Issue Brief

FEDERAL ISSUE BRIEF

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CMS Has Issued a Final Rule Regarding "Minimum Staffing Standards for Long-Term Care (LTC) Facilities and Medicaid Institutional Payment Transparency Reporting

The Centers for Medicare & Medicaid Services (CMS) have issued a final regarding minimum staffing standards for Long-Term Care (LTC) facilities and Medicaid Institutional Payment Transparency.

This final rule establishes minimum staffing standards to address ongoing safety and quality concerns for the 1.2 million residents receiving services in Medicare and Medicaid certified Long-Term Care (LTC) facilities each day.

These regulations are basically effective on June 21, 2024.

A copy of this 329-page rule is currently available at: https://public-inspection.federalregister.gov/2024-08273.pdf. The rule is scheduled to be published in the May 10 ***Federal Register***.

Note: We are adding page numbers from the display copy to this narrative in red.

Summary of Provisions

Specifically, CMS is revising § 483.35(b) to require an Registered Nurse (RN) to be on site 24 hours per day and 7 days per week (24/7 RN) to provide skilled nursing care to all residents in accordance with resident care plans, with an exemption from 8 hours per day of the onsite RN requirement under certain circumstances. Requirements for this exemption are consistent with the requirements for other waivers and exemptions set forth in the LTC requirements. (Page 5)

CMS is specifying that facilities must provide, at a minimum, 3.48 total nurse staffing hours per resident day (HPRD) of nursing care, with 0.55 RN HPRD and 2.45 Nurse Aid (NA) HPRD. CMS is defining "hours per resident day" as staffing hours per resident per day which is the total number of hours worked by each type of staff divided by the total number of residents as calculated by CMS. CMS notes that while the 3.48 total nurse staffing, 0.55 RN, and 2.45 NA HPRD standards were developed using case-mix adjusted data sources, the standards themselves will be implemented and enforced independent of a facility's case-mix. (Pages 5 & 6)

In other words, facilities must meet the minimum 3.48 total nurse staffing, 0.55 RN, and 2.45 NA HPRD standards regardless of the individual facility's resident case-mix, as they are the minimum standard of staffing. If the acuity needs of residents in a facility require a higher level of care, as the acuity needs in many facilities will, a higher total, RN, and NA staffing level will likely be required.

According to CMS, these new required minimum staffing requirements will increase staffing in more than 79 percent of nursing facilities nationwide, and the specific RN and NA HPRD requirements exceed the existing minimum staffing requirements in nearly all States. (Page 7)

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CMS is finalizing a staggered implementation of these requirements over a period of up to 5 years for rural facilities and 3 years for non-rural facilities to allow all facilities the time needed to prepare and comply with the new requirements. (Page 7)

Exemption from the minimum standards of 0.55 HPRD for RNs, 2.45 HPRD for NAs and 3.48 HPRD for total nurse staffing, and the 8-hours per day of the 24/7 RN onsite requirement would be available only in limited circumstances. In order to qualify for an exemption, a facility must meet the following criteria: (1) the workforce is unavailable as measured by having a nursing workforce per labor category that is a minimum of 20 percent below the national average for the applicable nurse staffing type, as calculated by CMS, by using the Bureau of Labor Statistics and Census Bureau data; (2) the facility is making a good faith effort to hire and retain staff; (3) the facility provides documentation of its financial commitment to staffing; (4) the facility posts a notice of its exemption status in a prominent and publicly viewable location in each resident facility; and (5) the facility provides individual notice of its exemption status and the degree to which it is not in compliance with the HPRD requirements to each current and prospective resident and sends a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman. If the exemption is granted, CMS will post on Care Compare a notice of its exemption status and the degree to which it is not in compliance with the requirements.

