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California Department of Public Health



EDMUND G. BROWN JR.
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NOTICE OF PROPOSED RULEMAKING
Title 22, California Code of Regulations
DPH-17-011P - Skilled Nursing Facilities 3.5 Direct Care Hours
Notice Published: October 19, 2018

Notice is hereby given that the California Department of Public Health (Department) is proposing the regulation described below. This notice of proposed rulemaking commences a rulemaking to make the emergency regulation permanent after considering all comments, objections, and recommendations regarding the regulation.

PUBLIC PROCEEDINGS

The Department is conducting a written comment period during which time any interested person or such person's duly authorized representative may present statements, arguments or contentions (all of which are hereinafter referred to as comments) relevant to the action described in the Informative Digest/Policy Statement Overview section of this notice.

PUBLIC HEARING

The Department has scheduled a public hearing to accept comments on the proposed action. Any person may present statements or arguments described in the Informative Digest. The Department requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

Date: **December 7, 2018**

Time: **9:00 AM to 5:00 PM**

Location: **1500 Capitol Ave, Room 146, Sacramento, CA 95814**

An agenda for the public hearing will be posted at the time and place of hearing location.

WRITTEN COMMENT PERIOD

Any written comments pertaining to these regulations, regardless of the method of transmittal, must be received by the Office of Regulations by 5 p.m. on December 7, 2018, which is hereby designated as the close of the written comment period.

Comments received after this date will not be considered timely. Persons wishing to use the California Relay Service may do so at no cost by dialing 711.



Written comments may be submitted as follows:

1. By email to: regulations@cdph.ca.gov. It is requested that email transmission of comments, particularly those with attachments, contain the regulation package identifier “**DPH-17-011P - SNF 3.5 Direct Care Hours**” in the subject line to facilitate timely identification and review of the comment;
2. By fax transmission to: (916) 636-6220;
3. By United States Postal Service to: California Department of Public Health, Office of Regulations, 1415 L Street, Suite 500, Sacramento, CA 95814; or
4. Hand-delivered to: California Department of Public Health, Office of Regulations, 1415 L Street, Suite 500, Sacramento, CA 95814.

All submitted comments should include the regulation package identifier (**DPH-17-011P - SNF 3.5 Direct Care Hours**), author’s name and mailing address.

AUTHORITY AND REFERENCE

The Department is proposing to amend the proposed rulemaking under the authority provided in sections 1275, 1276.5, 1276.65, and 131200, of the Health and Safety Code.

The Department is proposing to implement, interpret, or make specific sections 1276, 1276.5, 1276.65, 131050, 131051, and 131052, of the Health and Safety Code; and section 14126.022, of the Welfare and Institutions Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

These regulations will implement new minimum staffing requirements for skilled nursing facilities (SNFs) as established by Senate Bill (SB) 97 (Chapter 52, Statutes of 2017). This regulatory action is necessary to comply with language in the legislation directing the California Department of Public Health (Department) to adopt regulations to implement the amendments made by SB 97.

Policy Statement Overview

Problem Statement: 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). This regulatory action is necessary to implement these new minimum staffing requirements and to make permanent the emergency regulations that became effective on July 1, 2018.

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, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things, 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.

EVALUATION AS TO WHETHER THE REGULATIONS ARE INCONSISTENT OR INCOMPATIBLE WITH EXISTING STATE REGULATIONS

The Department evaluated whether the proposed regulations are inconsistent or incompatible with existing state regulations. This evaluation included a review of the Department's laws, as well as those statutes and regulations related to SNFs. 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 requirements in SNFs, the Department has concluded that no known statute or operative regulation conflicts with this proposed regulatory action.

LOCAL MANDATE

The Department has determined that the proposed 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 ESTIMATE

A. Cost or Savings to Any State Agency: None.

B. Cost to Any Local Agency or School District: None.

C. Other Nondiscretionary Cost or Savings Imposed on Local Agencies: There are no known costs or savings imposed on local agencies in connection to these proposed regulations.

