

COLORADO HEALTH CARE ASSOCIATION 2022 Annual Convention, Loveland, Colorado

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Legal, Legislative and Regulatory Update –

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THE UPDATE FOR 2022

OVERVIEW OF SIGNIFICANT DEVELOPMENTS

- National Case and Legal Matters of Import**
- Selected state legislative developments affecting LTC**
- Federal and State Survey/Enforcement trends**

NOT AN ATTEMPT TO SURVEY ALL MATTERS IMPACTING LTC

- Will cover only some of the important developments in depth**
- We will have a Q & A session as well**

NATIONAL DEVELOPMENTS ---CASES

COVID 19 CIVIL LTC LITIGATION

PREP ACT IMMUNITY CASES

THE CA CASES (*GARCIA, SALDANA AND MARTIN*)

THE THIRD CIRCUIT CASE (*ESTATE OF MAGLIOLI*)

- **BASIS:** Immunity from civil liability exists where “covered persons” deploy “countermeasures” during a public health emergency”
- **ISSUES:**
 - What constitutes appropriate “counter measures?”
 - What is federal pre-emption?
 - What is the extent of the immunity, if any?

NATIONAL DEVELOPMENTS – CASES CONT'D

- Does a violation of the MCR/MCD regulations establish a civil “private right of action” for NH residents via 42 USC Section 1983?
- Seventh Circuit Decision says “Yes” as does the Third Circuit—But other Circuits have ruled “No”
- *Health and Hosp. Corp. of Marion Cty v. Talevski*—Currently on review at SCOTUS due to this “Split in the Circuit Courts”
- Colorado Federal District Court Decision: *Hawkins v. Bent County Health Care* has ruled to the contrary
- **BOTTOM LINE:**
 - If there is a causal connection, then the regulatory violation establishes liability in and of itself

NATIONAL DEVELOPMENTS – CASES CONT'D

***AM. HOSP. ASS'N V. BECERRA* (SCOTUS DECISION)**

- **ISSUE:** Does CMS have the authority to forgo a required statutory study when setting pharmacy reimbursement rates?

***BARROWS V. BECERRA* (SECOND CIRCUIT—REMAND TO TRIAL COURT)**

- **ISSUE:** Are Medicare Beneficiaries entitled to due process when a hospital makes an adverse continuation of stay determination?

***AVON NURSING & REHAB V. BECERRA* (SO. DIST. OF NY—ON REMAND FOR TRIAL ON THE MERITS)**

- **ISSUE:** Are survey teams required to have an RN as team member?

NATIONAL DEVELOPMENTS – FEDERAL (CMS) INITIATIVES

**PER THE WHITE HOUSE PROCLAMATION OF FEB. 2022,
CMS WILL BE PROPOSING A RULE TO REQUIRE NHS
TO PROVIDE MINIMUM STAFFING LEVELS**

**WHILE CMS IS SUPPOSEDLY STUDYING THE
APPROPRIATE REQUIREMENT—DISCUSSIONS
INDICATE THE MINIMUM LEVEL WILL BE @ 4 + HOUR
PPD**

— ISSUES:

- Does CMS have the statutory authority?**
- What will this cost (est. \$4B)?**
- Will there be a waiver process?**
- What will be the impact on civil liability risks?**

NATIONAL DEVELOPMENTS – DOJ NATIONAL NURSING HOME INITIATIVE (NNHI)

UTILIZING THE FALSE CLAIMS ACT TO COMBAT WHAT IT SEES AS “GROSSLY SUBSTANDARD SERVICES”

NOT A NEW APPROACH BUT DEPARTS FROM DOJ’S FCA OVERBILLING AND THERAPY CASES

CASES WILL BE DATA DRIVEN TO FIND FACILITY OUTLIERS IN:

**FIVE STAR QUALITY MEASURES
OVERALL STAFFING SCORE
REGISTERED NURSE STAFFING
PBJ REPORTS**

NATIONAL DEVELOPMENTS – REVISED FEDERAL GUIDANCE (SOM APP PP) ON ARBITRATION AGREEMENTS

Survey Probes—Compliance determined in part by interviews with Residents and their Representatives

