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FINDING OF EMERGENCY
Readopt of Emergency Regulations for
Skilled Nursing Facilities Direct Care Hours
DPH-17-011E

The Director of the California Department of Public Health (Department) finds that an emergency exists and that the proposed emergency regulations, as required by the Legislature, are necessary for the immediate preservation of the public peace, health and safety, or general welfare.

The Department has found that the deemed emergency circumstances that necessitated the original emergency regulations in June 2018 still exist and that the readoption of the regulations is necessary to protect the public health, safety, and welfare.

INTRODUCTION

The Department proposes to readopt the regulations described below. Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency shall provide a notice of the proposed action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations set forth in Government Code section 11349.6. These regulations will implement new minimum staffing requirements for skilled nursing facilities (SNFs), as required by Senate Bill (SB) 97 (Chapter 52, Statutes of 2017). Pursuant to this legislation, the new minimum staffing requirements became effective July 1, 2018. This action is necessary to comply with language in the legislation directing the Department to adopt emergency regulations to implement the amendments made by SB 97.

DEEMED EMERGENCY

The Legislature provided the Department with express authority to adopt emergency regulations to implement new minimum staffing requirements for SNFs as established by SB 97. Enacted in July 2017, SB 97 increased the minimum staffing standard for SNFs from 3.2 nursing hours per patient day (NHPPD) to 3.5 direct care service hours per patient day (DCSHPPD), with a minimum of 2.4 hours per patient day performed by certified nurse assistants (CNAs). The new standard became effective July 1, 2018.



Health and Safety Code section 1276.65, subdivision (c)(1)(D),¹ states:

The department shall repeal and amend existing regulations and adopt emergency regulations to implement the amendments made by the act that added this subparagraph. The department shall consult stakeholders prior to promulgation of regulations and shall provide a 90-day notice to stakeholders prior to adopting regulations. The adoption of these regulations shall be deemed an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

(Emphasis added.) Given these requirements, the Department did not have sufficient time to promulgate permanent regulations to meet its statutory obligation to adopt regulations by July 1, 2018. To satisfy the requirement to consult with stakeholders prior to promulgation of the regulations, the Department solicited written comments from stakeholders beginning in August 2017 and hosted a series of four stakeholder forums between October 2017 and February 2018. The Department sent invitations to these stakeholder forums and email alerts related to announcements about SB 97 implementation to an extensive list of stakeholders. The Department also maintained a page on its website where it posted all written comments received, meeting minutes from the stakeholder forums, a contact email address for interested parties to submit comments, and other materials related to the implementation of SB 97, such as All Facility Letters (AFLs).

The input received from stakeholders was critical to the development of the regulations. However, since SB 97 also requires the Department to provide a 90-day notice to stakeholders prior to adopting regulations, the Department was required to provide the regulation text to stakeholders no later than April 1, 2018. At the January 22, 2018, stakeholder forum, the Department shared a timeline for implementation of the emergency regulations that stated that the Department would post the regulation text on its website at the end of March 2018. At the February 22, 2018, stakeholder forum, the Department informed stakeholders it would be posting the regulation text on its website on March 30, 2018. The Department also included this information in the meeting minutes from these forums, which were posted on the webpage referenced above. The Department posted the regulation text on its website on March 30, 2018, in compliance with the April 1, 2018, deadline. Text has remained posted on the Department's website since that date, available to stakeholders and any member of the public.

Following the stakeholder forums, the Department worked to prepare the emergency rulemaking documents filed with the Office of Administrative Law on June 19, 2018. Because the requirements established by SB 97 became effective July 1, 2018, failure to adopt those emergency regulations by that date would have likely resulted in serious harm to the public peace, health, safety, or general welfare. Without immediate regulatory guidance from the Department regarding proper staffing

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

thresholds and the associated waiver processes, there would have been confusion among SNFs as to the applicable requirements. Residents would have also been placed at risk of not receiving the required level of care. Residents of SNFs are among the most vulnerable members of the population. Any doubt surrounding the level of care to which these residents are entitled could have resulted in serious harm to their health and safety. The regulations at issue clarified the minimum direct care service hours received by each resident, ensuring resident needs are timely met and addressed. The immediate adoption of those emergency regulations was necessary to prevent or significantly alleviate that harm by ensuring that there was no gap between the effective date of the statutory requirements and the Department's regulations. The Legislature recognized this when it expressly deemed the adoption of the regulations to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare. (§ 1276.65, subd. (c)(1)(D).) For all the reasons articulated, the emergency situation addressed by those regulations also poses such an immediate, serious harm that delaying action to allow notice and public comment would have been inconsistent with resident safety and the public interest. (Cal. Code Regs., tit. 1, § 50, subd. (a)(5)(B).)

