

**INFORMATION ADDED TO THE RULEMAKING FILE**  
**Changes to the Statement of Reasons**

**This document adds information resulting from comments received by the Department. Bracketed, bold text contains a description and/or explanation of revisions to the text following the 45-day comment period.**

A 2000 and 2001 study by the Institutes of Medicine, titled "Improving the Quality of Long-Term Care" (Exhibit G), provided the data that demonstrated that although an increase of licensed staff did improve quality of care, the research failed to define an optimal staffing level due to the varying differences in types of care needed for residents. The study determined that increased nursing staffing levels alone are a necessary, but not comprehensive, condition for positively affecting the quality of care in nursing homes.

Many nursing staff providing direct care, including Registered Nurses, Licensed Vocational Nurses, Licensed Psychiatric Technicians and Certified Nurse Assistants (CNAs), may work varying time schedules. These schedules, other than eight-hour shifts, can include two-to-four hour "short shifts or split shifts" that are defined as non-consecutive working periods within a 24-hour period and extended (10 – 16 hour) shifts. If the shift exceeds the eight-hour time frame or is a fraction thereof, a formula is necessary for calculating the nursing staff-to-patient ratio.

The formula identifies a direct caregiver as a full-time employee equivalent (FTE) that would equate to one person working full-time. For example, one person working full time (based upon an 8-hour shift) equals one FTE, as do two people each working four hour shifts. To determine FTEs, the SNF would multiply the number of direct care giving staff by the total number of hours worked, and then would divide the total number of hours by eight to reflect the FTE staffing for one shift.

**[Several commenters questioned how the Department intended to calculate shifts, and noted that while the ISOR discussed the use of full-time equivalents (FTEs) to determine how shifts were determined, the regulation itself did not. The Department is proposing amendments to the regulation to specify how a SNF needs to use FTEs to ensure it provides 3.2 nursing hppd of care to its residents.]**

## **Article 1– Definitions**

### **Section 72038. Direct Caregiver**

This term is defined in statute and identifies the skill levels of those persons who are employed to provide care for residents in a SNF.

Direct care giving is defined as the performance of nursing services as described in 22 CCR sections 72309, 72311 and 72315. This section limits the definition to direct caregivers who are actually performing nursing services, not at meals or in training, with one exception, and emphasizes the statutory prohibition on including directors of nursing services in larger SNFs in the definition.

**[For a variety of reasons, many commenters found fault with the definition of “direct caregiver” contained in the emergency regulation. Some believed that the language that limited direct caregivers to those individuals “while actually providing care to patients” might be interpreted to mean only individuals providing care at the patient’s bedside would qualify. Others believed it might mean that the only type of care that could be included would be the provision of the activities of daily living (ADLs), rather than all nursing services as described in Title 22. Some concern was expressed that the definition would not meet the statutory requirement that the Department “convert” the 3.2 nursing hppd to ratios, since it would eliminate a category of caregiver currently counted toward that requirement, that is, nursing assistants in training programs while caring for a SNF’s residents. Additionally, some commenters believed that time spent away from providing nursing care, e.g., at meals or in training, needed to be excluded from time counted as “direct care giving.”]**

**The Department is proposing to amend the emergency regulation to make it clear that time spent by persons who may act as direct caregivers providing nursing services to residents, as that term is described in sections 72309, 72311 and 72315, will be counted as direct care giving. The Department also is proposing to amend the emergency regulation to include nurse assistants in training as direct caregivers when they are providing care to patients. The Department also is proposing to amend section 72329.1(g)(5) to specify when time spent on breaks or in training may be counted toward providing direct care giving to ensure that the regulation actually converts the required 3.2 nhppd to a ratio without changing how the Department calculates a SNF’s compliance with the statutory requirement it provide 3.2 nhppd for its patient population. This proposed amendment will, of course, require that SNFs that use nurse assistants**

**in training as direct caregivers include them in the posting required by subdivision (i) of section 72329.1.]**

**Section 72329.1 Nursing Service - Staff**

This section is adopted to make grammatical corrections and to clarify the language contained in its predecessor, section 72329, and to make consistent the terms used to provide guidance in complying with this section.

The Department proposes to amend subsection (a) to include a statement that the regulatory requirements set forth the minimum number of staff, and that a SNF shall employ additional staff as necessary in order to meet the needs of its residents.

