

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/SB 804

INTRODUCER: Health Policy Committee and Senator Albritton

SUBJECT: Modernization of Nursing Home Facility Staffing

DATE: February 21, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Looke</u>	<u>Brown</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Looke</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 804 makes several changes to Florida statutes related to nursing home staffing and changes of ownership.

Nursing Home Staffing

CS/SB 804 amends multiple sections of the Florida Statutes to modify nursing home staffing requirements. The bill modifies the definition of “resident care plan” and defines the terms “direct care staff” and “facility assessment.” The bill allows the currently required 3.6 hours of direct care to be met with direct care staff rather than requiring it be met by certified nursing assistant (CNA) and nurse staffing. The bill also reduces the requirement that a nursing home provide a minimum of 2.5 hours of CNA staffing per resident per day to 2.0 hours of staffing per resident per day.

The bill specifies that staffing requirements in the section are minimum requirements and that complying with the minimum requirements is not admissible as evidence of compliance with certain federal regulations. The bill also specifies that the required 3.6 weekly average of direct care staffing hours (but not the 2.0 hours of daily CNA staffing or the 1.0 hours of daily nurse staffing) includes hours provided by paid feeding assistants who have completed a feeding assistant training program, that staffing hours do not include time spent on certain administrative tasks, and that nursing assistants employed under CNA training and personal care attendant

programs¹ may count toward providing such hours of care. The bill requires nursing homes to document compliance with staffing standards and to maintain records for five years and report staffing in accordance with specified federal law.

The bill repeals a \$1,000 fine for a nursing home that has failed to comply with minimum staffing requirements.

The bill reworks a provision in law that prevents a nursing home from accepting new residents if the nursing home is not compliant with state minimum staffing requirements.

The bill establishes a Nursing Home Sustainability Task Force that is required to review, analyze, and make recommendations specific to the sustainability of the state's nursing home model to the Agency for Health Care Administration (AHCA), the Governor, and the Legislature by January 1, 2025.

Changes of Ownership and Other Provisions

CS/SB 804 also revises provisions in s. 400.024, F.S., related to changes of ownership in nursing homes. The bill specifies that any unsatisfied or undischarged adverse final judgment of a nursing home that is changing ownership becomes the responsibility and liability of the new owner. Additionally, the bill requires a nursing home to provide notice to any claimant² after the licensee or controlling interest files a change of ownership application and to allow such claimant 30 days to file an objection to the change of ownership. The AHCA must consider any objection when making its decision to approve or deny the change of ownership application.

Additionally, the bill specifies that annual financial reports filed by nursing homes with the AHCA are not exempt from public records requirements and may be discoverable and admissible in a civil or administrative action.

The bill provides an effective date of July 1, 2022.

II. Present Situation:

Nursing Homes

Nursing homes in Florida are licensed under Part II of ch. 400, F.S., and provide 24 hour a day nursing care, case management, health monitoring, personal care, nutritional meals and special diets, physical, occupational, and speech therapy, social activities and respite care for those who

¹ These include CNAs in training and those who have preliminarily passed the certification exam; CNAs certified or registered in other states who have no findings of abuse, neglect, or exploitation; and personal care attendants. *See* s. 400.211(2), F.S.

² The bill defines a claimant as a resident, the resident's family, or the resident's personal representative who has notified the licensee or facility of a potential claim by notice of intent letter or who has initiated an action, claim, or arbitration proceeding against the licensee or facility.

are ill or physically infirm.³ Currently there are 705 nursing homes licensed in Florida.⁴ Of the 705 licensed nursing homes, 669 are certified to accept Medicare or Medicaid and consequently must follow federal Centers for Medicare & Medicaid Services (CMS) requirements for nursing homes.⁵

Direct Care Staff

Federal law defines “direct care staff” as those individuals who, through interpersonal contact with nursing home 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 long-term care facility (for example, housekeeping).⁶

Direct care staff are the primary providers of paid, hands-on care for more than 13 million elderly and disabled Americans. They assist individuals with a broad range of support, including preparing meals, helping with medications, bathing, dressing, getting about (mobility), and getting to planned activities on a daily basis.⁷

Direct care staff fall into three main categories tracked by the U.S. Bureau of Labor Statistics: Nursing Assistants (usually known as Certified Nursing Assistants or CNAs), Home Health Aides, and Personal Care Aides:

- Nursing Assistants or Nursing Aides generally work in nursing homes, although some work in assisted living facilities, other community-based settings, or hospitals. They assist residents with activities of daily living (ADLs) such as eating, dressing, bathing, and toileting. They also perform clinical tasks such as range-of motion exercises and blood pressure readings.
- Home Health Aides provide essentially the same care and services as nursing assistants, but they assist people in their homes or in community settings under the supervision of a nurse or therapist. They may also perform light housekeeping tasks such as preparing food or changing linens.
- Personal Care Aides work in either private or group homes. They have many titles, including personal care attendant, home care worker, homemaker, and direct support professional. (The latter work with people with intellectual and developmental disabilities.) In addition to providing assistance with ADLs, these aides often help with housekeeping chores, meal preparation, and medication management. They also help individuals go to work and remain

³ AHCA webpage, nursing homes, available at https://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Long_Term_Care/Nursing_Homes.shtml (last visited Feb. 11, 2022).

⁴ Florida Health Finder Report, available at <https://www.floridahealthfinder.gov/facilitylocator/ListFacilities.aspx> (last visited Feb. 11, 2022).

⁵ *Id.*

⁶ 42 CFR s. 483.70(q)(1)

⁷ Khatutsky, et al., *Understanding Direct Care Workers: a Snapshot of Two of America’s Most Important Jobs, Certified Nursing Assistants and Home Health Aides*, (March 2011), available at <https://aspe.hhs.gov/basic-report/understanding-direct-care-workers-snapshot-two-americas-most-important-jobs-certified-nursing-assistants-and-home-health-aides#intro> (last visited on Feb. 4, 2022).

engaged in their communities. A growing number of these workers are employed and supervised directly by consumers.⁸

The federal government requires training only for nursing assistants and home health aides who work in Medicare-certified and Medicaid-certified nursing homes and home health agencies. Such training includes training on residents' rights; abuse, neglect, and exploitation; quality assurance; infection control; and compliance and ethics; and specifies that direct care staff must be trained in effective communications.⁹

Federal Requirement for a Nursing Home Facility Assessment

Federal law in 42 CFR s. 483.70(e) requires that a nursing home conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. Facilities must review and update this assessment at least annually or whenever there is an actual or planned change that would require a substantial modification of any part of the assessment. The assessment must include:

- The facility's resident population, including, but not limited to:
 - Both the number of residents and the facility's resident capacity;
 - The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
 - The staff competencies that are necessary to provide the level and types of care needed for the resident population;
 - The physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and
 - Any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including, but not limited to, activities and food and nutrition services.
- The facility's resources, including but not limited to:
 - All buildings and/or other physical structures and vehicles;
 - Equipment (medical and non-medical);
 - Services provided, such as physical therapy, pharmacy, and specific rehabilitation therapies;
 - All personnel, including managers, staff (both employees and those who provide services under contract), and volunteers, as well as their education and/or training and any competencies related to resident care;
 - Contracts, memoranda of understanding, or other agreements with third parties to provide services or equipment to the facility during both normal operations and emergencies; and
 - Health information technology resources, such as systems for electronically managing patient records and electronically sharing information with other organizations.
- A facility-based and community-based risk assessment, utilizing an all-hazards approach.

⁸ Paraprofessional Healthcare Institute, *Who are Direct Care Workers?*, Feb. 2011, available at: <https://phinational.org/wp-content/uploads/legacy/clearinghouse/NCDCW%20Fact%20Sheet-1.pdf> (last visited on Feb. 4, 2022).

⁹ 42 CFR s. 483.95

Florida Nursing Home Staffing Standards

Section 400.23(3), F.S., requires the Agency for Health Care Administration to adopt rules providing minimum staffing requirements for nursing home facilities.¹⁰ The requirements must include:

- A minimum weekly average of 3.6 hours of direct care per resident per day provided by a combination of certified nursing assistants and licensed nursing staff. A week is defined as Sunday through Saturday.
- A minimum of 2.5 hours of direct care per resident per day provided by certified nursing assistant staff. A facility may not staff at a ratio of less than one certified nursing assistant per 20 residents.
- A minimum of 1.0 hour of direct care per resident per day provided by licensed nursing staff. A facility may not staff at a ratio of less than one licensed nurse per 40 residents.
- Nursing assistants employed under s. 400.211(2), F.S.,¹¹ may be included in computing the staffing ratio for certified nursing assistants if their job responsibilities include only nursing-assistant-related duties.
- Each nursing home facility must document compliance with staffing standards and post daily the names of staff on duty for the benefit of facility residents and the public.
- Licensed nurses may 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.
- Paid feeding assistants and non-nursing staff providing eating assistance to residents do not count toward compliance with minimum staffing standards.