The emergency regulations initially became effective on June 29, 2018, in compliance with SB 97's statutory effective date of July 1, 2018.

Following the adoption of the emergency regulations, the Department has made significant progress toward permanent adoption of the regulations. The Department continued soliciting written comments and held additional stakeholder meetings to discuss next steps, including development of the permanent regulations. At stakeholder meetings held July 10, 2018 and July 24, 2018, the Department shared a timeline for the adoption of the emergency regulations through the regular rulemaking process. The Department continued to post written comments received on its website, meeting minutes from the July stakeholder meetings, and other materials related to the implementation of SB 97.

Following the stakeholder meetings and input from stakeholders, the Department revised the emergency regulations and other related documents. To initiate the regular rulemaking process, the Department published the notice of proposed action in the California Regulatory Notice Register on October 19, 2018. The Department posted the information on its website, and notified stakeholders about the 45-day public comment period and public hearing via AFL, U.S.P.D. mail, and email alert.

The proposed permanent regulations are currently in the 45-day public comment period. The written comment period will close on December 7, 2018. The public hearing is also scheduled for December 7, 2018. The readoption of the emergency regulations is necessary to allow the Department to hold the public hearing, close the written comment period, respond to public comments and update related documents to the proposed permanent regulations.

The Department has found that the deemed emergency circumstances that necessitated the original emergency regulations in June 2018, still exist and the readoption of the emergency regulations is necessary to protect the public health, safety, and welfare.

AUTHORITY AND REFERENCE

Health and Safety Code sections 1250, 1276.5, 1276.65, 100275, 131051, and 131200 grant the Department general authority to adopt, amend, or repeal any reasonable rules or regulations as may be necessary or proper for the execution of its duties, and to exercise the powers and perform the duties conferred upon it by the Legislature.

The Department is proposing to readopt California Code of Regulations, title 22, division 5, chapter 3, section 72329.2 to implement Health and Safety Code section 1276.65.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The purpose and objective, background of existing laws, policy statement overview, problem statement, and benefits of these regulations are incorporated by reference, along with all other documents from the previous approved emergency rulemaking file, under file number 2018-0619-02E.

Policy Statement Overview

Problem Statement: Section 1276.65, amended in SB 97, increased the minimum staffing standard for SNFs from 3.2 NHPPD to 3.5 DCSHPPD, with a minimum of 2.4 hours per patient day performed by CNAs. This regulatory action is necessary to implement these new minimum staffing standards.

Objectives: The broad objectives of this proposed regulatory action are:

- To fulfill the legislative directive to adopt regulations to implement the amendments made by SB 97.
- To align the Department's regulations with changes to statute.

Benefits: The expected benefits of this proposed regulatory action are:

- To improve clarity and reduce confusion within the regulated community and for residents and their families by aligning the staffing standards in the Department's regulations with the standards set by the Legislature.

Pursuant to section 131051, subdivision (b)(5), the Department is responsible for licensing SNFs. As part of its licensing duties, the Department audits SNFs to determine compliance with minimum staffing standards. At present, the minimum staffing standard is 3.2 NHPPD. (§ 1276.5, subd. (a).) The NHPPD are calculated by dividing the total number of nursing hours performed by direct caregivers in a 24-hour period by the resident census during that period.

These regulations continue to implement the minimum staffing requirements for SNFs established by SB 97. Effective July 1, 2018, all SNFs, excluding distinct parts of general acute care hospitals, state-owned hospitals, or developmental centers, were required to increase staffing from 3.2 NHPPD to 3.5 DCSHPPD, with a minimum of 2.4 hours per patient day performed by CNAs. (§ 1276.65, subds. (c)(1)(B)-(C).) Direct care service hours are defined as the actual hours of work performed per patient day by a direct caregiver. (§ 1276.65, subd. (a)(1).) A direct caregiver means a registered nurse, a licensed vocational nurse, a psychiatric technician, a certified nurse assistant, or a nurse assistant participating in an approved training program, while performing nursing services. (§ 1276.65, subd. (a)(2).)

