

December 8, 2017

Chelsea Driscoll
Chief, Policy and Enforcement Branch
California Department of Public Health, Licensing and Certification Program
MS 3203, P.O. Box 997377
Sacramento, CA 95899-7377

RE: Comments on Workforce Shortage Waiver Draft Language for SB 97

Ms. Driscoll:

SEIU Local 2015 appreciates the opportunity to provide written comments on the recent Workforce Shortage Waiver Draft for SB 97 that was discussed at the last stakeholder meeting on November 17th. We found the discussion to be engaging and informative, and look forward to continuing to work collaboratively on the implementation of SB 97.

The following comments submitted by SEIU Local 2015 address each of the major components of the draft waiver with recommendations tailored to each section.

Guidelines for Waiver Application -Evidence of Workforce Shortage

SEIU Local 2015 agrees with the requirement of Skilled Nursing Facilities (SNFs) to “submit a waiver request with evidence to support the workforce shortage...” but we believe there should be more robust parameters to measure the evidence submitted by SNFs.

Specifically, under section A, we have concerns about using the Office of Statewide Health Planning and Development (OSHPD) data identifying registered nurse (RN) shortages in the county where the facility is located as a source to provide evidence of a workforce shortage. After examining the methodology used to determine a RN shortage area, we realized that half of the counties in California have an RN shortage designation since “counties receive the RNSA designation when the county’s ratio is greater than the total average”.¹ Additionally, we have major concerns with designating entire counties as having a workforce shortage since several counties have labor-market variance within their boundaries. For instance, Los Angeles County, which contains over 30% of all of the SNFs in California, is vast and contains several different labor markets, yet the entire county is designated as having an RN shortage in the OSHPD report. It simply does not make sense that just because a facility is located in Los Angeles county that it can apply for a staffing waiver, especially when there is are plenty of CNAs and LVNs in several sub-county labor markets.

Since there will be two waiver options, 1) Waiver of overall 3.5 hprd minimum requirement and 2) Waiver of 2.4 CNA hprd minimum requirement, it is imperative that SNFs are required to submit data on CNA shortages in the area, as there is a defined staffing requirement for that classification, rather than rely solely on the OSHPD RN shortage county designation. As we recommend below, CDPH can easily develop RN, LVN, and CNA shortage areas based on available information from CDPH, OSHPD, and the Department of Consumer Affairs. If CDPH does not develop a CNA workforce shortage designation, we do not support using the OSHPD RN workforce designation to allow a facility to receive a waiver for the minimum 2.4 hprd of C.N.A. care since it is

¹ OSHPD Registered Nurse Shortage Areas (Update) Report <https://www.oshpd.ca.gov/documents/HWDD/GIS/RNSA-Report-2017.pdf>

irrelevant.

Specifically under section B, we support facilities providing salary range information for nursing staff in their area, but we have concerns about facilities providing “salary ranges in the county where the facility is located”, since as we mentioned earlier that the county geography is not reflective of the various labor markets and variations within a county. Additionally, we have concerns about using the US Department of Labor, Bureau of Labor Statistics (BLS) Occupations Employment and Wage Estimates (OES) data for Metropolitan and Nonmetropolitan Areas since these areas can be broad (some areas include multiple counties) and may be not be inclusive of all of the labor market variations in our state. Furthermore, the BLS OES Metropolitan and Nonmetropolitan area estimates include wage information for RNs, LVNs, and CNAs that work in all industries, not just nursing facilities. We suggest that CDPH consult with the Employment Development Division (EDD) and assess whether the BLS OES data for industry and occupation can be provided at sub-county levels beyond the metropolitan and nonmetropolitan area designations. The OES research industry and occupation data available on the BLS website has hourly wage ranges for RNs, LVNs, and NAs that are employed in nursing facilities only, and is only available for the state level. However, according to BLS, “additional information may be available from the State Workforce Agency (SWA) in each state”.²

Recommendations on Evidence of Workforce Shortage

- SEIU recommends that CDPH create their own methodology to designate a workforce shortage area for each of the nursing classifications of RNs, LVNs, and CNAs using a similar method to that of OSHPD to compare the active licensed/certified RNs, LVNs, and CNAs to patient/resident days in a sub-county geography.
 - Rather than using county level information, a smaller geography should be used, such as OSHPD Medical Service Study Areas (MSSA)³ that are sub-county geographical units and are used for the OSHPD primary care, dental, and mental health shortage area designations.
 - For the first year of implementation, SEIU proposes using OSHPD Health Facility Planning Areas (HFPA) for the geographic comparison since this information is readily available in the OSHPD Long Term Care Facilities Annual Financial Pivot Profile⁴ and it is easy to identify which HFPA each SNF is located in.
 - CDPH can request a cross-walk of the zip codes contained in each HFPA from OSHPD so they can easily assign the RN, LVN, and CNA addresses to the correct HFPA. Since CDPH maintains the CNA registry list, the data is readily available to sum the number of active CNAs by HFPA. CDPH can work with the Department of Consumer Affairs to receive the number of active licensed RNs and LVNs.
 - To determine the number of total SNF resident days and total Hospital patient days, this information can be gathered by HFPA from the most recently available OSHPD LTC facilities annual financial pivot profile and OSHPD Hospital annual financial pivot profile.
 - To determine what portion of SNF and hospital patient days to use for the shortage ratio calculation, a ratio of the number of CNA Full-time equivalent (FTE) employees in hospitals in the HFPA divided by the total number of CNA FTEs employed for both hospitals and SNFs in the HFPA based on OSHPD annual financial data can be applied to the total hospital patient days, and a ratio of the number of CNA FTEs employees in SNFs divided by the total number of CNA FTEs employed for both hospitals and SNFs based on OSHPD annual financial data can be applied to the total SNF resident days. There is a variance among the HFPAs in their staffing mix, so it is more accurate to use the OSHPD LTC facility and Hospital financial data rather than apply a universal percentage to all of the HFPAs, such as 8% of a SNF patient days should be used in the calculation to determine if there is an RN shortage.