As finalized, States will have to comply with these requirements beginning 4 years from the effective date of this final rule. (Page 9)

The following table estimates CMS' cost of compliance. (Page 10)

Provision Description	Total Transfers/Costs
Comprehensive Staffing Requirement for LTC Facilities	Without accounting for any exemptions, CMS estimates that the overall economic impact for the proposed minimum staffing requirements for LTC facilities (that is, collection of information costs and compliance with the 24/7 RN, facility assessment, and minimum 3.48 total nurse staffing, 0.55 RN, and 2.45 NA HPRD requirements), which includes staggered implementation of the requirements, would result in an estimated cost of approximately $53 million in year 1; $1.43 billion in year 2; $4.4 billion in year 3; with costs increasing to $5.8 billion by year 10. CMS estimates the total cost over 10 years will be $43 billion, which was derived from *FY 2021 Worksheet S-3, Part V* of the Medicare Cost Report. ***LTC facilities are responsible for these costs (emphasis added).*** Quantified benefits include but are not limited to, increased community discharges, reduced hospitalizations, and emergency department visits, with a minimum estimated savings of gross costs of $318 million per year for Medicare starting in year 3. Various categories of other important but hard to quantify benefits include reduced staff burnout and turnover, increased safety and quality of care for LTC residents as well. Lack of quantification is also noteworthy as regards key categories of costs.
Medicaid Institutional Payment Transparency Reporting	The overall total economic impact for the reporting requirements is a one-time cost of $37.6 million and ongoing annual costs of $18.3 million per year. CMS estimates a 10-year cost of $147.9 million.

Definitions

Hours per resident day (Page 50)

CMS is finalizing the definition of "hours per resident day" as the total number of hours worked by each type of staff divided by the total number of residents as calculated by CMS. CMS is finalizing the definition of "representative of direct care employees" as an employee of the facility or a third party authorized by direct care employees at the facility to provide expertise and input on behalf of the employees for the purposes of informing a facility assessment.

Minimum Staffing Standards (§ 483.35(a)) (Page 51)

CMS is modifying its proposal and finalizing a requirement for facilities to provide a minimum total nurse staffing standard of 3.48 HPRD that must include at least 0.55 HPRD of RNs and 2.45 HPRD of NAs. CMS is not finalizing its proposal to limit determinations of compliance with hours per resident day requirements to the most recent available quarter of the payroll based journal (PBJ) System data submitted in accordance with § 483.70(p).

Registered Nurse 24 hours per day, 7 days a week (§ 483.35(b)(1)) (Page 64)

CMS is finalizing with revisions the proposed requirement for an RN to be onsite 24 hours a day, 7 days a week and available to provide direct resident care. The RN can be the director of nursing (DON); however, they must be available to provide direct resident care. Also, LTC facilities that qualify for a hardship exemption to the minimum nurse staffing requirement set forth at § 483.35(b)(1)(i) in accordance with the criteria outlined at § 483.35(h) (as finalized in the rule) may also request an exemption of 8 hours per day of the 24/7 RN requirement. CMS has added this as it believes that additional flexibility is needed for facilities as they adopt the 24/7 RN requirement. CMS has added a requirement at § 483.35(c)(2) to specify that for any periods when the onsite RN requirements are exempted in accordance with § 483.35(h), facilities must have a registered nurse, nurse practitioner, physician assistant, or physician available to respond immediately to telephone calls from the facility. In addition, CMS is modifying the language at existing § 483.35(e) (finalized at § 483.35(f)) to revise the heading of the paragraph to read "Nursing facilities: Waiver of requirement to provide licensed nurses and a registered nurse on a 24-hour basis". CMS is also, modifying the language at existing § 483.35(f) (finalized at § 483.35(g)) to revise the heading of the paragraph to read "SNFs: Waiver of the requirement to provide services of a registered nurse for at least 112 hours a week".

