

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1239 Nursing Home Facility Staffing Requirements

SPONSOR(S): Finance & Facilities Subcommittee, Melo

TIED BILLS: IDEN./SIM. **BILLS:** SB 804

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Facilities Subcommittee	14 Y, 4 N, As CS	Guzzo	Lloyd
2) Health Care Appropriations Subcommittee	9 Y, 4 N	Nobles	Clark
3) Health & Human Services Committee			

SUMMARY ANALYSIS

A nursing home is a facility that provides 24-hour nursing care, personal care, or custodial care to individuals who are ill or physically infirm. Nursing homes are licensed and regulated by the Agency for Health Care Administration (AHCA) under part II of ch. 400, F.S. Nursing homes are required to meet certain conditions of participation (COPs) established by the Centers for Medicare and Medicaid Services (CMS) in order to qualify to participate in the Medicare and Medicaid programs.

The CMS COPs do not include minimum staffing requirements. Instead, CMS requires nursing homes to conduct and document a facility assessment to determine the resources necessary to care for its residents competently during day-to-day operations and emergencies.

Current state law requires nursing homes to comply with the following minimum staffing requirements:

- A minimum weekly average of 3.6 hours of direct care per resident per day provided by a combination of certified nursing assistants (CNAs) and licensed nursing staff.
- A minimum of 2.5 hours of direct care per resident per day provided by CNAs. A facility may not staff at a ratio of less than one CNA per 20 residents.
- A minimum of 1.0 hour of direct care per resident per day provided by licensed nurses. A facility may not staff at a ratio of less than one licensed nurse per 40 residents.

The bill reduces the number of hours of required CNA direct care from 2.5 hours to 2 hours per resident per day. The bill retains current law requiring 1 hour of licensed nurse direct care per resident per day. In total, at least 3 hours of direct care per resident per day must be provided by CNAs and licensed nurses.

For the remaining 0.6 hours of the required 3.6 weekly average of total hours of direct care, the bill allows nursing homes to count care provided by any combination of the following categories of disciplines and professions: physicians; nursing; pharmacy; dietary; therapeutic; dental; podiatry; mental health; and paid feeding assistants.

The bill requires nursing homes to maintain records documenting compliance with minimum staffing requirements for at least five years.

Legal proceedings for noncompliance with federal staffing requirements are often rebutted by nursing homes with proof of compliance with state staffing requirements as evidence of federal staffing requirements compliance. The bill provides that evidence of a facility's compliance with state minimum staffing requirements is not admissible as evidence of compliance with federal staffing requirements.

In a change of ownership (CHOW), the bill makes the transferee liable for an unsatisfied adverse final judgement against the transferor. Upon filing a CHOW application, the transferor must provide written notice to each pending claimant. Within 30 days of receipt of the written notice, the bill allows a claimant to object to the application under certain circumstances, and AHCA must consider the objection in its decision to approve or deny a CHOW application.

The bill has no fiscal impact on state or local government.

The bill is effective upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME: h1239c.HCA

DATE: 2/14/2022

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Nursing Home Staffing Requirements

Federal Staffing Requirements

Nursing homes are required to meet certain conditions of participation (COPs) established by the Centers for Medicare and Medicaid Services (CMS) in order to qualify to participate in the Medicare and Medicaid programs.¹

The CMS COPs do not include minimum staffing requirements. Instead, CMS requires nursing homes to conduct and document a facility assessment to determine the resources necessary to care for its residents competently during day-to-day operations and emergencies.² Nursing homes must review and update the assessment at least annually and whenever there is a change that would require a substantial modification to any part of the facility assessment. The facility assessment must include:

- The facility's resident population.
- The facility's resources, including:
 - services provided, such as physical therapy, pharmacy, and specific rehabilitation therapies;
 - All personnel, including managers, staff, and volunteers, as well as their education and training and any competencies related to resident care.³

The CMS COPs also require nursing homes to electronically submit to CMS complete and accurate direct care staffing information, including the following:

- The category of work for each person on direct care staff,⁴ including, but not limited to, whether the individual is a registered nurse, licensed practical nurse, licensed vocational nurse, certified nursing assistant (CNA), therapist, or other type of medical personnel as specified by CMS;
- Resident census data; and
- Information on direct care staff turnover and tenure, and on the hours of care provided by each category of staff per resident per day, including, but not limited to, start date, end date, and hours worked for each individual.⁵