Nursing Homes with Unsatisfied Judgments or Settlement Agreements

Section 400.024, F.S., establishes restrictions on nursing homes that have had an adverse final judgment against a licensee which arises from an award pursuant to s. 400.023, F.S.,¹² including an arbitration award, for a claim of negligence or a violation of residents' rights, in contract or tort, or from noncompliance with the terms of a settlement agreement as determined by a court or arbitration panel, which arises from a claim pursuant to s. 400.023, F.S.

Section 400.024, F.S., requires that the nursing home must pay the judgment creditor the entire amount of the judgment, award, or settlement and all accrued interest within 60 days after the date such judgment, award, or settlement becomes final and subject to execution unless otherwise mutually agreed to in writing by the parties. If the nursing home does not pay the judgment, then the statute establishes that such failure is additional grounds that may be used by the AHCA for revoking a license or for denying a renewal application or a related party change of ownership application. The section deems that the AHCA is notified of an unsatisfied judgment or settlement when a certified copy of the judgment and a certified copy of a valid

¹⁰ These requirements apply to all nursing homes, s. 400.23(5), F.S., provides additional requirements specific to nursing homes that treat persons under the age of 21.

¹¹ *Supra* n. 1.

¹² Establishing requirements for civil lawsuits against nursing homes.

judgment lien certificate, filed in accordance with ss. 55.202¹³ and 55.203¹⁴, F.S., are served to the AHCA by a process server or received by certified mail, return receipt requested.

Within 60 days after receiving such documents, the AHCA must notify the nursing home by certified mail, return receipt requested, that it is subject to disciplinary action unless, within 30 days after the date of mailing the notice, the nursing home:

- Shows proof that the unsatisfied judgment or settlement has been paid in the amount specified;
- Shows proof of the existence of a payment plan mutually agreed upon by the parties in writing;
- Furnishes the AHCA with a copy of a timely filed notice of appeal;
- Furnishes the AHCA with a copy of a court order staying execution of the final judgment; or
- Shows proof by submitting an order from a court or arbitration panel that is overseeing any action seeking indemnification from an insurance carrier or other party, that the licensee believes is required to pay the award.

If the AHCA is placed on notice and such proof is not provided by the nursing home, the AHCA must issue an emergency order pursuant to s. 120.60, F.S., declaring that the facility lacks financial ability to operate and a notice of intent to revoke or deny a license. Additionally, if the AHCA is put on notice and:

- The license is subject to renewal, the AHCA may deny the license renewal unless compliance with s. 400.024, F.S. is achieved; and
- A change of ownership application for the facility at issue is submitted by the licensee, by a person or entity identified as having a controlling interest in the licensee, or by a related party, the AHCA must deny the change of ownership application unless compliance with s. 400.024, F.S. is achieved.

Nursing Home Financial Reports

Currently, nursing homes are required to submit financial data to the AHCA pursuant to s. 408.061(5)-(6), F.S. These provisions were added in 2021 by SB 2518 (ch. 2021-41, L.O.F.) and mirror provisions in current law that require other health care facilities to submit such data.¹⁵ Prior to July 1, 2021, nursing homes were exempt from this reporting requirement.

A nursing home must report, within 120 days after the end of its fiscal year, its actual financial experience for that fiscal year, including expenditures, revenues, and statistical measures. Such data may be based on internal financial reports that are certified to be complete and accurate by the chief financial officer of the nursing home. This actual experience must include the fiscal year-end balance sheet, income statement, statement of cash flow, and statement of retained earnings and must be submitted to the AHCA in addition to the information filed in the uniform system of financial reporting. However, unlike other health care facilities, data submitted by nursing homes is not required to be audited.

¹³ Related to judgments, orders, and decrees; lien on personal property.

¹⁴ Related to judgment lien certificates; content, filing, and indexing.

¹⁵ See s. 408.061(4), F.S.