There are two waivers discussed in § 483.35 of the LTC participation requirements that are set forth in paragraphs (e) and (f) (redesignated in this final rule as paragraphs (f) and (g), respectively). The requirements for these waivers come directly from the statute, specifically section 1819(b)(4)(C)(ii) and

1919(b)(4)(C)(ii) of the Act, respectively. Since these two waivers are statutory, the waivers can only be removed or modified in detail by legislation. Thus, the waivers in existing § 435.35(e) and (f) (redesignated as paragraphs (f) and (g) in this final rule) will not be changed except for conforming changes. To assist readers and provide clarity, in the table below provides an overview of the differing requirements for the statutory waiver at § 483.35(e) and (f) (finalized as paragraphs (f) and (g) in this rule). (Page 71)

Requirements for the LTC Staffing Statutory Waivers by Facility Type

Facility Type*	NFs*	SNFs*
Statutory Citation	Section 1919(b)(4)(C)(ii) of the Act	Section 1819(b)(4)(C)(ii) of the Act
Regulatory Citation and requirements for participation that can be waived	§ 483.35(e) Nursing services. Nursing facilities: Waiver of requirement to provide licensed nurses on a 24-hour basis (*final rule redesignates this paragraph as paragraph (f)*)) The State can waive the following requirements: 1. The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans. 2. The facility must use the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week *(final rule revises to must have a RN onsite 24 hours per day, for 7 days a week).*	§ 483.35(f) Nursing services. SNFs: Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week. *(final rule redesignates this paragraph as (g) and revises title)* The Secretary can waive the following requirement: 1. The facility must use the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week *(final rule revises to must have a RN onsite 24 hours per day, for 7 days a week).*
Criteria that must be met to be eligible for the statutory waiver	1. The facility must demonstrate to the satisfaction of the State that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel. 2. The State determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility. 3. The State finds that, for any periods in which licensed nursing services are not available, a registered nurse or a physician is obligated to respond immediately to telephone calls from the facility. 4. A waiver is subject to annual State review. 5. In granting or renewing a waiver, a facility may be required by the State to use other qualified, licensed personnel. 6. The State agency granting a waiver of such requirements provides notice of the waiver to the Office of the State Long- Term Care Ombudsman (established under section 712 of the Older Americans Act of 1965) and the	1. The facility is located in a **rural area** and the supply of skilled nursing facility services in the area is not sufficient to meet the needs of individuals residing in the area. 2. The facility has one full-time registered nurse who is regularly on duty at the facility 40 hours a week. 3. The facility either— • Has only patients whose physicians have indicated (through physicians' orders or admission notes) that they do not require the services of a registered nurse or a physician for a 48-hours period, **OR** • Has made arrangements for a registered nurse or a physician to spend time at the facility, as determined necessary by the physician, to provide necessary skilled nursing services on days when the regular full-time registered nurse is not on duty; 4. The Secretary provides notice of the waiver to the Office of the State Long-Term

	protection and advocacy system in the State for individuals with a mental disorder who are eligible for such services as provided by the protection and advocacy agency. 7. The facility must notify residents of the facility and their resident representatives of the waiver.	Care Ombudsman (established under section 712 of the Older Americans Act of 1965) and the protection and advocacy system in the State for individuals with developmental disabilities or mental disorders; and 5. The facility must notify residents of the facility and their resident representatives of the waiver. 6. The waiver is subject to annual renewal by the Secretary.
*Note: The State has its own independent discretion to waive the requirements issued under section 1919(b)(4)(C) of the Act. Therefore, dually-certified facilities must meet the requirements outlined for both SNFs and NFs, whichever is more stringent.		

Hardship Exemptions from the Minimum Hours Per Resident Day Requirements (§483.35(g)) (Page 76)

CMS is finalizing its proposal for hardship exemptions to the HRPD requirements with the following modifications:

- CMS has redesignated the proposed hardship exemption from the minimum hours per day requirements at § 483.35(g) as new paragraph (h) in this final rule and revised the heading to also include a hardship exemption from the "registered nurse onsite 24 hours per day, for 7 days a week requirements".