- Was the agreement explained “in a way” that you understood?**
- Were the waiver provisions of the Agreement explained?**
- If the agreement was contained within another document were you told how to decline?**
- Did you feel you were obligated, required, forced or pressured to sign?**
- Have you been prohibited or discouraged from communicating with government officials (including surveyors) about the agreement?**

IMPACT OF FEDERAL GUIDANCE ON COLORADO'S HEALTH CARE ARBITRATION STATUTE'S REQUIREMENTS

HCAA has specific requirements for an agreement to be valid

Colorado court decisions have upheld the use of such agreements in NHS if statutory requirements are met--

- *Johnson v. Rowan* (Ct. of App.)—failure provide copy and not counter signed by facility—reference made to a “stack of papers” presented in the admissions process**
- *Colorow v. Fischer* (Sup. Ct)—formatting not a matter of strict compliance but one of substantial compliance**
- Bottom Line: Intent of the HCAA is to ensure a voluntarily entered into arrangement**
 - Ensuring voluntariness**
 - Assessment of cognitive capacity of those signing**
 - Full explanation of rights and HCAA protections**

NEW NURSING HOME BEDS—DEMONSTRATION OF NEED

**HB 21-1227—REVISING PROCESS FOR SHOWING NEED AND
MAKING A LIMITED EXEMPTION**

NEED CRITERIA NOW IN STATUTE

APPLIES TO “NEW” FACILITIES ONLY AS OF 6/30/21

***OLMSTEAD* PRETEXT**

REQUIRED RULE MAKING

**EXEMPT FACILITIES FOR FIVE OR FEWER BEDS PAID AT THE
STATE-WIDE AVERAGE RATE**

HCPF MORATORIUM RULE—EFF. 6/30/21

§§8.430 –NEW FACILITY CRITERIA

- VIRTUALLY THE SAME AS PRIOR REG**
- RESTRICTIVE FORMULAS**
 - SERVICE AREA BED RATIO –LESS THAN 40 BEDS PER 1000 IN POPULATION**
 - EXISTING OCCUPANCY—MUST EXCEED 90% FOR SIX MONTHS PRIOR IN SERVICE AREA**
- FIVE BED EXEMPTION**
 - APPLIES TO ACCOMMODATE RESIDENTS WHO NO LONGER HAVE THIRD PARTY RESOURCES**
 - FACILITY NOT CONSIDERED TO BE MEDICAID CERTIFIED**
 - WHEN BED OCCUPIED BY QUALIFYING RESIDENT— STATE-WIDE AVERAGE RATE**



2022 Legislative Overview

HB22-1296

RESIDENTIAL REAL PROPERTY

- **Nursing homes are traditionally classified as residential properties for the purpose of tax assessments. However, some local tax authorities have determined that facilities that provide short-term convalescent care and rehabilitation services are classified according to the procedures for nonresidential property. This has resulted in some facilities having increases in their property tax bill in the thousands of dollars**
- **This bill specifies nursing homes that provide convalescent care and rehabilitation services, are classified and assessed as residential regardless of a resident's length of stay**

HB22-1247

ADDITIONAL REQUIREMENTS NURSING FACILITY FUNDING

- The bill directs Health Care Policy and Financing to issue additional supplemental payments for the 2021-22 state fiscal year**
- Establishes reporting necessary to administer additional supplemental funding**
- Requires the Department to engage with stakeholders to produce a report on funding for nursing facilities**
- The bill grants the department authority to promulgate rules as necessary for the implementation of the payments and their supporting requirements**
- The bill authorizes the Department to request quarterly financial statements from providers to determine their financial stability**

SB22-210 LICENSE SUPPLEMENTAL HEALTH-CARE STAFFING AGENCIES

- Requires a healthcare staffing agency to an annual certification with CDPHE**
- Report a detailed listing of the average amount charged during each quarter of the reporting period to a healthcare facility for each category of healthcare worker providing services to the facility**
- A detailed listing of the average amount paid during each quarter to healthcare workers**
- Agency must certify that each healthcare worker had a current, unrestricted license and met the continuing education standards for their position**
- The Department shall provide copies of the reports required to the CDPHE and HCPF to analyze the information and determine the need for regulation of staffing agencies**

