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Short-Term Takeaways From CMS' New Long-Term Care Rules

By **Meredith Auten, Jonathan York and Kayla Kaplan** (June 11, 2024, 6:00 PM EDT)


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On May 10, the Centers for Medicare & Medicaid Services published its final rule to implement a minimum staffing floor for nursing homes in the U.S., as first announced on April 22.[1]

The final rule,[2] which as proposed garnered significant attention and opposition, with over 46,000 public comments submitted, reflects the Biden administration's efforts to implement staffing mandates to ensure the quality of care for long-term care nursing home residents.

The regulatory changes are highly controversial and face headwinds in Congress, where House Republicans have already introduced a resolution to overturn the final rule, and there is a potential for significant litigation over the new provisions.

Any challenges to the final rule will also be affected by the U.S. Supreme Court's ultimate decision regarding the persistence of Chevron deference, which is being reconsidered this term.

While uncertainties abound in the face of this regulatory landscape, all stakeholders must consider the reality of enhanced staffing now in light of workforce shortages and more focused regulatory requirements on staffing and facility plan of care assessments.

Key Staffing Provisions

The final rule requires nursing homes to have a minimum of 3.48 hours per resident day, or HPRD, with each resident receiving at least 0.55 hours of care from a registered nurse per day and at least 2.45 hours of care from a nursing aid per day.

A small nuance from the proposed rule is that facilities will have flexibility to use a combination of staff — registered nurses, licensed nurse practitioners, licensed vocational nurses or nursing aids — to provide the additional 0.48 HPRD needed to meet the minimum standard.

In addition to the minimum HPRD, the final rule requires a registered nurse to be on-site at facilities 24 hours a day, seven days a week to provide direct patient care, which is aimed at addressing preventable safety events during more vulnerable times for residents like nights and weekends.

The final rule also includes a staggered implementation and provides for some regulatory flexibility in meeting the new standards.

The timeline for implementation of these requirements tracks from the final rule publication date — May 10 — and will be staggered over a three-year period for all nonrural facilities as follows:

- Phase 1: Within 90 days, facilities must meet the facility assessment requirements;
- Phase 2: Within 2 years, facilities must meet the 3.48 HPRD total nurse staffing requirement and the 24/7 registered nurse requirement;
- Phase 3: Within 3 years, facilities must meet the 0.55 registered nurse and 2.45 HPRD requirements.

CMS acknowledged that these requirements will be more challenging for facilities in more rural areas, as defined by the Office of Management and Budget, and has given them additional time: one and two years, respectively, to meet these standards.

CMS also announced that the agency is finalizing a proposal for hardship exemptions from the minimum staffing standards for HPRD and the 24/7 onsite registered nurse requirements.

The hardship exemptions are limited to facilities in geographic areas where the provider-to-population ratio for the nursing workforce is 20% below the national average. Those eligible facilities will be required to submit documentation of their efforts to recruit and retain staff, as well as a financial commitment to staffing.

Stakeholders should note that these exemptions are not a fallback position and must be actively pursued. Facilities that have not submitted data through the payroll-based journal system or have been identified as a special focus facility will not be eligible for an exemption after the fact.

Facility Assessments

While CMS already requires facilities to conduct and document an annual assessment, CMS also announced that it was finalizing additional requirements for these assessments, with the goal of producing more individualized staffing plans. Facilities will be required to document methods for care planning for certain needs such as residents with behavioral health issues, significant changes in census, facility leadership and maximizing recruitment of staff.

Notably, facilities must develop a staffing plan to maximize recruitment and retention consistent with President Joe Biden's April 2023 executive order on increasing access to high-quality care and supporting caregivers.[3] This executive order is far-reaching in ambition, but it is not clear if its provisions related to healthcare workforce recruitment and retention have been implemented to any degree.

CMS' announcement specifically noted that one effect of these bolstered assessments could be facilities "staffing at levels above the finalized minimums as indicated by resident acuity." How this expectation will be met by the industry is unknowable at this time.

Staffing Resources and Incentives

In September, CMS' announcement of the proposed rule was accompanied by an initiative that would invest over $75 million as part of a nursing home staffing campaign, introducing incentives for workers to pursue careers as nursing home staff.