**[Several commenters recommended that this statement be included in the regulation. The Department accepted this recommendation.]**

**Section 72329.1(g)**

This subsection is adopted to provide the nurse-to-patient (resident) ratio which meets the nursing hppd required in a manner that takes into account LNs, licensed psychiatric technicians, and CNAs, as well as the length of the shift worked.

**Considerations for ratio conversion**

**[Several commenters disagreed with the Department's interpretation of the ratio of licensed nurses to unlicensed caregivers based upon OSHPD's 2002 – 2005 reports; the Department estimated that there were approximately two unlicensed staff members for each licensed nurse. The Department has been collecting data for several years, and has adjusted its estimate based on the numbers determined by the Department.]**

Since 2002 the Department has been collecting data on the numbers of licensed and unlicensed staff working in SNFs (Exhibit I), and has based the ratios contained in the regulations on these figures. These data indicate that approximately 47% of direct caregivers work on the day shift, 33% on the evening shift, and 20% on the night shift. They also show that approximately 30% of the caregivers are licensed nurses. In order to meet the required 3.2 nursing hppd, a SNF needs to employ at least one direct caregiver for every 2.5 patients. This breaks down to 0.4 caregivers for every resident, which in turn equals approximately 0.28 unlicensed caregivers and 0.12 licensed nurses for each resident. Based upon this the Department is choosing to use a ratio of 1 direct caregiver to each 2.5 residents, and included within that ratio, a ratio of at least 1

licensed nurse for every 8 residents. To provide SNFs the flexibility to choose how they wish to assign their licensed versus unlicensed staff, in its proposed amendment to the emergency regulation, the Department is not specifying a patients/individual staff shift ratio that it will require for licensed staff.

Currently there are over 1295 SNFs in California that, upon appropriation in the annual Budget Act or another statute for implementation, will be affected by these ratios. The bed capacity of these SNFs ranges from fewer than 20 beds to 300 beds or more. These calculations can be used in any size SNF; however, at no time may the amount of care be less than 3.2 nursing hppd. Current regulation, section 72329, requires that all SNFs be staffed by at least one LN, awake and on duty at all times, day and night (subsections (b) and (c)). Therefore, in a smaller SNF with a resident census of less than 24 residents, the LN to patient ratio will be higher, but at no time shall the nursing hppd be less than 3.2 nursing hppd.

The assumptions underlying the regulations are as follows:

1. 3.2 hours of care per patient
2. Each caregiver can render 8 hours of care per shift, even if the services of several individuals are required to equal one caregiver.
3. There are three 8-hour shifts during a 24-hour period.
4. A licensed nurse must be awake and on duty 24 hours per day, seven days a week.
5. Licensed nurses may be substituted for non-licensed staff, but not vice-versa.
6. A SNF may meet the required shift ratio by assigning a direct caregiver to less than an FTE during a particular shift, or by assigning an FTE to overlapping shifts.

**[One commenter recommended that the Department allow SNFs to use a fraction of a direct caregiver to meet a required shift ratio. In examining the comments from a number of providers, it became evident that most SNFs defined their staffing requirements by tenths of a caregiver. The Department therefore decided to accept this recommendation.]**

**[Several commenters felt that the language contained in the ISOR that suggested that the Department would only examine combined ratios, and not look at the compliance with each of the required ratios separately, was confusing. The Department, therefore, is proposing to eliminate this language.]**

In the proposed amendments to Section 72329.1, subsection (g)(2) shows the criteria used for calculating the ratio. The standard of 3.2 nursing hppd is calculated by dividing the total number of hours of work performed by on-duty nursing caregivers in a

24-hour period by the SNF resident census. Bed holds are not to be included in the census calculations, since the ratio is calculated on the actual number of residents in the SNF and not the number of beds in the SNF. During any 24-hour period, if a resident is admitted or re-admitted, and the addition of this resident changes the staffing ratio requirement, the SNF must provide the appropriate staffing in order to meet the required nursing hppd.

The statute (HSC section 1276.65(d)) mandates that SNFs shall staff at a licensing level that is most appropriate for the individual needs of residents. In instances that require varying levels of care, the SNF has the flexibility to assign appropriate nursing staffing to "ensure no less care is given" at different times (shifts) during a 24-hour period to meet the individual needs of their residents. The phrase "ensure that no less care is given" follows the statutory requirement directing the Department to provide a formula that would make certain that the nurse-to-resident ratio would meet the minimum standard of care per resident in SNFs, and is required pursuant to HSC section 1276.65.