HB22-1298

FEE RELIEF FOR NURSES AND NURSE AIDES

- The bill provides a license fee relief for fiscal years 22-23 and 23-24 or until the appropriation is fully expended**
- The bill funds the expenses of the state board of nursing to facilitate fee relief for nurses, nurse aides, and psychiatric technicians**

HB22-1333

INCREASE MINIMUM WAGE FOR NURSING HOME WORKERS

- Under current law, only nursing facilities that are within a locality that has increased its local minimum wage are eligible to receive annual supplemental payments to increase the minimum wage for nursing facility employees up to the minimum wage set by the locality**
- This bill changes the definition of eligible nursing facility provider and allows any SNF statewide that meets the criteria to receive wage enhancement supplemental payments, as defined in the bill, to increase the minimum wage for nursing facility employees to at least \$15 per hour**

SB22-53

HEALTH FACILITY VISITATION

- The bill specifies a patient admitted to a hospital, SNF, or ALF may have at least one visitor of the resident's choosing during the stay**
- Requires a facility to have policies regarding the visitation rights of residents, including policies to set forth any reasonable restriction the facility may need to place on resident visitation rights and the reasons for the restriction or limitation**
- Policies cannot prohibit visitation if the sole reason is to reduce the risk of pandemic disease transmission**
- The bill recognizes regulatory mandates as an exception, such as a direction from CDPHE or CMS or declared health care emergency**

SB22-079

REQUIREMENT FOR DEMENTIA TRAINING

- The bill requires the adoption of rules requiring SNF, ALF, and Adult Day Care facilities to provide four hours of dementia training for staff providing direct-care residents. Must be completed within 120 days after start of employment or the provision of direct-care services**
- 2 hours of continuing education on dementia every two years**
- Effective January 2024**

SB22-054

INCREASING SAFETY IN ASSISTED LIVING FACILITIES

- Specifies requirements for involuntary discharge
 - Notice requirements, resident appeal rights, notification of Ombudsman****
- Specifies all ALF Administrators must have 1-year experience supervising the delivery of personal care services that include ADLs or has attained the education or experience established by the state board in place of that supervisory experience**
- Increases civil money penalties maximum from \$2,000 per year to \$10,000 per violation and allows the Department to exceed the maximum under certain circumstances**

REMEMBER ALL POLITICS IS LOCAL

- Don't let legislators who pass these bills hear only one side of the argument
- You have a story to tell on how these bills affect the day-to-day care of your residents and your ability to provide that care – and if you don't tell it, no one else will
- Stay informed during the legislative session by attending the CHCA Governmental Policy Meeting that meets monthly
- If you want to know who your legislator is, go to <https://openstates.org>. You can input your home address or your facility



Thank you

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SURVEY AND REGULATORY DEVELOPMENTS

CMS staffing study

results in spring 2023

- 50 initial site visits – CO is included in the 15 states being visited
- 25 follow-up validation site visits to affirm/question initial findings
- On-site interviews, survey data, qualitative contextual info
- Some site visits will look at time it takes to complete care tasks
- Literature review will cover: correlation between staffing levels and quality outcomes
- RN, LPN, C.N.A. hours per patient day will be the metric compared to QMs and survey outcomes, trends over time
- Analyses will include acuity, case-mix, and selected facility characteristics
- Cost analysis will include: extra costs to increase staffing, Medicare cost reports, payer mix

OIG Inspection of Life Safety Compliance

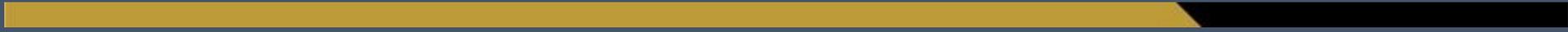
At 150 of 154 Nursing Homes... The OIG found 1,094 areas of noncompliance with life safety requirements. ... problems with building exits, fire barriers, carbon monoxide detectors, smoking policies and fire drills....**recommended CMS propose regulations requiring nursing homes and inspection contractors to notify state survey agencies when fire alarm and sprinkler systems aren't working or at risk of not working, and carbon monoxide detectors to be installed for all nursing homes that use fuel-burning appliances or have an attached garage.**

CMS agreed with those two recommendations, as well as the suggestion that CMS work with state survey agencies to require mandatory participation in standardized life safety training for nursing home staff.

