

CMS Proposed Minimum Staffing Standards – Kansas Summary and Concerns

LeadingAge Kansas

CMS released the proposed Minimum Staffing Standards Rule on September 1, 2023, and was posted to the Federal Register for comments on September 6, 2023. Below are points dissecting the rule and in **bold** are the concerns providers can reference when speaking with policymakers or writing unique Kansas specific [comments to submit](#) on the rule. Comments are due November 6, 2023. This is a living document with new information being added as additional data is collected. New data will be highlighted and dated as it is added.

Formulation of the Rule

- CMS used information from Payroll Based Journaling (PBJ) data, RFI FY 2023 SNF PPS Rule comments, survey compliance data, and Abt Associates 2022 Nursing Home Staffing Study to draft the proposed rule.

- **Concerns –**
 - Payroll Based Journaling (PBJ) does not currently have the ability to show time frames of when RNs are working to support whether facilities are currently meeting the 24/7 RN staffing standard.
 - For example, a facility could have 24 hours of coverage on PBJ data for a single day, but that could potentially be 3 RNS working 8 hours each during the same time frame. This shows the data used to formulate this standard was potentially skewed.

 - Survey Compliance Data is subject to human interpretation of rules that can result in an increase of immediate jeopardy (IJ) tags based on that individual’s understanding of “likely to cause serious injury.”
 - In short, there’s not enough control and consistency in surveys due to the nature of how they are administered which can lead to skewed interpretation of “dangerous” nursing homes.

 - Abt Associates 2022 Nursing Home Staffing Study showed there’s no set number of staffing minimum that will guarantee quality of care due to the nature of the business and how each individual defines high quality care.
 - The study summarized their findings with, “Ultimately, the realized improvements in quality and safety will depend on nursing home success in increasing staffing levels to comply with minimum staffing requirements.”

 - **There is a lack of evidence-based data that can support this rule.**

 - **There is no acknowledgement of the funding needed and where it will come from to meet the rule provisions.**

 - **There is no acknowledgement of the decline of individuals entering the healthcare workforce, specifically LTC, to funnel to the workforce and meet the rule provisions.**

24/7 Registered Nurse Requirement

- Modifies existing requirement 42 CFR §483.35(b)(1) to go from use of services of an RN from 8 hours per day, seven days per week to 24 hours per day, seven days per week.
- The Director of Nursing (DON) would count towards these hours, but CMS is soliciting feedback on whether DON should be excluded.
- CMS would maintain the 42 CFR §483.35(f) waiver process, but this waiver does not exclude providers from complying with the minimum staffing standard requirement of .55 RN hours per resident per day (HPRD).
- Implementation is 2 years for urban areas and 3 years for rural areas from the date the final rule is published. The definition of rural is based on Census Bureau's definition which is a population under 50,000.
- **Concerns –**
 - An additional 3,267 RNs would be needed nationwide to meet the requirement, collectively costing nursing homes \$349M per year at an average cost of \$5.97 per resident per day.
 - **For Kansas, an additional 71 RNs are needed in rural areas, with 38 RNs needed in urban areas costing Kansas \$9.0M per year at an average cost of \$7.14 per resident per day.**
 - **Since the start of the pandemic all or part of at least 47 nursing facilities have closed or reduced their offerings in Kansas. According to CMS, the implementation of the 24/7 Registered Nurse requirement would dramatically increase the cost per resident day for small rural nursing homes that are serving the tens of thousands of older Kansas living in senior care deserts.**

Minimum Staffing Standards

- Sets staffing standards to .55 RN HPRD and 2.45 NA HPRD, but certain facilities may require more based on resident acuity.
 - *Kansas currently requires 2.0 hours of direct care staff time per resident and a daily average of not fewer than 1.85 hours during any 24-hour period, subject to changes due to acuity.*
- Standard does not include Licensed Practical Nurses (LPNs) in the 3.0 HPRD requirement.
- Exemptions require **all** three criteria to be met –
 - Location: Providers must either be in an area with a medium (20% below the national average) or low (40% below the national average) provider-population ratio for nursing workforce or located 20 miles or more from the next closest LTC facility as determined by CMS.
 - Good Faith Efforts: Recruit and retain staff. Must be demonstrated through plans and efforts including providing prevailing wages.