Unfortunately, CMS' final rule announcement did not provide any additional information on the program, noting that CMS is currently conducting research to "inform the structure of the program" and that the agency anticipates financial incentives, e.g., tuition reimbursement and scholarships, to begin distribution in 2025.

In essence, then, the long-term care health sector is dealing with an unfunded mandate. This is especially troubling given the estimated $43 billion the final rule is estimated to cost nursing homes over the next decade, according to the U.S. Department of Health and Human Services, with the additional staff promised by CMS likely not ready to enter the workforce until 2027 at the earliest.

CMS' lack of acknowledgment of workforce realities and the dire nursing shortage for all healthcare providers, not simply those in service at long-term care facilities, is woefully misguided and may critically undermine the important objectives of the staffing and care mandates.

It is also the reason many credible healthcare organizations, such as the American Hospital Association,[4] have not embraced the new regulatory paradigm, noting the final regulation will exacerbate the healthcare workforce crisis and predicting reduced nursing home admission capacity and the closure of many good nursing homes with high-quality metrics due to an inability to recruit nursing professionals to the heightened standards.

Comments to the proposed rule suggested the cost of the staffing mandates will be staggering and not doable, especially for smaller and rural nursing homes.

Congressional Involvement

A week after CMS announced the final rule, Reps. Michelle Fischbach, R-Minn., and Greg Pence, R-Ind., introduced a Congressional Review Act joint resolution — H.J. Res. 139 — that would overturn the mandatory minimum staffing requirements.

Congressional Republicans, congressional Democrats from rural areas and industry leaders alike echoed common concerns about the rule — namely that its anticipated cost will exacerbate the workforce shortage in the long-term care health sector.

Both lawmakers and industry voices also expressed concern that the rule would likely have the unintended consequence of nursing homes either closing or severely limiting their admissions in order to achieve the requisite HPPD with the same level of staff.[5]

In contrast, Sen. Bob Casey, D-Pa., chairman of the U.S. Senate Special Committee on Aging, issued an announcement praising the final rule. Casey described the rule as an "important step towards ensuring that all nursing homes are providing the care that all residents need and deserve."[6]

Casey's support for the rule comes as no surprise, given his sponsorship of the Nursing Home Improvement and Accountability Act of 2021, which, if passed, would have required the HHS to conduct a study on staffing and use that report to set minimum staffing requirements in skilled nursing facilities

and nursing facilities for registered nurses, licensed practical nurses or licensed vocational nurses, and certified nursing assistants.[7]

Importantly, unlike the final rule, the NHIA would have also provided temporary additional federal funding through Medicaid to increase wages and improve recruitment and retention of long-term care healthcare workers.

Other Democratic lawmakers, specifically Sen. Elizabeth Warren, D-Mass., expressed disappointment in industry reactions to the final rule. Sens. Warren; Richard Blumenthal, D-Conn.; and Bernie Sanders, I-Vt., issued letters to certain for-profit nursing home operators the same day CMS issued the final rule.

Warren also publicly questioned whether the operators' concerns related to the final rule were consistent with the compensation paid to the companies' top executives.[8]

The resolution has been referred to committee, and it is unclear when or if it will next be acted upon. And while the Republican-sponsored resolution only requires a simple majority vote in both the U.S. House of Representatives and Senate, even if it were to survive a vote in the Democratic-controlled Senate, the resolution would almost certainly be vetoed by Biden, who would not lightly overturn his own agency's action.

It's also unclear whether there is any support for reviving legislation like the NHIA, or introducing new legislation that may pave over the funding gaps left by CMS in the wake of the final rule.

Chevron Deference Looms Large

Given the increased scrutiny the final rule generated through its notice-and-comment period and the introduction of a CRA joint resolution for disapproval, the final rule is almost certainly to be challenged under the Administrative Procedure Act. As such, the U.S. Supreme Court's current consideration of Chevron deference may have an important effect on any challenge to the final rule.

