 2014, the Department has had a small staff of non-RNs investigating medical information breaches. Expanding this investigative staff with AGPAs or SIs may be an effective way to relieve some workload from HFENs, enabling them to focus their clinical expertise on survey and other complaint/ERI investigation work. The applicant pool for AGPAs and SIs is substantial. The AGPA classification is the journey-level analyst civil service classification used by Departments statewide and the SI classification is also used statewide.

In December 2015, using existing position authority, the Department initiated a pilot program that will use 13 AGPAs or SIs spread across the six regions of the state to investigate medical information breaches. These AGPAs or SIs will address medical breach investigation workload in each of our 14 district offices and Los Angeles County but will not be physically located in every district office. The Department proposes a three-year pilot to allow time to recruit and train the AGPAs or SIs and collect sufficient data to assess this model's effectiveness, as well as feasibility of expanding the program. The Department will periodically provide updates in its November estimates on the pilot's progress.