- Financial commitment: Nursing homes applying would demonstrate financial commitment by providing documentation on financial resources expended annually on nurse staffing relative to revenue.
- Exemptions will not be granted if even **one** of the following applies –
 - Nursing home failed to submit PBJ data.
 - Nursing home designated as a Special Focus Facility (SFF).
 - Nursing home cited for either a pattern of or widespread insufficient staffing that results in actual harm.
 - Nursing home cited in the past 12 months at immediate jeopardy for insufficient staffing.
- Exemptions are only good for one year and eligible for renewal in one-year terms.
- Implementation is 3 years for urban areas and 5 years for rural areas from the date the final rule is published. The definition of rural is based on Census Bureau’s definition which is a population under 50,000.
- **Concerns –**
 - An additional 12,639 RNs and 76,376 NA would be needed nationwide to meet the requirement, collectively costing nursing homes \$4.2B per year at an average cost of \$13.24 per resident per day.
 - **The demand of labor to meet these staffing provisions will drive up staffing agency costs without a funding stream for facilities to pay long-term.**
 - **For Kansas, 153 facilities need an additional 51 RNs and 369 NAs statewide costing Kansas \$24.9M per year at an average cost of \$8.79 per resident per day.**
 - **For rural Kansas facilities, 63 facilities are needing RNs or NAs that comes to an average cost of \$5.86 per resident per day.**
 - **For urban Kansas facilities, 90 facilities need RNs or NAs that comes to an average cost of \$10.23 per resident per day.**

Enforcement of Nurse Staffing Requirements

- Enforcement data comes from survey and certification process, relying in part on PBJ data.
- Remedies for noncompliance could include Civil Money Penalties (CMPs), Denials of Payment for Medicare and Medicaid beneficiaries, or termination of the provider agreement.
- **Concerns –**
 - Survey Compliance Data is subject to human interpretation of rules that can result in an increase of immediate jeopardy (IJ) tags based on that individual’s understanding of “likely to cause serious injury.”

- Payroll Based Journaling (PBJ) does not currently have the ability to show time frames of when RNs are working to support whether facilities are currently meeting the 24/7 RN staffing standard.
- Civil Money Penalty Reinvestment Program is still on hold by CMS to align all states to the same grant process. However, CMPs continue to be imposed and dollars collected. Reinvestment money is being withheld from facilities who could use it to address staffing concerns.

Alternative Staffing Standard Proposal

- Not proposed in the rule, but CMS is requesting feedback on alternative standard of 3.48 HPRD, with .55 HPRD for RNs, 2.45 HPRD for NAs, and the remaining .48 HPRD without a designation staff type.
- **Concerns –**
 - CMS estimates a collective cost of \$4.25B annually for nursing homes to meet a 3.48 total nurse staffing standard requirement.

Facility Assessments

- Must be evidence-based and data driven by using MDS or quality measures.
- Implemented and revised with input from variety of staff including direct care staff and representatives from outside the facility.
- Must drive staffing decisions based on acuity or behavioral health.
- Must include staffing plan for all shifts and weekends.
- Must include staffing recruitment and retention plan.
- Must include staffing contingency plan to be used before facilities need to activate the emergency plan.
- Implementation is 60 days from the date the final rule is published.
- **Concerns –**
 - Will require additional administrative burden that can pull time away from engaging with residents.
 - Will require additional engagement from direct care staff with no funding for additional costs to cover time spent on these activities.

Medicaid Payment Transparency

- Reporting provision for state Medicaid agencies.
- States would be required to report annually, and information will be posted to individual states' websites as well as the federal Medicaid.gov website.

- **Concerns –**
 - Additional administrative burden on nursing homes with extent of burden depending on reporting process established by the state.
 - Provision could create opportunities for inaccurate conclusions to be drawn from data as there is no identified way to report on other ways Medicaid payments are used for resident benefit.

How Congressional Delegates Can Help

- Meet with LeadingAge Kansas members at their facilities to see the good work they are doing.
- Push back on CMS and the White House by calling for a withdrawal of the rule while the agency takes necessary actions to appropriate funding or enact policy that enhances the aging services workforce.

How State Legislators Can Help

- Meet with LeadingAge Kansas members at their facilities to see the good work they are doing.
- Support staffing agency regulations to prevent skyrocketing labor costs to meet these standards.
- Update the Kansas Nursing Facility Reimbursement Rate Methodology to include the costs of these rule provisions.