Issue Brief

FEDERAL ISSUE BRIEF

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Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting

The Centers for Medicare & Medicaid Services (CMS) have issued a proposed rule that would establish minimum staffing standards to address ongoing safety and quality concerns for the 1.4 million residents receiving care in Medicare and Medicaid certified Long-Term Care (LTC) facilities.

The proposal would also promote public transparency related to the percent of Medicaid payments for certain institutional services that are spent on compensation to direct care workers and support staff.

The proposal is scheduled to be published in the ***Federal Register*** on September 6. A copy of the 231-page document is currently available at: https://public-inspection.federalregister.gov/2023-18781.pdf. A 60-day comment period ending November 6 is provided.

Comment

Note, much of this proposal is based on studies. Further, CMS is seeking comments on most of its proposed changes.

As usual, we are annotating the material below with corresponding page numbers from the display version of the proposal.

Major Provisions

CMS proposes to revise § 483.35(b) to require an RN to be on site 24 hours per day and 7 days per week to provide skilled nursing care to all residents in accordance with resident care plans. CMS also proposes individual minimum staffing type standards, based on case-mix adjusted data for RNs and nurse aides (NAs), to supplement the existing "Nursing Services" requirements at 42 CFR 483.35(a)(1)(i) and (ii) to specify that facilities must provide, at a minimum, 0.55 RN hours per resident day (HPRD) and 2.45 NA HPRD.

CMS is proposing to stagger the implementation dates of these requirements to allow facilities the time needed to prepare and be in compliance with the new requirements. Specifically, CMS proposes that the RN on site, 24 hours per day, for 7 days a week would take effect 2 years after publication of the final rule; and CMS proposes that the individual minimum standards of 0.55 HPRD for RNs and 2.45 HPRD for NAs would take effect 3 years after publication of the final rule. (Page 8)

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Summary of Cost and Benefits (Page 9)

Provision Description	Total Transfers/Costs
Comprehensive Staffing Requirement for LTC Facilities	Without accounting for any exemptions, we estimate 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 0.55 RN and 2.45 NA HPRD requirements), which includes staggered implementation of the requirements, would result in an estimated cost of approximately for $32 million in year 1; $246 million in year 2; $4 billion in year 3; with costs increasing to $5.7 billion by year 10. **We estimate the total cost over 10 years will be $40.6 billion**, which was derived from *FY 2021 Part V* of the Medicare Cost Report. LTC facilities would be expected to bear the burden of these costs, unless payors increase rates to cover cost. 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, and increased safety and quality of care for LTC residents. Lack of quantification is also noteworthy as regards key categories of costs.
Medicaid Institutional Payment Transparency Reporting	The overall economic impact for the proposed reporting requirement is a one-time cost of $38 million and ongoing annual costs of $18 million per year.

Minimum Staffing Standards for Long-Term Care Facilities (Page 10)

CMS commissioned a nursing home staffing study in 2001, entitled "Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes," commonly referred to as the 2001 CMS Staffing Study, that focused on two empirical analyses related to the link between staffing and quality.

CMS says that the proposed RN requirement of 0.55 HPRD is higher than every State, and only lower than the District of Columbia (D.C.) based on data from September 2022. The proposed NA requirement of 2.45 HPRD is higher than all States and D.C., based on data reported in September 2022.

The 2022 Nursing Home Staffing Study report, which is being published concurrently with this proposed rule, found that States that established higher nurse staffing standards resulted in increased staffing within nursing homes, but the magnitude of this increase varied by the staff type. (Page 29)

Medicaid Institutional Payments and Payment Transparency (Page 42)

CMS is proposing a Medicaid Institutional Payment Transparency provision that is intended to promote public payment transparency. "Greater transparency will help us assess the extent to which LTC facilities with a large Medicaid population have challenges achieving compliance with minimum staffing standards. State Medicaid Agencies would be required to publicly report the percentage of payments expended for direct care workers and support staff services in Medicaid-participating nursing facilities and Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID). We expect that as a result of this transparency requirement, some facilities would likely increase staffing independent of our proposed minimum staffing standards."

Provisions of the Proposed Regulations (Page 46)

CMS proposes a comprehensive staffing approach that consists of the three following elements: (1) establishing new minimum nurse staffing standards based on case-mix adjusted staffing; (2) revising the on-site RN requirement; and (3) revising the existing facility assessment requirement.

CMS is proposing to specify HPRD for RNs and NAs in the minimum staffing requirement at § 483.35(a) and are not proposing a total nurse staffing level under which facilities have the flexibility to decide between types of licensed nurses to meet the minimum requirement. (Page 54)

First, research evidence suggests that greater RN presence has been associated with higher quality of care and fewer deficiencies. Second, it has been reported in the literature that where standards provide flexibility as between types of licensed nurses (that is, do not specify RN hours), LPN/LVNs may find themselves practicing outside of their scope of practice partly because there are not enough RNs providing direct patient care and supervision of LPN/LVNs.