SB 97 directed the Department to adopt emergency regulations to implement the new direct care service hour requirements, in consultation with stakeholders. (§ 1276.65, subd. (c)(1)(D).) To engage stakeholders and promote transparency in the development of these emergency regulations, the Department solicited written comments and hosted a series of four public stakeholder forums between October 2017 and February 2018. The Department considered the comments received both in writing and during the stakeholder forums in the development of the emergency regulations.

Implementation of the new staffing standard, as well as the regulations, was contingent on an appropriation in the annual Budget Act and continued federal approval of the Skilled Nursing Facility Quality Assurance Fee pursuant to Health and Safety Code division 2, chapter 2, article 7.6 (commencing with section 1324.20). (§ 1276.65, subd. (i).) In anticipation of the necessary appropriation and federal approval, the Department adopted California Code of Regulations, title 22, section 72329.2 to implement the amendments made by SB 97.

SPECIFIC RATIONALE FOR EACH SECTION

Section 72329.2, subdivision (a)(1).

This proposed readopt of the emergency regulation implements the new DCSHPPD requirements for SNFs. The Department adopted the same standards set out in section 1276.65, subdivisions (c)(1)(B) and (c)(1)(C). Following extensive stakeholder engagement, the Department adopted the minimum staffing requirements set forth by the Legislature, rather than adopting higher minimum staffing requirements. The Department continues to believe the staffing requirements set forth by the Legislature present the best balance between ensuring resident safety and establishing minimum requirements that can reasonably be achieved by all facilities. The Department continues to believe going above the minimum 3.5 and 2.4 DCSHPPD requirements would be unreasonably burdensome for facilities, especially considering the documented shortage of direct caregivers in many counties and the fact that prior to SB 97, there was no minimum staffing requirement specific to CNAs.

Further, regardless of the minimum requirements, facilities are still required to employ and schedule sufficient staff to ensure quality resident care based on the needs of residents. (§ 1276.65, subd. (d).) Resident needs may necessitate staffing above the

minimum requirements some or all of the time.

This proposed readopt of the emergency regulation also restates the statutory exemptions to these staffing requirements, as found in section 1276.65, subdivision (c)(1)(B), and clarifies that distinct part SNFs are still required to meet the 3.2 NHPPD standard set forth in section 1276.5. The Legislature did not amend the 3.2 NHPPD standard in section 1276.5, so that standard still applies to distinct part SNFs. This regulation continues to be reasonably necessary to align the Department's regulations with statute, improve clarity, and reduce confusion.

Section 72329.2, subdivisions (a)(2)(A) and (B).

This proposed readopt of the emergency regulation clarifies that the new 3.5 and 2.4 DCSHPPD requirements do not always apply in SNFs that provide care for persons with mental health disorders. For patients certified for special treatment programs, SNFs are held to a different staffing standard. A special treatment program service unit distinct part is an identifiable and physically separate unit of a SNF or an entire SNF that provides therapeutic programs to an identified population group of persons with mental health disorders. (§ 1276.9, subd. (b).) A special treatment program service unit distinct part is required to staff at a minimum of 2.3 NHPPD. (§ 1276.9, subd. (a).) This proposed readopt of the emergency regulation is reasonably necessary to reduce confusion about the applicable staffing requirements in SNFs that serve persons with mental health disorders.

Section 72329.2, subdivisions (b)(1), (2), (3), (4), and (5).

This proposed readopt of the emergency regulation establishes the process for a facility to apply for the waiver authorized by 1276.65, subdivision (c)(2). Subdivision (c)(2) authorizes SNFs to apply for a waiver that addresses individual patient needs, except that in no instance shall the facility fall below 3.5 direct care service hours per patient day. (§ 1276.65, subd. (c)(2).) This waiver is known as the patient needs waiver. If granted, this waiver permits a facility to waive the requirement to staff at 2.4 direct care service hours for CNAs. However, the facility is still required to provide an overall minimum of 3.5 DCSHPPD. The notice and posting requirements are necessary to ensure that all residents and their family members are aware that a facility has requested or received a waiver of the minimum staffing requirements.