- CMS has revised the location criteria at newly redesignated § 483.35(h)(1) (proposed § 483.35 (g)(1)) to eliminate the 20 mile criterion and remove all references to a 40 percent below national average provider-to-population ratio. CMS is finalizing at newly redesignated § 483.35 (h)(1) (proposed § 483.35 (g)(1)) the requirement that the facility be located in an area where the supply of applicable health care staff (RN, or NA, or total nurse staffing) is not sufficient to meet area needs as evidenced by the applicable provider-to-population ratio for nursing workforce(RN, NA, or combined licensed nurse and nurse aide) that is a minimum of 20 percent below the national average, as calculated by CMS, by using the Bureau of Labor Statistics and Census Bureau data.

- CMS has modified the requirements at § 483.35(h)(1) to specify that a facility can receive an exemption from one, two, or all three of the following requirements, as follows:

  (1) The facility may receive an exemption from the total nurse staffing requirement of 3.48 hours per resident day at § 483.35(b)(1) if the combined licensed nurse, which includes both RNs and LVN/LPNs, and nurse aide to population ratio in the area is a minimum of 20 percent below the national average.
  (2) The facility may receive an exemption from the RN 0.55 hours per resident day requirement (§ 483.35(b)(1)(i)) and an exemption of 8 hours a day from the RN on site 24 hours per day, for 7 days a week requirement (§ 483.35(c)(1)) if the RN to population ratio in the area is a minimum of 20 percent below the national average.
  (3) The facility may receive an exemption from the NA 2.45 hours per resident day requirement at § 483.35(b)(1)(ii) if the NA to population ratio in the area is a minimum of 20 percent below the national average.

- CMS has added new requirements at § 483.35(h)(4), Disclosure of exemption status, to require that the facility:

  (1) Posts, in a prominent location in the facility, and in a form and manner accessible and understandable to residents, and resident representatives, a notice of the facility's exemption status, the extent to which the facility does not meet the minimum staffing requirements, and the timeframe during which the exemption applies; and
  (2) Provides to each resident or resident representative, and to each prospective resident or resident representative, a notice of the facility's exemption status, including the extent to which the facility does not meet the staffing requirements, the timeframe during which the exemption applies, and a statement reminding residents of their rights to contact advocacy and oversight entities, as provided in the notice provided to them at § 483.10(g)(4); and
  (3) Sends a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.
- CMS is not finalizing paragraph (g)(5)(iv) due to changes made to exemptions for the 24/7 RN requirement.

- CMS is finalizing, as proposed, requirements for good faith efforts to hire (§ 483.35(h)(2)) and demonstrated financial commitment (§ 483.35(h)(3)).

- CMS has renumbered proposed paragraphs (g)(4) through (6) as paragraphs (h)(5) through (7) in the section accordingly.

- CMS has revised paragraph (h)(7) to provide that the term for a hardship exemption under § 483.35(h) is from grant of exemption until the next standard recertification survey, unless the facility becomes an Special Focus Facility, or is cited for widespread insufficient staffing with resultant resident actual harm or a pattern of insufficient staffing with resultant resident actual harm, is or cited at the immediate jeopardy level of severity with respect to insufficient staffing as determined by CMS, or fails to submit Payroll Based Journal data in accordance with § 483.70(p). A hardship exemption may be extended on each standard recertification survey, after the initial period, if the facility continues to meet the exemption criteria in § 483.35(h)(1) through (5), as determined by the Secretary.

Facility Assessment (Proposed § 483.71) (Page 95)

CMS is finalizing as proposed the relocation of § 483.70(e) to a standalone section, § 483.71. CMS is finalizing as proposed the addition of "behavioral health issues" to § 483.71(a)(1)(ii); the addition of "and skill sets" to § 483.71(a)(1)(iii); and the addition of "as required" in § 483.73(a)(1) through (3).