III. Effect of Proposed Changes:

CS/SB 804 amends ss. 400.021, 400.23 and 400.141, F.S., to modify nursing home staffing requirements. The bill amends the definition of “resident care plan” to specify that the plan must be comprehensive and person-centered and developed in accordance with 42 CFR s. 483.21(b). The bill also defines the terms:

- “Direct care staff” to mean 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. The term does not include individuals whose primary duty is maintaining the physical environment of the facility, including, but not limited to, food preparation, laundry, and housekeeping. The term includes, but is not limited to, disciplines and professions that must be reported in accordance with 42 C.F.R. s. 483.70(q) and all of the following:
 - Licensed nurses.
 - Certified nursing assistants.
 - Physical therapy staff.
 - Occupational therapy staff.
 - Speech therapy staff.
 - Respiratory therapy staff.
 - Activities staff.
 - Social services staff.
 - Mental health service workers.
- “Facility assessment” to mean a process to determine the staff competencies that are necessary to provide the level and types of care needed for the facility’s resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent factors that are present within that resident population. The definition also specifies that additional requirements for conducting a facility assessment must be performed in accordance with 42 CFR s. 483.70(e).

The bill makes the following changes regarding minimum staffing requirements for nursing homes:

- Reduces from 2.5 to 2.0 the number of hours of direct care that must be provided by a CNA per resident per day. Hours provided by nursing assistants who are employed under s. 400.211(2), F.S.,¹⁶ still qualifies under the bill.
- Repeals the requirement that 3.6 hours of direct care per resident per day must be provided by a CNA or a licensed nurse and instead may be provided by any direct care staff.
- Allows hours of eating assistance provided by paid feeding assistants or direct care staff, other than CNAs, who have completed the feeding assistant training program established under s. 400.141(1)(v), F.S., to qualify towards fulfilling the 3.6 hour requirement detailed above.
- Repeals a \$1,000 fine for a nursing home that has failed to comply with minimum staffing requirements
- Specifies that time spent on nursing administration, staff development, staffing coordination, and the administrative portion of the minimum data set and care plan coordination for Medicaid, does not qualify as direct care.

¹⁶ *Id.*

- Specifies that the staffing requirements in s. 400.23(3)(b), F.S., are minimum nurse staffing requirements for nursing home facilities and that evidence that a facility complied with the minimum direct care staffing requirements is not admissible as evidence of compliance with the nursing services requirements under 42 CFR s. 483.35¹⁷ or 42 CFR s. 483.70.¹⁸

The bill reworks a provision in law that prevents a nursing home from accepting new residents if the nursing home is not compliant with state minimum staffing requirements. Current law in s. 400.141(1)(n)1., F.S., provides that a nursing home may not accept new residents if the facility has failed to meet minimum state staffing requirements for two consecutive days until such time as the facility has met state minimum-staffing requirements for six consecutive days. The current law provision does not require any action by the AHCA to trigger the moratorium, meaning the nursing home must execute the moratorium on its own, and a moratorium can be triggered by failures to comply with either the state minimum-required hours of direct care, CNA care, and nursing care per resident per day; or the requirement that the a nursing home meet specified state minimum ratios of CNAs to residents and nurses to residents.¹⁹ If a nursing home fails to execute the moratorium it is subject to a \$1,000 fine.

The bill, instead of automatically establishing a moratorium preventing a nursing home from accepting new residents if it is not compliant with minimum staffing requirements, amends this provision to authorize the AHCA to impose the moratorium on a nursing home accepting new residents if the nursing home is not compliant with direct care hours required per resident per day for 48 consecutive hours. Additionally, by specifying that the moratorium may be imposed for failure to comply with “minimum hours of direct care” requirements, the bill prevents the AHCA from imposing a moratorium for any failure of a nursing home to meet minimum staff ratio requirements.²⁰ The bill specifies that the moratorium remains in place until the nursing home is able to document compliance with minimum direct care hours required per resident per day.

The bill specifies that each nursing home must determine its direct care staffing needs based on its facility assessment and the individual needs of each resident based on the resident’s care plan. Additionally each nursing home must maintain records of staffing for five years and report staffing in accordance with 42 C.F.R. s. 483.70(q). The bill amends current posting requirements to require that a nursing home post only the names of CNAs and licensed nurses, rather than all staff, who are on duty for the benefit of facility residents and the public.

The bill establishes the Nursing Home Sustainability Task Force, which must review, analyze, and make recommendations specific to the sustainability of the state’s model of providing quality nursing home care. The task force must consist of representatives of nursing home providers and other interested stakeholders. The task force must review all areas of the provision of health care services to residents, regulation, liability, licensing, quality initiatives, and the availability of quality, affordable, and accessible health care. The task force must make any recommendations to the AHCA, the Governor, and the Legislature by January 1, 2025.

¹⁷ Relating to the provision of nursing services and establishing staff requirements for nursing homes.

¹⁸ Relating to the administration of nursing homes.

¹⁹ See 400.23(3)(b)1.a.-c., F.S. Current law requires that a nursing may not staff below one CNA per 20 residents and one licensed nurse per 40 residents.