The staffing information must be reported to CMS at least quarterly.⁶

The CMS COPs also require nursing homes to post certain nurse staffing information on a daily basis, including the actual hours worked by registered nurses, licensed practical nurses or licensed vocational nurses, and CNAs. The data must be posted in a clear and legible format in a prominent place that is readily accessible to residents and visitors. The facility must maintain the staffing data for a minimum of 18 months, or as required by state law, whichever is greater.⁷

¹ 42 C.F.R. § 483.1.

² 42 C.F.R. § 483.70(e).

³ Id.

⁴ Direct care staff are those individuals who, through interpersonal contact with residents or resident care management, provide care and services to allow residents to attain or maintain the highest practicable physical, mental, and psychosocial well-being. Direct care staff does not include individuals whose primary duty is maintaining the physical environment of the facility (for example, housekeeping).

⁵ 42 C.F.R. § 483.70(q).

⁶ Id.

⁷ 42 C.F.R. § 483.35(g).

State Staffing Requirements

A nursing home is a facility that provides 24-hour nursing care, personal care, or custodial care to individuals who are ill or physically infirm.⁸ Nursing homes are licensed and regulated by the Agency for Health Care Administration (AHCA) under part II of ch. 400, F.S.

As of January 2021, there were 27 states with laws on staff-to-resident ratios in nursing homes.⁹

Certified Nursing Assistants and Licensed Nurses

Section 400.23(3), F.S., establishes minimum staffing requirements for nursing home facilities:

- A minimum weekly¹⁰ average of 3.6 hours of direct care per resident per day provided by a combination of CNAs and licensed nursing staff.
- A minimum of 2.5 hours of direct care per resident per day provided by CNAs. A facility may not staff at a ratio of less than one CNA per 20 residents.
- A minimum of 1.0 hour of direct care per resident per day provided by licensed nurses. A facility may not staff at a ratio of less than one licensed nurse per 40 residents.

When computing the staffing ratio for certified nursing assistants, nursing home facilities are allowed to use uncertified nursing assistants under certain conditions to satisfy the staffing ratio requirements so long as their job duties only include nursing assistant-related duties.¹¹

If approved by AHCA, licensed nurses may also be used to meet staffing requirements for CNAs if the licensed nurses are performing the duties of a CNA and the facility otherwise meets minimum staffing requirements for licensed nurses.¹²

Current law prohibits nursing homes from counting paid feeding assistants and non-nursing staff toward compliance with minimum staffing requirements.¹³ Additionally, nurse and CNA time spent feeding is not counted towards minimum staffing.

A nursing home is prohibited from scheduling a CNA or a licensed nurse for more than 16 hours within a 24-hour period for three consecutive days, except in an emergency, in which case the emergency must be documented and must be for a limited, specified period of time.¹⁴

Nursing homes are required to maintain a daily chart of CNA services provided to each resident. The daily chart must document assistance with activities of daily living and eating or drinking, and must record each offering of nutrition and hydration for residents whose plan of care or assessment indicates a risk for malnutrition or dehydration.¹⁵

Nursing homes are required to document compliance with staffing requirements and post daily the names of staff on duty.¹⁶

⁸ Section 400.021(7), F.S.

⁹ In January of 2021, Finance & Facilities Subcommittee staff conducted a 50-state analysis of states that had laws on staff-to-patient ratios in nursing homes.

¹⁰ A week is defined as Sunday through Saturday.

¹¹ Sections 400.23(3)(a)2. and 400.211(2), F.S. Nursing facilities may employ uncertified nursing assistants for a single consecutive period of up to 4 months if they: are enrolled in, or have completed, a state-approving nursing assistant program; have been positively verified as actively certified and on the registry in another state with no findings of abuse, neglect, or exploitation in that state; have preliminarily passed the state's certification exam; or are employed as a personal care attendant.

¹² Section 400.23(3)(a)4., F.S., and rule 59A-4.108(7), F.A.C. The hours of a licensed nurse with dual job responsibilities may not be counted twice.