As noted above, the conversion of the 3.2 nursing hppd to each resident would be one nursing caregiver to each 2.5 residents in a 24-hour period, and the calculation is based on the actual daily resident census. Therefore, in order to calculate the total number of nursing staff necessary, the SNF would divide the resident census by 2.5 to determine the total number of staff required in the 24-hour period.

**[Many commenters expressed their concerns about the effect of the Department's decision to require SNFs to "round up" to the next whole staff member on each shift. As noted above, the Department has eliminated this requirement by allowing SNFs to use fractional FTE's to meet the required ratio. The Department has deleted the chart illustrating the staffing needed to meet the original requirement, and one illustrating the proposed amendment to the emergency regulation is included below.]**

Caregiver-to-Resident Ratio Table to Meet the Minimum 3.2 Nursing hppd

Resident Ratio	Resident Census	Direct Care Staff	Licensed Nurses <sup>1</sup>	RN/DON <sup>2</sup>	RN/DON <sup>3</sup>	RN <sup>4</sup>
2.5	1 - 2	1	3	1		
5	3 - 5	2	3	1		
7.5	6 - 7	3	3	1		
10	8 - 10	4	3	1		
12.5	11 - 12	5	3	1		
15	13 - 15	6	3	1		
17.5	16 - 17	7	3	1		
20	18 - 20	8	3	1		
22.5	21 - 22	9	3	1		
25	23 - 24	10	3	1		
25	25	10	4	1		
27.5	26 - 27	11	4	1		
30	28 - 30	12	4	1		
32.5	31 - 32	13	4	1		
35	33 - 35	14	5	1		
37.5	36 - 37	15	5	1		
40	38 - 40	16	5	1		
42.5	41 - 42	17	6	1		
45	43 - 45	18	6	1		
47.5	46 - 47	19	6	1		
50	48	20	6	1		
50	49 - 50	20	7	1		
52.5	51 - 52	21	7	1		
55	53 - 55	22	7	1		
57.5	56	23	7	1		
57.5	57	23	8	1		
60	58 - 59	24	8	1		
60	60	24	8		1	
62.5	61 - 62	25	8		1	
65	63 - 64	26	8		1	
65	65	26	9		1	
67.5	66 - 67	27	9		1	
70	68 - 70	28	9		1	
72.5	71 - 72	29	9		1	
75	73 - 75	30	10		1	
77.5	76 - 77	31	10		1	
80	78 - 80	32	10		1	
82.5	81 - 82	33	11		1	
85	83 - 85	34	11		1	
87.5	86 - 87	35	11		1	
90	88	36	11		1	
90	89 - 90	36	12		1	
92.5	91 - 92	37	12		1	
95	93 - 95	38	12		1	
97.5	96	39	12		1	
97.5	97	39	13		1	
100	98 - 99	40	13		1	
100	100	40	13		1	3

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Resident Ratio	Resident Census	Direct Care Staff	Licensed Nurses <sup>1</sup>	RN/DON <sup>2</sup>	RN/DON <sup>3</sup>	RN <sup>4</sup>
102.5	101 - 102	41	13		1	3
105	103 - 104	42	13		1	3
105	105	42	14		1	3
107.5	106 - 107	43	14		1	3
110	108 - 110	44	14		1	3
112.5	111 - 112	45	14		1	3
115	113 - 115	46	15		1	3
117.5	116 - 117	47	15		1	3
120	118 - 120	48	15		1	3
122.5	121 - 122	49	16		1	3
125	123 - 125	50	16		1	3
127.5	126 - 127	51	16		1	3
130	128	52	16		1	3
130	129 - 130	52	17		1	3
132.5	131 - 132	53	17		1	3
135	133 - 135	54	17		1	3
137.5	136	55	17		1	3
137.5	137	55	18		1	3
140	138 - 140	56	18		1	3
142.5	141 - 142	57	18		1	3
145	143 - 144	58	18		1	3
145	145	58	19		1	3
147.5	146 - 147	59	19		1	3
150	148 - 150	60	19		1	3
152.5	151 - 152	61	19		1	3
155	153 - 155	62	20		1	3
157.5	156 - 157	63	20		1	3
160	158 - 160	64	20		1	3
162.5	161 - 162	65	21		1	3
165	163 - 165	66	21		1	3
167.5	166 - 167	67	21		1	3
170	168	68	21		1	3
170	169 - 170	68	22		1	3
172.5	171 - 172	69	22		1	3
175	173 - 175	70	22		1	3
177.5	176	71	22		1	3
177.5	177	71	23		1	3
180	178 - 180	72	23		1	3
182.5	181 - 182	73	23		1	3
185	183 - 184	74	23		1	3
185	185	74	24		1	3
187.5	186 - 187	75	24		1	3
190	188 - 190	76	24		1	3
192.5	191 - 192	77	24		1	3
195	193 - 195	78	25		1	3
197.5	196 - 197	79	25		1	3
200	198 - 200	80	25		1	3

<sup>1</sup> Included in Direct Care Staff Number.

