

November 3, 2023

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services (HHS)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Submitted electronically to www.regulations.gov

Re: Medicare and Medicaid Programs; Minimum Staffing Standards for Long Term Care (LTC) Facilities and Medicaid Institutional Payment Transparency Reporting [CMS–3442–P]

Dear Secretary Becerra:

The American Nurses Association (ANA) applauds the Centers for Medicare & Medicaid Services (CMS) for recognizing the need to ensure safe and adequate staffing in LTC facilities across the country through the proposed rulemaking that will establish minimum staffing standards for nurses and other care personnel. Nurse staffing standards are paramount in guaranteeing the safety of nurses and health care personnel and the provision of high-quality care to patients. ANA appreciates this critical first step in addressing staffing challenges in our nation’s skilled nursing facilities.

While ANA supports CMS’ approach as outlined in the proposed rule to implement a nurse staffing standard, we urge the agency to consider the following recommendations, as detailed in this comment letter:

- 1. Refine the staffing requirements to include all parts of the patient care team and conduct periodic reviews of staffing standards,**
- 2. Finalize requirements to have a registered nurse (RN) onsite 24-hours, seven days a week (24/7),**
- 3. Ensure nurse input is reflected in facility assessments,**
- 4. Shorten the implementation timeline for finalized requirements,**
- 5. Enforce standards through substantive approaches to address noncompliance,**
- 6. Rigorously consider which facilities are granted exemptions, and**
- 7. Work closely with nurses to address workforce needs and challenges.**

ANA is the premier organization representing the interests of the nation’s over 5 million RNs, through its state and constituent member associations, organizational affiliates, and individual members. ANA advances the nursing profession by fostering high standards of nursing practice, promoting a safe and ethical work environment, bolstering the health and wellness of nurses, and advocating on health care issues that affect nurses and the public. ANA members also include the four APRN roles: nurse practitioners (NPs), clinical nurse specialists (CNSs), certified nurse-midwives (CNMs), and certified registered nurse anesthetists (CRNAs). RNs serve in multiple direct care, care coordination, and administration leadership roles, across the full spectrum of health care settings. RNs lead and coordinate

patient care delivery, educate patients and the public about various health conditions including essential self-care, and provide advice and emotional support to patients and their family members.

1. CMS must refine the proposed minimum staffing requirements prior to finalizing and implementing any enforceable standards.

ANA supports CMS' approach to achieve safe nurse staffing in LTC facilities through the use of enforceable minimum standards. We recognize the use of standards, including ratios, as one approach to address chronic staffing challenges in all care settings. Furthermore, we acknowledge the challenges faced by LTC facilities, especially during the COVID-19 pandemic response. We appreciate the Biden Administration and its agencies for recognizing these challenges and taking real action to address them—focusing primarily on nurse staffing levels.¹

In the above-captioned rule, CMS proposes to establish minimum staffing standards of 0.55 hours per resident day (HPRD) for RNs and 2.45 HPRD for nurse aides (NAs). Facilities would be required to meet these minimums regardless of their individual patient case mix. In addition, CMS seeks comment on whether a minimum total nurse staffing standard should also be required. The total minimum discussed in the rule would be 3.48 HPRD, with other alternatives. This HPRD rate is consistent with the “medium” staffing option examined in the nursing home study that was made public with the release of the rule. ANA recognizes that the provisions of this rule reflect thoughtful consideration of how to achieve safe nurse staffing levels in LTC facilities. **As CMS determines which provisions to finalize, ANA urges the agency to adopt the following refinements to the staffing standards to better achieve safe nurse staffing levels.**

a. CMS must include all parts of the patient care team in LTC facilities in any minimum staffing standards.

In the proposed rule, CMS focuses the minimum staffing standards on RNs and NAs, as noted above, omitting the important contributions of Licensed Practical Nurses/Licensed Vocational Nurses (LPNs/LVNs). Even in the alternate proposal of moving toward a standard based on total HPRD, the focus remains on RNs and NAs. CMS reasons that it pursued this approach in recognition of the increased quality of care correlated with increased RN hours and over concerns with LPNs possibly practicing above their state-determined license. ANA appreciates CMS for recognizing the critical role and leadership of RNs in the delivery of high-quality care in LTC facilities. However, we are concerned that the omission of LPNs/LVNs from the proposed rule overlooks the contributions of these nurses to the patient care team.

The Bureau of Labor Statistics estimates 35 percent of all LPNs/LVNs are practicing in LTC facilities—making them a critical part of the care team in these facilities, especially in light of ongoing workforce shortages and challenges.² We are concerned that insufficient staffing levels of LPNs, because of the

¹ The White House. FACT SHEET: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes. February 28, 2022. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>. Accessed October 2023.