¹³ Section 400.23(3)(b), F.S.

¹⁴ Rule 59A-4.108(6), F.A.C.

¹⁵ Section 400.141(1)(r), F.S.

¹⁶ Section 400.23(3)(a)3., F.S.

Paid Feeding Assistants

Section 400.141(1)(v), F.S., authorizes nursing home facilities to employ paid feeding assistants in accordance with Federal regulations¹⁷ to help residents who have no complicated feeding problems but need some assistance in eating or drinking. Paid feeding assistants are required to complete a feeding assistant training program developed by AHCA, which must, at a minimum, be 12 hours and provide training on:

- Feeding techniques;
- Assistance with feeding and hydration;
- Communication and interpersonal skills;
- Appropriate responses to resident behavior;
- Safety and emergency procedures, including the Heimlich maneuver;
- Infection control;
- Residents rights; and
- Recognizing changes in residents that are inconsistent with their normal behavior and the importance of reporting those changes to the supervisory nurse.¹⁸

Pursuant to Federal regulations, paid feeding assistants are required to work under the supervision of a registered nurse or licensed practical nurse.¹⁹ Federal regulations also require nursing homes to maintain a record of all individuals that have successfully completed the training course.²⁰

Of the 27 states with laws on staff-to-resident ratios in nursing homes, 10 of those states specifically prohibit nursing homes from counting paid feeding assistants toward the nursing home staff-to-resident ratio requirements of their states. The other 17 states do not specify whether or not paid feeding assistants count toward the nursing home staff-to-resident ratio requirements of their states.²¹

Florida currently prohibits nursing homes from counting paid feeding assistants toward the nursing home staff-to-resident ratio requirements contained in s. 400.23, F.S.²²

Fines and Penalties

AHCA is required to conduct at least one unannounced inspection of licensed nursing homes every 15 months.²³ To determine compliance with the minimum staffing requirements, AHCA reviews a facility's time cards, payroll, or computer printouts of actual time worked for the two-week period immediately preceding the inspection.

Nursing homes are required to place a self-imposed moratorium on new admissions if they fail to comply with minimum staffing requirements for two consecutive days, and such a moratorium must continue until the facility is in compliance with the minimum staffing requirements for six consecutive days.²⁴ AHCA is authorized to impose a fine of \$1,000 on a facility that fails to self-impose a moratorium for noncompliance with minimum staffing requirements.²⁵

¹⁷ 42 C.F.R. § 483.60, and 42 C.F.R. § 488.301.

¹⁸ Section 400.141(1)(v), F.S.

¹⁹ 42 C.F.R. § 483.60(h).

²⁰ 42 C.F.R. § 483.160(b).

²¹ *Supra* at note 9.

²² Section 400.23(3)(b), F.S.

²³ 42 C.F.R. §. 488.308(a).

²⁴ Section 400.141(1)(n)1., F.S.

²⁵ *Id.*

Effect of the Bill

The bill makes the following changes to the minimum staffing requirements for nursing homes.

Requirement	Current Law	Effect of the Bill
Minimum Average of Combined Direct Care Hours Provided by Certain Professionals	<ul style="list-style-type: none">• 3.6 daily care hours• Based on weekly average of hours provided by CNAs and licensed nurses.	<ul style="list-style-type: none">• 3.6 daily care hours• Based on weekly average of hours provided by CNAs, licensed nurses, and the following categories of direct care services: physician; pharmacy; dietary; therapeutic; dental; podiatry; and mental health.
Direct Care by CNAs Per Resident Per Day	Minimum of 2.5 hours provided by CNAs per resident per day.	Minimum of 2.0 hours provided by CNAs per resident per day.
Direct Care by Nurses	Minimum of 1.0 hours provided by licensed nurse per resident per day.	No change
Direct Care by Other Staff	n/a	Maximum 0.6 hours provided by non-CNAs, non-nurses per resident per day (3.6 hrs. overall minimum, minus 2.0 hrs. CNA, minus 1.0 min. nurses = 0.6 hour daily provided by any combination of nurse, CNA, or other direct care staff)

As depicted in the table above, the bill reduces the number of hours of required CNA direct care from 2.5 hours to 2 hours per resident per day. The bill retains current law requiring 1 hour of licensed nurse direct care per resident per day. In total, at least 3 hours of direct care per resident per day must be provided by CNAs and licensed nurses.