Section 72329.2, subdivision (c)(1).

This proposed readopt of the emergency regulation references the new type of waiver authorized by SB 97, known as the workforce shortage waiver. Section 1276.65, subdivision (l), directed the Department to create a waiver of the 3.5 and 2.4 direct care service hour requirements to address a shortage of available and appropriate health care professionals and direct caregivers. The Department is authorized to create this waiver via AFL. (§ 1276.65, subd. (l).) Though the AFL sets out the requirements for obtaining the workforce shortage waiver, the Department continues to believe it is reasonably necessary to reference this waiver in the proposed readopt of the emergency regulations to improve clarity and reduce confusion by referencing all available waivers in the same provision of law.

Section 72329.2, subdivision (d).

This proposed readopt of the emergency regulation restates section 1276.65, subdivision (i), which restricts the Department's ability to implement these regulations without a specific legislative appropriation in the annual Budget Act and continued federal approval of the Skilled Nursing Facility Quality Assurance Fee pursuant to Article 7.6 (commencing with section 1324.20). This readopt of the emergency regulation is reasonably necessary to improve clarity and reduce confusion because someone reading this regulation may not otherwise be aware of the contingency language in section 1276.65, subdivision (i).

Section 72329.2, subdivision (e).

This proposed readopt of the emergency regulation is reasonably necessary to clarify the Department retains its authority to continue to implement Welfare and Institutions Code section 14126.022 via AFL. This readopt of the emergency regulation is reasonably necessary to improve clarity and reduce confusion because the AFL issued pursuant to Welfare and Institutions Code section 14126.022 also relates to implementation and enforcement of DCSHPPD requirements, namely, the process for auditing SNF compliance with the requirements. The Department believes it should be clearly stated that nothing in this proposal to readopt the emergency regulations shall infringe upon that separate and concurrent statutory authority.

STATEMENTS OF DETERMINATIONS AND ECONOMIC IMPACT ASSESSMENT

The Department has determined that the proposed regulatory action would have a minor economic impact on SNFs applying for a waiver to address individual patient needs pursuant to Health and Safety Code section 1276.65, subdivision (c)(2). Existing regulations require SNFs to apply for this waiver using the program flexibility procedures specified in California Code of Regulations, title 22, section 72213. However, the proposed regulations impose additional administrative requirements on waiver applicants, such as requiring facilities to post the waiver in a public location within the facility and providing written notice of an approved or pending waiver to potential residents. The Department anticipates these impacts will be minimal.

The proposed regulatory action would not have any economic impact on California business enterprises and individuals that do not seek a waiver under Health and Safety Code section 1276.65, subdivision (c)(2). The Department acknowledges that the new staffing standards will create increased costs for facilities and will likely create additional jobs for CNAs and licensed nurses. However, these costs result solely from legislative action. The regulations restate the requirements in Health and Safety Code section 1276.65. As a result, these emergency regulations only add minimal costs to the costs created by the statutory changes.

CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS

The Department has determined that this proposed regulatory action is not inconsistent or incompatible with existing operative regulations. After conducting a review for any regulations that would relate to or affect staffing standards for SNFs, the Department has concluded that no known statute or operative regulation conflicts with this proposed regulatory action.

MANDATED BY FEDERAL LAW OR REGULATIONS

The Department has made a determination that this proposal is not mandated by federal law or regulations.

LOCAL MANDATE

The Department has determined that this regulatory action would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by part 7 (commencing with section 17500) of division 4 of the Government Code.

FISCAL IMPACT ASSESSMENT

- A. Cost to Any Local Agency or School District: None.
- B. Cost or Savings to Any State Agency: None.
- C. Other Nondiscretionary Cost or Savings Imposed on Local Agencies: None.
- D. Cost of Savings in Federal Funding to the State: None.

CONTACT PERSON

Inquiries regarding the proposed regulatory action can be directed to Anita Shumaker, with the Office of Regulations at (916) 440-7718, or the designated backup contact, Michael Boutros at (916) 440-7822.