The agency, however, **did not agree with a fourth recommendation:** that CMS develop a plan in conjunction with state survey agencies to address issues preventing more frequent surveys at facilities with a history of high-risk deficiencies.

<https://www.mcknights.com/news/cms-may-expand-emergency-preparedness-requirements-for-nursing-homes/>

- 
- COVID-19 National Emphasis Program



Phase III Enforcement

Phase III of the ROPs went into effect on 11/28/2019, but enforcement was held due to COVID

Cultural
competence in
caregiver training

Trauma-informed
Care & Planning

Change in
Condition
training/competency

IP Nurse [already
enforced due to
COVID]

Physical
Environment – call
lights

Training
requirements

Regulations impacted

§483.25(m) Trauma-Informed Care

§483.75(c) QAPI/QAA - Data Collection and Monitoring

§483.80 Infection Control

§483.80(b) Infection Preventionist - Qualifications/Role

§483.80(c) IP participation in QAA

§483.85 Compliance and Ethics Program

§483.95 Training Requirements: §483.95(a) Communication,

§483.95(b) Resident's Rights & facility responsibilities, §483.95(d) QAPI,

§483.95(e) Infection Control, §483.95(f) Compliance and Ethics,

§483.95(i) Behavioral Health

Beginning October 24th, 2022

Staffing

CMS added new requirements for **surveyors to incorporate the use of Payroll Based Journal staffing data for their inspections**. “This will help better identify potential noncompliance with CMS’s nurse staffing requirements, such as lack of a registered nurse for eight hours each day, or lack of licensed nursing for 24 hours a day,” the agency said in a statement. “This guidance will help to uncover instances of insufficient staffing and yield higher quality care.”

Private Rooms

CMS is also **urging** providers to consider making changes to their physical environment to allow for a maximum of double occupancy in each room and explore more ways to add more single occupancy rooms for residents.

- Privacy
- Homelike environment
- Infection Control

<https://www.mcknights.com/news/breaking-cms-releases-updated-phase-3-guidance/>

Abuse Clarifications

Resident to Resident Abuse of Any Type

A resident to resident altercation should be reviewed as a potential situation of abuse. The surveyor should not assume that every resident to resident altercation results in abuse.

For example, infrequent arguments or disagreements that occur during the course of normal social interactions (e.g., dinner table discussions) would not constitute abuse.

The surveyor must determine whether the incident would meet the definition of abuse. [pg. 70]

Capacity and Consent

Residents have the right to engage in consensual sexual activity.

However, anytime the facility has reason to suspect that a resident may not have the capacity to consent to sexual activity, the facility must take steps to ensure that the resident is protected from abuse.

These steps should include *evaluating whether the resident has the capacity to consent to sexual activity*. [pg. 75]

Anti-Retaliation Requirements

Facility is required to **develop policies prohibiting retaliation for reporting suspicions of a crime,**

Provide annual notification to each covered individual of their obligation to comply with the reporting requirements under section 1150B(b) of the Act



the facility must **posting notice in a conspicuous location informing covered individuals of their rights under section 1150B of the Act,** including the right to file a complaint with the State Survey Agency if they believe the facility has retaliated against an employee or individual who reported a suspected crime and how to file such a complaint. [pg. 141]



Develop and implement written policies and procedures that **establish coordination with the QAPI program** required under §483.75 [pg. 144]

Involuntary Discharges – D/C to hospital, refusal to readmit

The facility must have evidence that:

- the resident's status at the time the resident seeks to return to the facility (not at the time the resident was transferred for acute care) meets one of the discharge criteria at §483.15(c)(i).
- Must provide notice of a transfer or discharge to ensure residents and their representatives receive complete and accurate information in the notice of transfer and discharge.
- The resident has the right to return to the facility pending an appeal of any facility-initiated discharge unless the return endangers the health or safety of the resident or other individuals in the facility.
- Must document the danger that the failure to transfer or discharge would pose. Residents who are sent to the acute care setting for routine treatment/ planned procedures must also be allowed to return to the facility.

