



ISABELLE HIMMELBERGER-NOVEMBER 29, 2024

BLOG: MINIMUM STAFFING RULE TO THE RESCUE?

Quite a stir was caused back in April of this year when the Centers for Medicare and Medicaid Services (CMS) established its [Final Rule \(CMS 3442-F\)](#) requiring minimum staffing standards for Long Term Care (LTC) Facilities.

Anyone in the field is fully aware of the new regulations stating that the new nurse staffing standard should be 3.48 hours per resident per day (HPRD), to include 0.55 hours per resident of direct registered nurse care and 2.45 hours per resident of direct nurse aide care. The effective dates for this part of the Final Rule are May 10, 2027, for urban facilities and May 10, 2029, for rural facilities. The Final Rule estimated that 86% of Pennsylvania nursing homes will require more staff to comply, at a cost of \$298.2 Million ([89 FR at 40985 pp. 108-109](#)). The American Health Care Association/National Center for Assisted Living that represents more than 14,000 LTC Facilities released an [analysis](#) in May that showed that only 6% of Nursing Homes currently meet all of CMS's four new requirements.

In the meantime, each State has its own regulations for hours worked per resident. In Pennsylvania ([28 Pa. Code § 211.12](#)) this magic number was 2.7 hours prior to July 2023, but is currently 3.2 hours as of July 1, 2024 – still lower than the new federal mandated number. As of October 21, 2024, the Pennsylvania Department of Health's nursing home website indicated that more than a third of licensed nursing homes were still not meeting the State's current 3.2 standard. So far, the Department has refused to approve requests for exceptions to the State standards, even those based on undue hardship criteria (which are permitted under the new Final Rule) ([54 Pa. B. 7441](#), [54 Pa. B. 5308](#), [54 Pa. B. 5676](#))

The CMS Final Rule has also added the requirement to have an RN onsite 24 hours a day, seven days a week, to provide skilled nursing care. That requirement is to be effective in 2026 for urban facilities and later for the rural ones. Not an easy task especially in the current staffing state and costly at that. Pennsylvania regulations have required an RN onsite 24 hours a day since July 1, 2023 except for facilities with less than 60 residents ([28 Pa. Code § 211.12\(f.1 and f.2\)](#)).

In an industry that is one the most highly regulated and where it is already hard to find staffing, and make ends meet, it feels like an extra jab to the jaw. Having worked as a Personal Care Aide (night shift at that) a year during the Pandemic, I saw firsthand how big the turnover of staff was. Though a very rewarding job, it was also one of the hardest I ever had and grossly underpaid at \$12/hour – the going rate at the time.

In response to the new rigid CMS regulations, twenty States (not including Pennsylvania), along with nursing home associations and individual facilities, have joined in lawsuits seeking to invalidate and enjoin implementation of the Final Rule requirements.

In the case pending before the U.S. District Court for the Northern District of Iowa, *State of Kansas et al. v. Becerra et al.*, there is a pending motion, filed October 22, 2024, for a Preliminary Injunction to stay implementation of the Final Rule. In the related case before the U.S. District Court for the Northern District of Texas, [American Health Care Association et al v. Becerra et al.](#), the American Health Care Association, LeadingAge, Texas Health Care Association, Arbrook Plaza, Booker Hospital District, Harbor Lakes Nursing & Rehabilitation Center, and the State of Texas filed a motion for summary judgment, on October 18, 2024, to invalidate and enjoin the Final Rule, after which the Secretary of the U.S. Department of Health & Human Services (USDHHS) filed a cross-motion for summary judgment on November 15, 2024 seeking to dismiss the complaint, with both motions now pending decision by the Court.

On November 20, 2024, the USDHHS Office of Inspector General issued an updated "[Nursing Facility Industry Segment-Specific Compliance Program Guidance](#)" that lists as its very first compliance risk factor: "Staffing Levels, Shortages and Competencies," that recognized that: "Nursing facilities persistently operate in an environment of staffing shortages, high staff turnover, and workforce burnout, all of which exacerbate the challenges associated with attracting, training, and retaining an adequate and qualified workforce."

Naturally, it is of utmost importance to make sure that residents of LTC Facilities are taken care of properly, but it is a fine line LTC Facilities are balancing on. The raising number of bankruptcies of LTC Facilities shows that there is a deeper underlying problem: lack of resources and years of underfunding being just a few. In the meantime, nursing homes must navigate compliance with current rule while balancing available resources to pay for staffing, running a business and offering residents the care they need. Trying to squeeze water from a bleeding stone is certainly not the answer to this ongoing problem.

Capozzi Adler P.C. has stood behind and served Nursing Home Facility clients since 1997. We are here to help you maximize your MA Reimbursements through our Reimbursement and Regulatory Litigation team. Our attorneys and staff have extensive experience in regulatory matters. We're committed to analyzing the rapidly changing regulatory environment and keeping our clients advised on regulatory changes affecting their operations. While budgetary cuts at the state and federal levels have resulted in efforts to reduce reimbursement to healthcare providers, our goal is to "level the playing field" and obtain the reimbursement for care and services to which our clients are legally entitled.