²⁰ *Id.*

Change of Ownership

CS/SB 804 amends s. 400.024, F.S., relating to nursing homes that fail to satisfy judgments against them in order to specify that, should a nursing home with an unsatisfied or undischarged adverse final judgment against it be allowed by the AHCA to change ownership, the adverse final judgement becomes the responsibility and liability of the new owner. Additionally, when a change of ownership application is filed for a facility that has an unsatisfied judgment by a person or entity identified as having a controlling interest in the licensee, or by a related party, the bill provides that:

- The licensee or transferor must provide written notice of the filing of the application to each pending claimant²¹ or the claimant's attorney of record, if applicable, within 14 days after the date the application is filed with the AHCA. The written notice must be provided by certified mail, return receipt requested, or other method that provides verification of receipt.
- A claimant has 30 days after the date of receipt of the written notice to object to the application if the claimant has reason to believe that the approval of the application would facilitate a fraudulent transfer or allow the transferor to avoid financial responsibility for the claimant's pending claim.
- The AHCA must consider any objection brought under this provision of the bill in its decision to approve or deny an application for change of ownership under this part and part II of ch. 408, F.S.
- If a claim is pending in arbitration at the time that the application for change of ownership is filed, the claimant may file a petition to enjoin the transfer in circuit court.

Financial Filings

CS/SB 804 also amends s. 400.0234, F.S., to specify that forms filed with the AHCA pursuant to s. 408.061(5)-(6), F.S., which requires a nursing home to report its actual financial experience for that fiscal year, are not confidential or exempt from the public records requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and may be discoverable and admissible in a civil action under part II of ch. 400, F.S., or an administrative action under part II of ch. 400, F.S., or part II of chapter 408, F.S.

The bill makes other conforming and cross-reference changes.

The bill provides an effective date of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²¹ The bill defines a "claimant" as a resident or the resident's family or personal representative who has notified the licensee or facility of a potential claim by notice of intent letter or who has initiated an action, claim, or arbitration proceeding against the licensee or facility.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Article III, Section 6, of the State Constitution requires that “every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” CS/SB 804 is entitled “An act relating to the modernization of nursing home facility staffing.”

However, sections 3 and 4 the bill amend provisions relating to financial forms filed by nursing homes and nursing homes that have failed to satisfy a judgment or settlement, respectively. Neither of these sections directly relate to nursing home facility staffing and, as such, may be found to be outside of the scope of the bill as established in the bill’s title.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

SB 804 may have an indeterminate positive fiscal impact on nursing homes that are authorized to use staff other than CNAs to fulfill staffing requirements and due to the reduction of CNA hours that are required to be provided.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

CS/SB 804 creates a new definition for “direct care staff” in section 2 of the bill and limits the application of this definition to s. 400.23(3), F.S. However, the bill uses the defined term when amending s. 400.141, F.S., in section 5 of the bill. The bill should be amended to apply the definitions to the instance where the defined term is used in section 5 of the bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 400.23 and 400.141.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on February 11, 2022:

The CS:

- Modifies the definition of “resident care plan” in s. 400.021, F.S., to tie it to federal requirements in 42 CFR s. 483.21(b);
- Eliminates definitions for “average monthly hours of direct care per resident per day” and “non-nursing direct care staff” and adds a definition for “facility assessment;”
- Requires each facility to determine its direct care staffing needs based on the facility assessment and the individual needs of each resident;
- Reduces required hours of direct care provided by CNAs from 2.5 to 2.0 per resident per day, but reverts to current law the requirement that such direct care be provided by CNAs;
- Requires staffing data to be maintained for five years, rather than 18 months as required by the underlying bill (by a reference to 42 CFR s. 483.35(g));
- Specifies that the bill’s staffing requirements are minimum requirements and that compliance with the requirements is not admissible as evidence of compliance with specified federal requirements;
- Specifies that feeding assistance provided by CNAs does not count toward the 2.0 required hours of CNA direct care;
- Specifies that annual nursing home financial reports submitted to the AHCA are not exempt from public records requirements;
- Provides certain additional requirements for unpaid judgment or settlement agreements related changes of ownership of nursing homes;
- Allows the AHCA to impose a moratorium on a nursing home which has failed to comply with specified staffing requirements for 48 consecutive hours until such time as the nursing home is able to document compliance and strikes a \$1,000 fine for such noncompliance; and
- Establishes a Nursing Home Sustainability Task Force.

B. Amendments:

None.