² U.S. Bureau of Labor Statistics. Occupational Outlook Handbook—Licensed Practical and Licensed Vocational Nurses, Work Environment. Last modified September 6, 2023. <https://www.bls.gov/ooh/healthcare/licensed-practical-and-licensed-vocational-nurses.htm#tab-3>. Accessed October 2023.

proposed standards, might result in RNs having to absorb duties assigned to LPNs, potentially straining their already considerable workload and negatively impacting patient quality and outcomes. CMS is remiss to exclude LPNs/LVNs from the proposed HPRD rates. CMS should move toward adoption of a total staffing standard that reflects the entire care team of nurses—RNs, LPNs/LVNs, and NAs—who provide services to patients in LTC facilities. **As such, ANA urges CMS to create a total staffing standard that retains the proposed HPRD ratios for RNs and NAs with an additional HPRD standard specific to LPNs.**

b. CMS must implement a mechanism to review and refine all staffing standards as facilities come into compliance and the number of LTC facilities increases.

CMS acknowledges that the nurse staffing standards it proposes in the rule are lower than identified in recent studies—including the most recent CMS-commissioned Nursing Home Staffing Study.³ The agency estimates that the proposed requirements would increase nurse staffing levels in more than 75 percent of the nation’s LTC facilities. Further, the agency does note that the standards could be revisited if data and other evidence show an increase in standards is warranted. ANA recognizes that implementation of the standards would represent a significant increase in staffing at LTC facilities and appreciates the agency’s thoughtful approach to setting the proposed minimums. However, ANA urges CMS to institute a more systematic, periodic review of the minimum standards and their impact on quality, safety, and access. CMS should revisit the standards, at a minimum, within a year or two of full implementation of provisions in the final rule to ascertain if the agency’s approach is yielding its intended outcomes. CMS should then follow that with periodic reevaluations and redeterminations reflective of the number of facilities in compliance with the staffing requirements and increases in total LTC facilities. ANA urges CMS to institute a systematic review process to ensure that future administrations continue to examine HPRD rates and shift them into higher ranges. **As such, ANA urges CMS to implement a mechanism to ensure a systemic and periodic review of nurse staffing levels to work towards optimal, safe standards.**

2. CMS must finalize its proposal to have an RN onsite 24/7 at LTC facilities.

CMS proposes to require all facilities to have an RN onsite 24/7. This requirement would be independent of the RN and NA staffing requirements discussed above. ANA has long advocated for CMS to require LTC facilities to have a 24/7 RN and are pleased that the agency is proposing this requirement. This recommendation was most recently identified by the National Academies of Sciences, Engineering, and Medicine, who called for 24/7 direct care RN coverage—in addition to the director of nursing—with additional RN coverage as part of a larger recommendation to enhance staffing standards in nursing homes.⁴ We know that having an RN in person and onsite 24/7 in LTC facilities is important for patient care quality and safety. LTC facilities require the active contributions and clinical expertise of RNs at all times to ensure the delivery of skilled quality care for patients. **As such, ANA urges CMS to finalize its proposal to require an in-person 24/7 RN presence in LTC facilities.**

³ Abt Associates. Nursing Home Staffing Study. June 2023. <https://edit.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf>. Accessed October 2023.

⁴ National Academies of Sciences, Engineering, and Medicine. “The National Imperative to Improve Nursing Home Quality.” Consensus Study Report. 2022. <https://nap.nationalacademies.org/catalog/26526/the-national-imperative-to-improve-nursing-home-quality-honoring-our>. Accessed October 2022.

3. Nurse input must be reflected in Facility Assessments, with protections for nurses who raise concerns about staffing levels and work environment challenges.

CMS proposes to modify existing Facility Assessment requirements to allow facilities to have a process to consistently assess and document the necessary staff and resources needed to provide quality care to their residents. CMS also notes in the rule that the proposed nurse staffing standards would be a minimum, stating that it expects facilities to make staffing decisions that are based on acuity and ensure the provision of quality care to all residents. ANA wholeheartedly agrees with CMS that any required standards would represent a **minimum** and that actual staffing levels must consider nurse input on patient acuity levels. ANA strongly believes that RNs at all levels within a healthcare system must have a substantive and active role in staffing decisions to assure availability of the necessary time with patients to meet care needs and overall nursing responsibilities.⁵ As CMS monitors facilities and reviews facility assessments, we urge the agency to make this a part of compliance determinations. Safe staffing standards are critical in creating a floor to ensure enough nurses are available to provide quality care to patients but cannot be set absent considerations of patient acuity. Registered nurses are best positioned to determine staffing needs based on acuity and their input is vital in determining safe staffing levels.