The Supreme Court's 1984 ruling in Chevron v. Natural Resources Defense Council held that where a statute is ambiguous, Congress intended to delegate authority to the relevant executive agency to interpret the statute and promulgate rules to fill such purposeful statutory gaps.

The court adopted a two-part test where courts, in addressing challenges to regulations or other agency action, must determine (1) whether the delegating statute the agency interpreted is, in fact, ambiguous, and, if so, (2) whether the agency's interpretation of the statute is reasonable. If a court finds in the affirmative for both, it should defer to the agency's interpretation of the statute.

Chevron's applicability has been diminished in recent years. In fact, Chevron has not been relied upon in a Supreme Court decision since 2016. It nonetheless remains a significant judicial doctrine regarding agency deference, in particular for lower courts.

And now, the fate of the doctrine is in the balance as the court considers whether to overrule it based on arguments heard in Relentless Inc. v. Department of Commerce and Loper Bright Enterprises Inc. v. Secretary of Commerce in January. The court's ultimate ruling will likely affect challenges to agency regulation going forward, and the final rule will be no exception.

CMS may have strong arguments that it has a purposefully broad mandate to regulate nursing facilities.

As part of the background for the final rule published in the Federal Register, CMS cited Sections 1819(d)(4)(B) and 1919(d)(4)(B) of the Social Security Act as the source of its statutory authority to issue minimum staffing standards for long-term care facilities.[9]

Both provisions delegate broad authority to the secretary — providing that "[a] nursing facility must meet such other requirements relating to the health and safety of residents or relating to the physical facilities thereof as the Secretary may find necessary."

However, even rules promulgated in accordance with broad delegated authority may not be insurmountable if the court overturns or revises Chevron, where federal courts will need to carefully consider not just whether the agency's final rule is reasonable, but whether the agency can reasonably support the basis for its rulemaking.

Key Takeaways

The final rule is ambitious in mandating staffing quotas in nursing homes in the U.S., but there is much more work to be done by CMS for these new requirements to assure sustained quality care for nursing home residents, including increasing reimbursement for staffing and related activities and pioneering a sustainable national nursing professional recruitment and training effort.

An unfunded mandate is not a prescription for success if experience is any guide. Stakeholders nevertheless need to prepare for the expectation of increased staffing and more specialized facility assessments without meaningful funding, and closely monitor regulatory developments at the state and federal levels.

While it is currently unlikely that Congress will move forward with any meaningful action to address the final rule in the near term, that does not mean that CMS' mandatory staffing requirements are set in stone. Litigation challenging the rule will almost certainly be on the horizon, and the success of this litigation may be affected by the upcoming Chevron ruling.

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[1] https://www.cms.gov/newsroom/fact-sheets/medicare-and-medicaid-programs-minimum-staffing-standards-long-term-care-facilities-and-medicaid.

[2] https://www.federalregister.gov/public-inspection/2024-08273/medicare-and-medicaid-programs-minimum-staffing-standards-for-long-term-care-facilities-and-medicaid.

[3] https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/18/executive-order-on-increasing-access-to-high-quality-care-and-supporting-caregivers/.

[4] https://www.aha.org/news/headline/2024-04-22-cms-finalizes-minimum-staffing-standards-nursing-homes.

[5] https://fischbach.house.gov/2024/5/reps-fischbach-and-pence-introduce-cra-to-overturn-hhs-nursing-staff-mandate.

[6] https://www.aging.senate.gov/press-releases/casey-applauds-finalized-rule-promoting-safety-of-nursing-home-residents.

[7] https://www.finance.senate.gov/imo/media/doc/Nursing%20Home%20Improvement%20and%20Accountability%20Act_One-Pager_Final.pdf.

[8] https://www.warren.senate.gov/newsroom/press-releases/warren-lawmakers-call-out-hypocrisy-of-nations-largest-public-for-profit-nursing-homes-for-opposing-new-biden-admin-staffing-rule-while-spending-millions-enriching-executives-and-shareholders.

[9] https://www.federalregister.gov/documents/2024/05/10/2024-08273/medicare-and-medicaid-programs-minimum-staffing-standards-for-long-term-care-facilities-and-medicaid#citation-12-p40879.