Substance Abuse and Mental Health

Facility staff should have knowledge of signs and symptoms of possible substance use, and

Staff must be prepared to address emergencies (e.g., an overdose) by increasing monitoring, administering naloxone, initiating cardiopulmonary resuscitation (CPR) as appropriate, and contacting emergency medical services.

They expect use of non-pharmacological interventions, specific to residents living with mental disorders or substance use disorders, identifying alternative approaches to care to support this population.

SUD is added to the Facility Assessment.

Illegal substances on property

- If the facility determines through observation that a resident may have access to illegal substances that they have brought into the facility or secured from an outside source, the facility should not act as an arm of law enforcement.
- Rather, in accordance with state laws, these cases may warrant a **referral to local law enforcement**.
- To protect the health and safety of residents, facilities **may need to provide additional monitoring and supervision**.
- If facility staff identify items or substances that pose risks to residents' health and safety and are in plain view, **they may confiscate them**.
- But, facility **staff should not conduct searches** of a resident or their personal belongings, unless the resident, or resident representative agrees to a voluntary search and understands the reason for the search. [pg. 20]

5-Star Staffing Star – Getting Tougher

A total of six staffing measures will determine Staffing star ratings.

- Total nursing and
- RN nursing hours per resident day [HPRD]
- Total nursing (RN, LPN/LVN, CNA/aide) HPRD on the weekend
- Total nursing turnover
- RN Turnover
- Administrator Turnover

Facilities will earn points for their performance on all six measures. The sum of those points will determine their staffing star rating. This method is similar to how the Quality star rating is determined using multiple measures. The point thresholds for individual staffing measures and the staffing star rating can be found in the newly updated technical guide.

In addition to the calculation change...

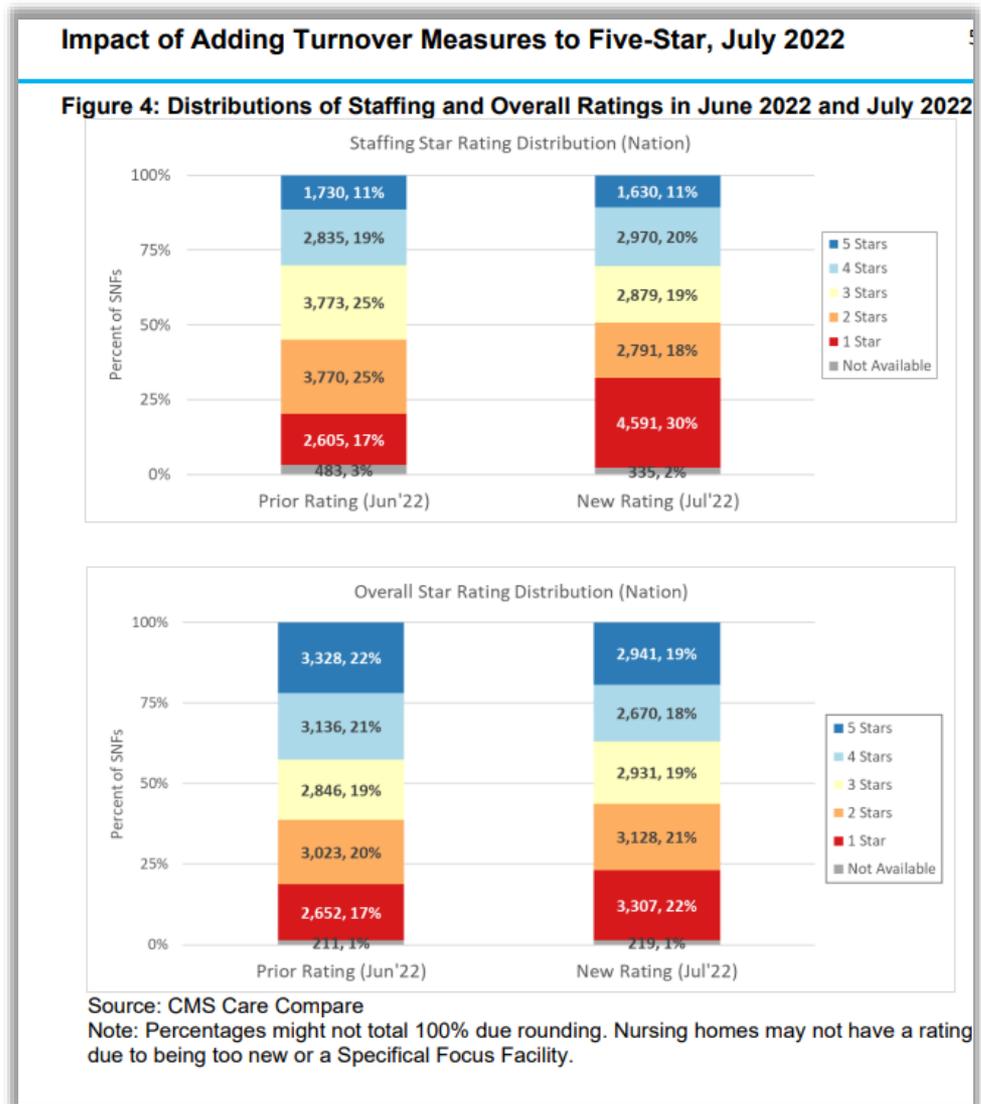
- CMS is altering how the staffing star rating will impact a facility's Overall Five-Star rating.
- Effective in July 2022, only facilities with a five star Staffing rating will gain a star in their Overall rating.
- Previously, four and five star Staffing facilities could receive this increase.
- Facilities will still lose an Overall star if their Staffing rating is one star.