CMS is also finalizing its proposal to redesignate the stem statement for current § 483.70(e) to the stem statement for proposed § 483.71 and existing § 483.70(e)(1) through (3) as proposed § 483.71(a)(1) through (3), respectively. CMS is finalizing as revised § 483.71(b) to require that the LTC facility actively require the participation of the nursing home leadership and management, including but not limited to, a member of the governing body, the medical director, an administrator, and the director of nursing; and, direct care staff, including but not limited to, RNs, LPNs/LVNs, NAs, and representatives of direct care staff, if applicable. The LTC facility must also solicit and consider input received from residents, resident representatives, family members, and representatives of direct care staff. CMS is also finalizing as proposed § 483.71(c) that sets out the activities for which the LTC facility must use the facility assessment, including making staffing decisions, developing and maintaining a plan to maximize recruitment and retention of direct care staff, to inform contingency planning for events that do not necessarily require activation of the facility's emergency plan.

Implementation Timeframe (Page 110)

CMS is finalizing the following implementation timeframe as follows:

- Rural facilities (as defined by OMB):
    - The requirement related to the Facility assessment at § 483.71 must be completed 90-days after the publication date of this final rule.
    - The requirement related to providing 3.48 HPRD for total nurse staffing at § 483.35(b)(1) and the requirement related to 24/7 onsite RN at § 483.35(c)(1) must be implemented 3 years after the publication date of this final rule.
    - The requirements related to providing 0.55 RN and 2.45 NA HPRD at § 483.35(b)(1)(i) and (ii) must be implemented 5 years after the publication date of this final rule.

- Non-rural facilities:
    - The requirement related to the Facility assessment at § 483.71 must be completed 90 days after the publication date of this final rule.
    - The requirement related to providing 3.48 HPRD for total nurse staffing at § 483.35(b)(1) and the requirement related to 24/7 onsite RN at § 483.35(c)(1) must be implemented 2 years after the publication date of this final rule.
    - The requirements related to providing 0.55 RN and 2.45 NA HPRD at § 483.35(b)(1)(i) and (ii) must be implemented 3 years after the publication date of this final rule.

These regulations are effective 60-days following the publication of the final rule in the ***Federal Register***.

Implementation Timeframes for Facilities in Rural Areas (Page 121)

Regulatory Section (s)	Implementation Date
§ 483.71	*Phase 1*: 90-days after the publication date of the final rule
§ 483.35(b)(1) and (c)(1)	*Phase 2*: 3 years after the publication date of the final rule
§ 483.35(b)(1)(i) and (ii)	*Phase 3*: 5 years after the publication date of the final rule

Implementation Timeframes for Facilities in Non-Rural Areas

Regulatory Section(s)	Implementation Date
§ 483.71	*Phase 1*: 90-days after the publication date of the final rule
§ 483.35(b)(1) and (c)(1)	*Phase 2*: 2 years after the publication date of the final rule
§ 483.35(b)(1)(i) and (ii)	*Phase 3*: 3 years after the publication date of the final rule

Comments

The cost of these changes will be significant. As noted, CMS says the 10-year cost is estimated to be $43 billion. Yet, CMS says this amount is the responsibilty of the LTC facilities.

It is obvious that different staff wrote various aspects of the rule. We find the material regarding staffing to be written well with final rule action sections.

We cannot say the same for the Medicaid Insitiutional Payment Transparency Reporting Provisions. One must search to find final actions which in this material is referred to as "After consideration."

One can appreciate the need for teams to put material together. Nonetheless, the inconsistency in style is a problem requiring attention.

Sections of the rule are somwhat difficult to follow. That is, the order is confusing. For example, the material regarding hardship exemptions is listed as "5." It is part of Section II. In other words, this item should be label as Section II paragraph 5. The final action provisions (Page 93) contain the changes from the proposed rule. Several paragraphs have numbered items within. However, on Page 95 a new paragraph 6 is listed. At the top of this page, the material "(7) in the section accordingly."

One sees 7 followed by 6 which of course leads to the conclusion that 7 is before 6 or 6 is after 7.

Again, CMS needs to refine its sections and tables to include more than just a letter or a number. Doing so what save readers much time in finding pertinent material.