For the remaining 0.6 hours of the required 3.6 weekly average of total hours of direct care, the bill allows nursing homes to count care provided by any combination of the following categories of disciplines and professions: physicians; nursing; pharmacy; dietary; therapeutic; dental; podiatry; mental health; and paid feeding assistants.

The bill also authorizes nursing homes to count paid feeding assistants towards the overall 3.6 hour weekly average minimum staffing requirement. Current law prohibits nursing homes from counting paid feeding assistants towards any of the minimum staffing requirements.

Current law requires nursing homes to post daily the names of all staff on duty. The bill requires nursing homes to post daily the hours worked by registered nurses, licensed practical nurses, and CNAs. Further, the bill requires nursing homes to maintain records documenting compliance with minimum staffing standards for at least five years.

Legal proceedings for noncompliance with federal staffing requirements are often rebutted by nursing homes who provide proof of compliance with state staffing requirements as evidence of compliance with federal staffing requirements. The bill provides that evidence of a facility's compliance with state minimum staffing requirements is not admissible as evidence of compliance with federal staffing requirements.

When a nursing home changes ownership it can often be difficult for a claimant to recoup an unsatisfied final judgement because they are unaware of the change or unable to identify the new owner. The bill adds several requirements to assist claimants in recovering unsatisfied final judgements

under such circumstances. Specifically, in a change of ownership (CHOW), the bill makes the transferee liable for unsatisfied adverse final judgements against the transferor. Upon filing a CHOW application, the transferor must provide written notice to each pending claimant. Within 30 days of receipt of the written notice, the bill allows a claimant to object to the application under certain circumstances, and AHCA must consider the objection in its decision to approve or deny a CHOW application. Further, if a claim is pending in arbitration at the time the CHOW is filed, the claimant may file a petition to enjoin the transfer in circuit court.

The bill is effective upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Amends s. 400.021, F.S., relating to definitions.

Section 2: Amends s. 400.23, F.S., relating to rules; evaluation and deficiencies; licensure status.

Section 3: Amends s. 400.024, F.S., relating to failure to satisfy a judgement or settlement agreement.

Section 4: Amends s. 400.141, F.S., relating to administration and management of nursing home facilities.

Section 5: Provides that the bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive fiscal impact on nursing homes resulting from the reduction in the number of hours of required CNA direct care from 2.5 hours to 2 hours per resident per day.

The bill may have a negative fiscal impact on nursing homes due to an increase in litigation costs related to the inadmissibility of evidence of compliance with state minimum staffing requirements as evidence of compliance with federal staffing requirements.

The bill may have a positive fiscal impact on claimants with unsatisfied judgements against nursing homes as the bill enhances their opportunity to recoup such judgements.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

AHCA has sufficient rule-making in current law to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 8, 2022, the Finance & Facilities Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Broadened the disciplines and professions of direct care staff that may be counted towards compliance with minimum staffing requirements;
- Required nursing homes to determine their direct care staffing needs based on a facility assessment performed in accordance with federal regulations;
- Retained current law for the required weekly average of direct care, but allows facilities to use a broader list of professionals to calculate their weekly average, instead of only using CNAs and licensed nurses;
- Removed a provision that allowed facilities to count non-nursing direct care staff towards the 2.5 hours that are currently required to be provided by CNAs, and reduces the 2.5 hours to 2 hours;
- Required facilities to maintain records documenting compliance with minimum staffing requirements for 5 years;
- Provided that evidence of a facility's compliance with the minimum staffing requirements contained in the bill is not admissible as evidence of compliance with federal regulations;
- Revised a provision that allows paid feeding assistants to count toward compliance with all minimum staffing requirements, instead to only count toward compliance with the overall minimum of direct care hours;
- Provided that the transferee in a change of ownership is responsible and liable for any unsatisfied or undischarged adverse final judgement; and
- Required the licensee or transferor who files an application for a change of ownership to provide written notice to each pending claimant or their attorney.

The analysis is drafted to the committee substitute as passed by the Finance & Facilities Subcommittee.