In addition to CMS' proposed 24-hour, 7 days a week requirement for an RN, CMS continues to maintain a separate requirement for the Director of Nursing (DON). All LTC facilities must designate an RN to serve as the DON on a full-time basis (§ 483.35(b)(2)). (Page 66)

CMS proposes at new § 483.71(b)(1) to require facilities to use the facility assessment to inform staffing decisions to ensure appropriate staff are available with the necessary competencies and skill sets necessary to care for its residents' needs as identified through resident assessments and plans of care as required in § 483.35(a)(3). (Page 76)

Facilities would also be required, at new § 483.71(b)(3), to consider the specific staffing needs for each shift, such as day, evening, night, weekends, and to adjust as necessary based on any significant changes to the resident population.

Hardship Exemption from the Minimum Hours Per Resident Day Requirements for RNs and NAs (Page 78)

CMS is proposing a hardship exemption to the HPRD requirements portion of the minimum staffing standards. The exemption would apply only to the RN and/or NA HPRD requirements and is separate and distinct from the existing statutory waiver process that addresses, in particular, overarching RN staffing requirements.

Specifically, CMS proposes to re-designate the existing requirements for nurse staffing information at existing § 483.35(g) to a new paragraph (h). CMS proposes at new § 483.35(g) to allow LTC facilities with a verifiable hardship that precludes the LTC facility from achieving or maintaining compliance to be exempt from one or both of the proposed requirements at § 483.35(a)(1)(i) and (a)(1)(ii). Given the complex health needs of LTC residents, to protect resident health and safety, CMS believes that it is important for exempted LTC facilities to maintain compliance with the 24/7 RN requirement as there are longstanding concerns related to low staffing levels in LTC facilities on weekends and evenings and ongoing RN presence is needed to provide care and monitor resident health.(Page 82)

Comment

CMS details numerous requirements for LTC hardship exceptions. Please refer to the proposal for these requirements, as well as CMS' requests for comments on specific items.

Medicaid Institutional Payment Transparency Reporting Provision (§§ 438.72 and 442.43) (Page 95)

CMS is proposing new Federal requirements that are intended to promote public transparency around States' statutory obligation under section 1902(a)(30)(A) of the Act and around the quality requirements in section 1932(c) of the Act for services furnished through managed care organizations (as well as for prepaid inpatient health plans (PIHPs) under section 1902(a)(4) of the Act), to make Medicaid payments that are sufficient to enlist enough providers so that quality long-term services and supports (LTSS) are available to the beneficiaries who want and require such care.

CMS is proposing at § 442.43(b) to require that States report annually on the percent of payments claimed by the State for Medicaid-covered services delivered by nursing facilities and intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) that are spent on compensation to direct care workers and support staff.

Proposed Provisions (Page 104)

CMS is proposing to create a new provision, § 442.43, which would specify requirements for States to report on compensation for direct care workers and support staff as a percentage of Medicaid payments for nursing facility and ICF/IID services. At § 442.43(a)(1), CMS proposes to define compensation to include salary, wages, and other remuneration as defined by the Fair Labor Standards Act and implementing regulations (29 U.S.C. 201 et seq., 29 CFR parts 531 and 778), and benefits (such as health and dental benefits, sick leave, and tuition reimbursement). In addition, CMS proposes to define compensation to include the employer share of payroll taxes for direct care workers and support staff delivering Medicaid-covered nursing facility and ICF/IID services (which, while not necessarily paid directly to the workers, is paid on their behalf).

CMS considered whether to include training or other costs in the proposed definition of compensation. However, CMS believes that a definition that more directly addresses the financial benefits to workers would better measure the portion of the payment for services that went to direct care workers and

support staff, as it is unclear that the cost of training and other workforce activities is an appropriate way to quantify the benefit of those activities for workers.

CMS proposes to define direct care workers to include: nurses (registered nurses, licensed practical nurses, nurse practitioners, or clinical nurse specialists) who provide nursing services to Medicaid-eligible individuals receiving nursing facility and ICF/IID services; certified nurse aides who provide such services under the supervision of one of the foregoing nurse provider types; licensed physical therapists, occupational therapists, speech-language pathologists, and respiratory therapists; certified physical therapy assistants, occupational therapy assistants, speech-language therapy assistants, and respiratory therapy assistants or technicians; social workers; personal care aides; medication assistants, aides, and technicians; feeding assistants; activities staff; and other individuals who are paid to provide clinical services, behavioral supports, active treatment (as defined at § 483.440148), or address activities of daily living (such as those described in § 483.24(b), which includes activities related to mobility, personal hygiene, eating, elimination, and communication),for individuals receiving Medicaid-covered nursing facility and ICF/IID services.

CMS also proposes in § 442.43(a)(2) to define direct care workers to include individuals employed by or contracted or subcontracted with a Medicaid provider or State or local government agency.

Final Thoughts

While the proposed rule is 231 pages, the actual changes being presented are only 122 pages.

A significant amount regulatory analysis (72 pages) is presented.

As noted above, this may seem like a simple rule, but it is going to cost providers of more than $40 billion over 10 years is not insignificant.