<sup>2</sup> May be included as Direct Caregiver when performing nursing services.

<sup>3</sup> May never be included as Direct Caregiver.

<sup>4</sup> Included in Direct Care Staff and Licensed Nurses Numbers.

**Length of Shift worked:**

HSC section 1276.65(c)(2) further requires that the length of the shift be taken into consideration. It is commonly known that the care given during the "day shift" requires higher staffing levels because that is the time when residents are awake and more active. It is also the time of day that the bulk of medications are administered, medical treatments and therapies are performed, and recreational activities are planned. Care giving, especially that performed by CNAs, requires feeding, transporting and assisting with the activities that interest residents and provide for the physical, mental and psychosocial well-being of each resident. Since that section of the law also dictates that these ratios maximize resident access to care and are calculated on hours per patient day (the assumption is that "day" = 24 hours), the SNF would have the opportunity and flexibility to evaluate each resident's care plan, and schedule the number of nursing staff appropriately for those shifts when care needs are more and less intensive. Although the law does not delineate a 24-hour average ratio, the staffing must be adequate and appropriate to meet the needs of residents at the time when they require the most care. Therefore, the SNF can meet the requirements of law as long as the 24-hour total nursing hppd meets the minimum standard and no less care is given.

The Department has determined that the ratios specified in the table below are required to meet the 3.2 nursing hppd minimum standard.

Classification	Day shift	Evening Shift	Night Shift	Total
Licensed nurse	*	*	*	1:8
Direct Caregiver	1: 5	1:8	1:13	1:2.5

**[Many commenters were concerned that the method the Department used eliminated the flexibility SNFs need to make adjustments to changing populations, particularly when SNFs might wish to provide more licensed staff than required, and fewer unlicensed staff. One commenter pointed out that the statute required the Department to adopt a ratio for "direct caregivers," with a separate one for licensed nurses; it did not require or authorize the Department to adopt one for unlicensed caregivers. The Department agrees with this comment and therefore is proposing to revise the ratios to require one for direct caregivers, and a separate one for licensed nurses. The Department has rejected the**

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\* Facility assigns subject to statutory and regulatory requirements.

**comment that suggested it does not have the authority to require ratios by shift, but proposes to eliminate the shift ratios for licensed nurses to give SNFs the ability to assign licensed nurses where and when they are most needed, subject to other statutory and regulatory provisions concerning the assignment requirements for licensed staff.**

These proposed ratios are based on two variables: (1) the ratios must provide 3.2 nursing hppd; and, (2) more care is required during the day and evening shifts than the night shifts.

The night shift has the lowest staffing requirement, followed by the evening and day shifts. The Department has adopted the above minimum ratios in order to meet the minimum 3.2 nursing hppd without exceeding that minimum by any more than is absolutely necessary.

The SNF shall ensure that nursing staff shall not be assigned more residents than the number for whom they can meet the individual care needs. If a SNF determines that some shifts would require more intense nursing care, and some less, than the regulations specify, it may request a waiver pursuant to subsection (j). These regulations do not prohibit the SNF from staffing above the minimum if there has been a determination that a higher level of staffing is necessary.

The regulation includes the statutory language authorizing the issuance of citations for a violation of its provisions to emphasize the fact a staffing violation may threaten or actually harm residents.

Section 72329.1(h) – Documentation of Daily Staffing:

Upon appropriation in the annual Budget Act or another statute, subsection (h) has been adopted to ensure compliance with the staffing requirements.

**[In accord with the proposed change to the way shift ratios are calculated, the Department also proposed to eliminate the requirement that SNFs track admissions and readmissions on each shift.]**

The ability of the SNF to provide adequate staffing to meet the needs of the residents who remain in the SNF and to accommodate any new admissions to the SNF presents a continuing challenge to the SNF staff. Inasmuch as the resident census and needs frequently change, SNFs must develop a method to increase staffing as necessary, to ensure that the standard 3.2 nursing hppd is met for the maximum resident census during the day.

