

## *A Closer Look at the Revised Nursing Facility Regulations*

# Nursing Services

### Executive Summary

Revised nursing facility regulations broadly affect facility practices, including nursing services. The regulations failed to include a numerical minimum staffing standard, instead maintaining the previous requirement that “sufficient staff” be available. The regulations do, however, place a greater emphasis on establishing minimum competencies and skill sets for all nursing personnel. Facilities must assess their resident population and resources to determine both the number and competencies of staff needed to care for residents. In addition, the regulations have increased requirements for in-service training of nursing personnel. Finally, the revised regulations require that the resident and resident representative be notified of any waivers of nursing staff requirements.

#### Acknowledgements

Justice in Aging, National Consumer Voice for Quality Long-Term Care, and Center for Medicare Advocacy created this issue brief in collaboration. This brief is the fourth of a series explaining important provisions of the revised regulations.

### Introduction

On September 28, 2016, the Centers for Medicare & Medicaid Services (CMS) released revised nursing facility regulations. These regulations govern most aspects of nursing facility operations, and apply nationwide to any nursing facility that accepts Medicare and/or Medicaid reimbursement.

### Sufficient Staffing

Consistent with the statute and previous rules, the revised regulations continue to require that there be “sufficient” nursing staff, rather than set a numerical minimum staffing standard. However, under a new requirement, nurses and nurse aides must have the necessary competencies and skills to keep residents safe and provide residents with the care they need to reach their highest level of well-being. “Competent” means that staff are able to successfully perform their jobs by applying their knowledge, abilities, and judgment.

For the first time, the regulations indicate what a facility must consider in determining sufficient staffing. As part of a new provision under Administration, a facility must conduct a facility assessment that includes evaluating 1) the number, acuity, diagnoses, and care required for their residents and 2) the training, experience, and skills of staff. The facility must then take into account its assessment of all residents and skill sets of individual staff when making staffing decisions.

Also new is a definition of “providing care.” The regulations specify that providing care is considered to be, at a minimum, assessing, evaluating, planning and implementing resident care plans and responding to the resident’s needs. This separates the task of “providing care” from administrative tasks such as charting.

## Registered Nurse

As under the previous regulations, there must be a registered nurse (RN) on duty at least 8 hours a day, 7 days a week, and the facility must have a licensed nurse on duty around the clock. In addition, the facility is required to designate an RN to serve as the director of nursing on a full-time basis. A waiver from these requirements is permitted under certain limited circumstances, as described below.

## Hiring Staff

A continuing requirement prohibits a facility from employing a nurse aide for more than 4 months unless he or she is competent in providing nursing and related services and has completed a training and competency evaluation program.<sup>1</sup> Such programs require at least 75 hours of training, and successful completion of a competency examination.

To ensure compliance with these requirements, a facility must seek information from every State registry that the facility believes may include information about the individual staff member or potential staff member. A nurse aide must complete a new training and competency evaluation program if 24 months have passed since he or she last provided nursing or related services for compensation.

## In-Service Education

The revised regulations continue to require that the facility complete a performance review of every nurse aide at least once every 12 months and

provide regular in-service education based on the outcome of these reviews.<sup>2</sup> However, the revised regulations require that the in-service education set out in section 483.95 now include dementia management and resident abuse prevention training,<sup>3</sup> and that the facility assessment be used, along with the nurse aides’ performance reviews, in determining areas of weakness that should be addressed by in-service training.

## Staffing Waivers

The revised regulations continue the waiver requirements set out by the previous regulations and the relevant statutes. A facility may request a waiver of the requirement to provide licensed nurses on a 24-hour basis if the facility has demonstrated, to the satisfaction of the State, that, despite due diligence, it has been unable to recruit sufficient staff. Before granting a waiver, the State must determine that the facility did diligently attempt to recruit staff, the waiver will not endanger the health or safety of the residents, an RN or physician will be on-call and obligated to respond immediately to calls from the facility, notice is provided to the State Long-Term Care Ombudsman, and the facility notifies the residents and their representatives of the waiver.

The revised regulations also maintain provisions permitting facilities to request a waiver of the requirement to provide services of an RN (and a director of nursing) seven days a week. In these situations, a waiver allows the facility to reduce the required RN staffing to only 40 hours per week. Waiver is allowed if the facility is located in a rural area where the availability of skilled nursing services is insufficient, the facility has a full time RN on duty 40 hours per week, and either 1) the residents’ physicians have indicated that their patients do not need RN or physician services for a 48-hour period (likely the weekend), or 2) arrangements have been made for an RN or physician to provide skilled nursing services,

<sup>2</sup> 42 C.F.R. § 483.35(d)(7).

<sup>3</sup> 42 C.F.R. § 483.95(g)(2).

<sup>1</sup> 42 C.F.R. §§ 483.35(d), 483.35(d)(1).

as deemed necessary by the physician, on days when the regular full-time RN is not on duty. In the event such a waiver is granted, notice must also be provided to the State Long-Term Care Ombudsman.

It is important to note that the revised regulations require that the nursing facility must notify the resident and the “resident representative” of any nurse staffing waiver.<sup>4</sup> The regulations now define “resident representative” as:

1. a person chosen by the resident or authorized by state or federal law (e.g. under a power of attorney) to act on behalf of the resident in numerous specified ways, including receiving notifications;
2. a legal representative; or
3. a court-appointed guardian or conservator.<sup>5</sup>

## Nurse Staffing Information

The revised regulations still require the facility to post daily:

1. the facility name,
2. the current date,
3. the total and actual number of hours per-shift worked by licensed and unlicensed nursing staff who are directly responsible for resident care, and
4. the resident census.<sup>6</sup>

In addition, the revised regulations retain the requirement that the posting be clear and readable, in a prominent place readily accessible to residents and visitors. Copies must be made available to the public based on the community standard for copying costs. The facility must maintain the data for a minimum of 18 months, or for any longer period required by state law.<sup>7</sup>

## Effective Dates

The revised regulations’ nursing services provisions were effective on November 28, 2016, except for provisions related to the facility assessment at section 483.70(e). Those provisions that utilize the facility assessment will become effective in Phase 2 on November 28, 2017.

## Finding the Regulations

Nursing services are discussed in Section 483.35 of Title 42 of the Code of Federal Regulations.

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4 42 C.F.R. §§ 483.35(e)(7), 483.35(f)(1)(v).

5 42 C.F.R. § 483.5.

6 42 C.F.R. §§ 483.35(g), 483.35(g)(1).

7 42 C.F.R. § 483.35(g)(2).

## Tips for Residents and Advocates

**Advocate for enough nursing staff to meet the resident's needs.** Don't just say "there isn't enough staff." Identify what specific needs are not being met and talk with facility leadership and the administrator. The care planning process is a good place to raise concerns about insufficient staffing.

**Work with the resident council or family council.** Broader advocacy is important if insufficient staffing is a problem for a number of residents or facility-wide. A council can point out that the facility must consider the number, acuity, and diagnoses of residents in its staffing decisions.

**Insist that staff be able to effectively provide the care the resident requires.** Residents and advocates should emphasize that the facility must have staff with the appropriate competencies and skill sets to care for the facility's particular resident population.

**Share concerns about insufficient staff with the survey and certification agency.** Many quality of care problems stem from insufficient staffing. The survey agency has authority to cite deficiencies in staffing and to issue penalties to sanction noncompliance and compel a facility to improve its staffing practices.