

**FINDING OF EMERGENCY**  
**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.

**INTRODUCTION**

The Department proposes to adopt the regulations described below. 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 become 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 is effective July 1, 2018. Health and Safety Code section 1276.65, subdivision (c)(1)(D), 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 that 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 this Finding of Emergency and other related documents. Because the requirements established by SB 97 become effective July 1, 2018, failure to adopt these emergency regulations by that date will likely result in serious harm to the public peace, health, safety, or general welfare. Without immediate regulatory guidance from the Department regarding proper staffing thresholds and the associated waiver processes, there will be confusion among SNFs as to the applicable requirements. Residents also will be 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 result in serious harm to their health and safety. The regulations at issue clarify the minimum direct care service hours received by each resident, to ensure that resident needs are timely met and addressed. The immediate adoption of these regulations is necessary to prevent or significantly alleviate that harm by ensuring that there is 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 these 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 just articulated, the emergency situation addressed by the regulations also poses such an immediate, serious harm that delaying action to allow notice and public comment would be inconsistent with resident safety and the public interest. (Cal. Code Regs., tit. 1, § 50, subd. (a)(5)(B).) As a result, the proposed emergency regulations are necessary to meet the July 1, 2018, implementation date of the new staffing standards.

## **AUTHORITY AND REFERENCE**

Health and Safety Code sections 1250, 1276.5, 1276.65, 100275, 131051, subdivision (b), 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 adopt 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**

### **Purpose**

These regulations will implement new minimum staffing requirements for skilled nursing facilities as established by Senate Bill (SB) 97 (Chapter 52, Statutes of 2017) 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.

### **Policy Statement Overview**

*Problem Statement:* Senate Bill 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.

The Department is authorized to adopt, amend, or repeal regulations pursuant to Health and Safety Code sections 1276.5,<sup>1</sup> 1276.65, 1275, and 131200 as may be necessary for the execution of its duties. 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.

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

These regulations would implement new 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, must increase staffing from the current 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).)

Senate Bill 97 directs 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 these emergency regulations.

Implementation of the new staffing standard, as well as these regulations, is 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 is adopting 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 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 decided to adopt the minimum staffing requirements set forth by the Legislature, rather than adopting higher minimum staffing requirements. At this time, the Department believes that 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 believes that 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 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 is 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 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 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 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 regulation references the new type of waiver authorized by SB 97, known as the workforce shortage waiver. Section 1276.65, subdivision (l), directs 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 believes it is reasonably necessary to reference this waiver in the proposed 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 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 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 regulation is reasonably necessary to clarify that the Department retains its authority to continue to implement Welfare and Institutions Code section 14126.022 via AFL. This 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 these proposed 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.