Moreover, nurses must be protected if and when they raise concerns about unsafe staffing levels and work environment challenges. All too often, nurses fear the potential of repercussions from coming forward and vocalizing concerns about facility staffing levels and patient safety. This is not conducive to a safe working environment for health care personnel and the patients they serve. CMS must ensure that the nurse's voice is captured in Facility Assessments and protected. CMS can look to existing federal whistleblower protections as models. **As such, ANA urges CMS to encourage and require facilities to seek nurse input in completing Facility Assessments and setting staffing levels appropriate for patient acuity.**

4. The Implementation timeline of the minimum nursing standards must be shortened.

CMS proposes an implementation timeline for the proposed staffing standards that would allow facilities located in urban areas two years to have an RN onsite 24/7 and three years to meet staffing minimums. For LTC facilities in rural areas, CMS proposes three years to come into compliance with the 24/7 RN requirement and 5 years for the minimum staffing standards. While we understand the agency's reasoning for proposing such a prolonged timeline—citing workforce challenges, especially in rural areas—ANA remains concerned that such a long implementation timeline could lead to unnecessary, further delays in ensuring facilities are staffed appropriately and safely. A shorter timeline would push facilities to begin attracting and retaining additional staff to meet any finalized requirements as soon as possible. **Assuring safe staffing levels in LTC facilities is too critical to allow for any further delays and, as such, ANA encourages CMS to shorten the implementation timeline for rural and urban facilities.**

5. Enforcement actions for noncompliance must substantively address workforce challenges within facilities, through mechanisms such as corrective action plans (CAPs).

CMS details in the rule several options available to the agency to penalize facilities found not in compliance with the staffing standard requirements. ANA strongly believes in **enforceable** staffing

⁵ American Nurses Association. Principles for Nurse Staffing, 3rd Edition. 2020. Available online at <https://www.nursingworld.org/PrinciplesForNurseStaffing>.

standards—holding facilities responsible for guaranteeing safe nurse staffing levels. CMS references enforcement actions, also referred to as “remedies” in the rule, that may include, but are not limited to, termination of provider agreements, nonpayment for services provided to patients covered by Medicare and/or Medicaid, and civil monetary penalties. ANA agrees that these actions would penalize facilities but remains concerned that they would do little to address the underlying unsafe staffing conditions. Rather than approaching noncompliant facilities with financial penalties, we urge CMS to work closely with facilities to improve staffing levels through substantive approaches such as CAPs. We understand that CMS utilizes CAPs to help bring other aspects of the programs it oversees into compliance and, therefore, the agency is well versed in this type of approach. **The critical nature of safe staffing levels warrants CMS to act substantively and work closely with facilities to bring them into compliance with requirements, such as through CAPs.**

6. CMS must conduct rigorous assessments and conduct timely follow-up for facilities granted exemptions to the staffing standards.

CMS proposes to grant exemptions to facilities that meet several criteria, as defined by the agency. Exemptions would be granted for a one-year period, with the ability to extend them in one-year increments thereafter. While the proposed criteria seem stringent, ANA encourages CMS to use the utmost care and discretion in determining which facilities are granted exemptions. We also encourage the agency to work closely with exempted facilities and conduct comprehensive reviews to move facilities toward full compliance in a timely manner. We are concerned about the possibility of facilities being granted endless exemptions without making real progress on nurse staffing levels. As noted above, safe staffing is too critical to allow facilities to continue to be granted exemption after exemption rather than be pushed to take real steps to fulfill all staffing requirements. Exemptions cannot be a way for facilities to avoid compliance with the standards on an ongoing basis. **ANA urges CMS to rigorously determine and work closely with facilities and nurses to ensure exemptions are only granted under the most stringent circumstances and in a way that moves staffing levels quickly into compliance.**

7. CMS must work with nurses to identify nursing workforce needs and challenges and implement approaches that ensure safe staffing and a workforce ready to meet future challenges.

While ANA appreciates the agency for issuing the above-captioned proposed rule to ensure safe staffing in LTC facilities, we are all too aware that this is just one aspect of a larger issue—a nursing workforce in crisis. ANA continues to call on HHS and CMS to take robust and immediate action to address the unsustainable nurse staffing crisis facing our country. Underlying, chronic staffing challenges have persisted for years, not only in LTC facilities but throughout the health care delivery system.

It is imperative that the Administration acknowledge and take concrete steps to address nurse staffing shortages across the care continuum that puts our ability to care for patients in jeopardy. ANA and its nurses stand ready to work closely with federal agencies to identify workforce needs and challenges, including:

1. Addressing the fatigue, mental health, and wellbeing of nurses,
2. Implementing effective workplace violence prevention strategies,
3. Developing strategies to retain the current nursing workforce through workplace environment improvements,

4. Working with CMS to adopt new payment methodologies that recognize the value that nurses bring to patient care and health outcome,
5. Investing in the education and training of the next generation of nurses,
6. Removing barriers to nurses practicing at the top of their license, and
7. building and maintaining a resilient workforce to meet our country's current and future health care needs.

Moreover, the current nursing shortage is not one that nurses alone can solve. As such, it is crucial that the Administration convenes nurses, hospitals, physicians, other health care personnel, state and federal government officials, payers, and key stakeholders to examine, identify, and then implement real solutions to nursing shortages in LTC facilities and in all care settings. **ANA and its nurses stand ready to work with CMS to holistically address nursing workforce challenges across the care continuum.**

ANA appreciates the opportunity to submit these comments and looks forward to continued engagement with HHS. Please contact Tim Nanof, Vice President, Policy and Government Affairs, at (301) 628-5166 or Tim.Nanof@ana.org, with any questions.

Sincerely,



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