In order for the Department to determine compliance with section 72329.1(g), the SNF must provide a mechanism to document the direct care giving staffing. Subsection

(h) requires the SNF to record and retain the staffing assignment records and payroll records. Skilled nursing facilities are also required to submit that information to the Department at the Department's request so that an evaluation of compliance may be made. The Department may evaluate compliance by analyzing payroll and staffing data submitted by SNFs, by on-site audits of staffing, or by a combination of the two. This documentation required to be submitted by SNFs shall include the licensing and certification categories of the direct caregivers and the resident daily census. These records must be retained by the SNF for a minimum of three years and must be made available at any time at the request of the Department. Although 42 CFR section 483.30(e)(3) only requires facilities certified to participate in Medicare and Medi-Cal to maintain daily nurse staffing forms "for a minimum of 18 months, or as required by State law, whichever is greater," this regulation extends the requirement to all SNFs, including uncertified SNFs. It also increases the required retention period to 3 years, as this is the retention period with which all SNFs must comply under section 226 of the Labor Code.

The regulation also provides consequences for SNFs that fail, for any reason, to comply with the Department's request for records in a timely fashion; it provides more than enough time (10 days) for a SNF to locate and submit its documentation.

#### Section 72329.1(i) Posting

Subsection (i) has been adopted as required by HSC section 1276.65(f) and pursuant to the federal requirement to post information identifying the direct caregiver staffing in the SNF. Both CMS and HSC section 1276.65 require posting of staffing information. The posting requirements of both the State and the Federal government are comparable. In order to calculate the minimum 3.2 nursing hppd in all the SNFs that employ caregivers for various "shift" hours during a 24-hour period, the proposed rule would establish a data collection component as well as fulfill the record keeping requirement for SNFs. The posting must include the number of licensed and unlicensed nursing staff directly responsible for resident care in the SNF for each shift, and the number of residents (the census) in the SNF. The posting will reflect the total number of residents that are assigned to direct caregivers per eight hour shift, or for any other period of time, in a 24-hour period. Therefore, the form used by certified SNFs to meet CMS requirements, with the addition of information regarding caregiver assignments, may be used in all licensed SNFs and will fulfill the reporting and posting data required by HSC section 1276.65.

**[Many commenters pointed out that almost all direct caregivers need to leave their regular assignments at times during the day to assist other caregivers for short periods. They also pointed out that few licensed nurses are actually assigned to providing care for individual residents. The Department has therefore**

**proposes to revise the posting requirements so that a SNF need only include the primary assignments of the direct caregivers on duty.**

**As one commenter noted, the federal government does not require that a specific form be used to satisfy its posting requirements, so the Department proposed amendments to the emergency regulation to allow SNFs to use the form they use to comply with the federal posting requirement, should they wish to do so, to comply with the Department's requirements, as long as that form is modified so that it also contains the information required by the regulation.]**

This rule will allow consistency and facilitate Department oversight in enforcing nurse staffing requirements and SNF census posting in all SNFs in the state. This rule will also provide the necessary criteria that would provide the data to identify a minimum nurse-to-patient ratio. Compliance with minimum staffing requirements will be identified and more easily determined by the resident, the resident's family, SNF employees, members of the public, and state inspectors.

Section 72329.1(j) Waiver:

HSC section 1276.65(c)(2) requires the Department to develop a process for SNFs to apply for a waiver that addresses individual patient needs. It also prohibits a waiver that reduces the staff-to-patient ratio to less than the equivalent of 3.2 nursing hppd. Subsection (j) is adopted to comply with this requirement.

If a SNF believes that the needs of its individual residents would be better met by providing staffing ratios different from those specified by the Department, it may request a waiver from those ratios, as long as its proposed ratios continue to provide each resident in the SNF the equivalent of a minimum of 3.2 nursing hppd. If a SNF does not use three shifts per day for its caregivers, it will need to apply for a waiver.

The process SNFs may use to apply for a waiver is the program flexibility process currently being utilized by SNFs. The approval would be granted providing that the SNF's policies, procedures and practices are consistent with the waiver approved by the Department. The continuation of the waiver shall be subject to evaluation during any inspection of the SNF, but at least annually in order for the Department to ascertain that the waiver continues to meet the residents' needs.