D. Cost or Savings in Federal Funding to the State: None.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE

Implementation of these proposed regulations is contingent upon an appropriation in the annual Budget Act and continued federal approval of the Skilled Nursing Facility Quality Assurance Fee, in accordance with Health and Safety Code section 1276.65, subdivision (i). The annual Budget Act for fiscal year 2018-19 included funding for these provisions.

The Department has made an initial determination that these proposed regulations would not have a significant statewide adverse economic impact directly impacting businesses, including the ability of California businesses to compete with businesses in other states. Jobs will not be created or eliminated in SNFs as a result of these regulations because the regulations only restate the new direct care service hour

requirements found in Health and Safety Code section 1276.65. The 2018 Budget Act includes \$43 million (\$21.7 million General Fund) for the SNF staffing standard “add-on” to implement SB 97. The add-on reimburses SNFs participating in the Medi-Cal program for costs to increase their staffing levels to meet the new statutory mandated staffing standards. These regulations do not add any additional cost to the cost of the statutory change.

These proposed regulations would have a minor economic impact on SNFs applying for a patient needs waiver to waive the requirement to staff at 2.4 direct care service hours per patient day for CNAs. The Department will use an online application process for this waiver and proposes additional administrative requirements for waiver applicants. These requirements include renewing the patient needs waiver annually, posting a notice of an approved waiver in a public location within the facility, and providing written notice of approved or pending waivers to potential residents.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

STATEMENT OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

In addition, the proposed regulations would not significantly affect the following:

- a) The creation or elimination of jobs within the State of California.
- b) The creation of new businesses or the elimination of existing businesses within the State of California.
- c) The expansion of businesses currently doing business within the State of California.
- d) The health and welfare of California residents, worker safety, and the State’s environment is expected 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.

IMPACT ON SMALL BUSINESS DETERMINATION

The Department has determined that the proposed regulations will have no adverse impact on small businesses. The proposed regulatory action would impose minimal direct or indirect costs on SNFs applying for a patient needs waiver. However, there is no reimbursable or calculable cost to the provider community or to the state to implement these regulations since the costs are a result of SB 97.

HOUSING COSTS DETERMINATION

The Department has determined that these proposed regulations will not impact housing costs.

DOCUMENTS INCORPORATED BY REFERENCE

None.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons or SNFs than the proposed regulatory action, or would be more cost-effective to affected private persons or SNFs and equally effective in implementing the statutory policy, including the higher staffing requirements established by SB 97, or other provision of law.

CONTACT PERSON

Inquiries regarding the substance of the proposed regulations described in this notice may be directed to Chelsea Driscoll (916) 552-8778. All other inquiries concerning the action described in this notice may be directed to, Michael Boutros, Office of Regulations, at (916) 440-7822, or to the designated backup contact, Anita Shumaker, Office of Regulations, at (916) 440-7718.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS

The Department has prepared and has available for public review an initial statement of reasons for the proposed regulations, all the information upon which the proposed regulations are based, and the text of the proposed regulations. The Office of Regulations, at the address noted above, will be the location of public records, including reports, documentation, and other material related to the proposed regulations (rulemaking file).

In order to request that a copy of this public notice, the regulation text, and the initial statement of reasons or alternate formats for these documents be mailed to you, please call (916) 558-1710 (or the California Relay Service at 711), send an email to regulations@cdph.ca.gov, or write to the Office of Regulations at the address previously noted. Upon specific request, these documents will be made available in Braille, large print, audiocassette, or computer disk.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The full text of any regulation which is changed or modified from the express terms of the proposed action will be made available by the Department's Office of Regulations at least 15 days prior to the date on which the Department adopts, amends, or repeals the resulting regulation.

FINAL STATEMENT OF REASONS

A copy of the final statement of reasons (when prepared) will be available upon request from the Office of Regulations.

INTERNET ACCESS

Materials regarding the action described in this notice (including this public notice, the regulation text, and the initial statement of reasons) that are available via the Internet may be accessed at www.cdph.ca.gov/Programs/OLS/Pages/Proposed-Regulations.aspx.