5-Star Changes Impact

- An analysis by consulting and analytics firm Formation Healthcare found that more than a quarter of providers (3,783) nationally declined in overall 5-star rating from June to July, with 419 losing 2 or more stars. ... Many facilities are being penalized with automatic 1-star staffing ratings for data submission issues, not replying to CMS audit findings and having days with no RN hours reported.
- **Only 16 percent of nursing homes had an increase in their Staffing rating, despite 50 percent having an increase in their total adjusted staffing hours per resident day from 2021q4 to 2022q1.**

<https://www.mcknights.com/news/1-in-3-nursing-homes-fall-in-staffing-under-new-five-star-rating-system/>



Dementia Care Training

New SB79 Requirements BY JANUARY 1, 2024, THE STATE BOARD OF HEALTH SHALL ADOPT RULES

Applies to Nursing Care Facilities and Assisted Living Providers

AT LEAST FOUR HOURS OF INITIAL DEMENTIA TRAINING

- TRAINING for all direct care staff MUST BE COMPLETED WITHIN ONE HUNDRED TWENTY DAYS AFTER THE EFFECTIVE DATE OF THE DEMENTIA TRAINING REQUIREMENT
- TRAINING MUST BE COMPLETED WITHIN ONE HUNDRED TWENTY DAYS AFTER THE START OF EMPLOYMENT

AT LEAST TWO HOURS OF CONTINUING EDUCATION ON DEMENTIA TOPICS FOR ALL DIRECT-CARE STAFF MEMBERS EVERY TWO YEARS.

Proof of training completion is valid for 24 months from one employer to the next.

THE CONTENT OF THE INITIAL DEMENTIA TRAINING, WHICH MUST BE CULTURALLY COMPETENT AND INCLUDE THE FOLLOWING TOPICS: (I) DEMENTIA DISEASES AND RELATED DISABILITIES; (II) PERSON-CENTERED CARE; (III) CARE PLANNING; ACTIVITIES OF DAILY LIVING; AND (V) DEMENTIA-RELATED BEHAVIORS AND COMMUNICATION;

"DIRECT-CARE STAFF MEMBER" MEANS A STAFF MEMBER CARING FOR THE PHYSICAL, EMOTIONAL, OR MENTAL HEALTH NEEDS OF RESIDENTS IN A COVERED FACILITY AND WHOSE WORK INVOLVES REGULAR CONTACT WITH RESIDENTS WHO ARE LIVING WITH DEMENTIA DISEASES AND RELATED DISABILITIES.

<https://legiscan.com/CO/text/SB079/2022>



“Be careful out there.”

**For questions or further
information contact**

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