² BLS OES Research estimates by industry and occupation: https://www.bls.gov/oes/2014/may/oes_research_estimates.htm

³ <https://www.oshpd.ca.gov/HWDD/MSSA.html>

⁴ <https://www.oshpd.ca.gov/HID/LTC-Financial.asp#Profile>

- In order for a HFPA to be designated as having a shortage, its ratio of staff to patient days should be in the top 25% of all HFPA's.
- Here is an example of an alternative workforce shortage area designation methodology table:

Direct Care Occupation (A)	County (B)	Health Facility Planning Area (C)	Active Licensed/Registered (D)	% employed by SNFs (E)	SNF Total Patient Days (F)	% employed by Hospitals (G)	Hospital Patient Days (H)	Shortage Ratio $((E*F)+(G*H))/D$	Designated (Yes, if ratio is in top 25% of all HFPA's)
RN	Yuba/Sutter	227	465	7.5%	165,000	90%	53,000	132.0	Yes
LVN	Yuba/Sutter	227	65	95%	165,000	1%	53,000	2521.2	Yes
CNA	Yuba/Sutter	227	330	75%	165,000	20%	53,000	415.1	Yes

- CDPH should post the sub-county workforce shortage designated areas on their website, so facilities can assess whether they are located in such an area. CDPH should make it very clear a facility located in a geographic area designated as having either a RN, LVN, or CNA shortage is not automatically eligible for a staffing waiver.
- If EDD is not able to produce sub-county industry and occupation salary range information for nursing staff employed by nursing facilities, one alternative for facilities to provide the wage and benefit expenditure ranges for non-temporary employees for each of the nursing staff job classifications based on OSHPD LTC Facilities Annual Financial pivot profile for the HFPA that the SNF is located in. Here is an example:

Sample SNF Hourly Salary & Benefit Estimates by HFPA (Based on OSHPD LTC Facilities Annual Financial data)

HFPA	Nursing Staff Job Classification	Minimum	Weighted Average	Median	75 th Percentile	Max
925	NA	\$11.37	\$15.66	\$15.76	\$17.07	\$21.17
925	LVN	\$23.89	\$32.26	\$32.25	\$33.59	\$45.13
925	RN	\$30.22	\$44.08	\$44.22	\$46.72	\$58.92

Note: OSHPD LTC Facilities Annual Financial Data includes salary & wage expenditures by job classification and an overall employee benefit factor for each facility that submits a report. To determine the hourly salary & benefit estimate, calculate the Salary & Wages/Productive Hours for each nursing job classification and multiply it by (1+benefit factor). The benefit factor is Total Benefits divided by Total Salary & Wages.

- SEIU recommends that the following additional information be collected as evidence to support the workforce shortage.
 - Range of Staff turnover rates for the HFPA (or other designated sub-county geography)
 - Range of Staff retention rates for the HFPA (or other designated sub-county geography)
 - The OSHPD LTC facilities annual financial data contains a labor report for each facility which

contains the average number of employees, total employees over the course of the reporting year, employees with continuous service, turnover percentage, and continuous service employees as a % of average employees. This data can be easily viewed by HFPAs to determine the ranges.

- SEIU recommends that CDPH design and conduct an annual survey of all SNFs where they can provide information regarding nursing job vacancies, starting hourly rates for nursing positions, benefits, nursing staff turnover and retention, and recruitment strategies, such as offering a higher hourly wage to employees that work the 11 pm to 7 am shift. The responses to the survey will provide a more accurate picture of the potential workforce shortage areas in the state and serve as a good basis to compare facilities that are applying for a waiver to those that are not. For example, the survey results may indicate which HFPAs or sub-county geographies have more than 60% of facilities experiencing higher vacancy rates than the county or state average.

Guidelines for Waiver Application – Evidence of efforts to address the workforce shortage & action plans

SEIU Local 2015 agrees with the requirements laid out in sections B, C, and D regarding requirements for SNFs to submit evidence of their efforts to address a workforce shortage, to submit a detailed plan of corrective action, and to submit a plan of how it will meet residents’ needs despite the workforce shortage. However, we believe these measures should be more strictly defined to indicate what the acceptable and unacceptable levels of recruitment and retention activities are that would allow a SNF to qualify for a waiver.

Recommendations for Evidence of efforts to address the workforce shortage

- Amend the language to state “SNFs must submit evidence of efforts to address the workforce shortage that **must at a minimum** include the following: **(CDPH may include additional requirements)**”
- In addition to the CDPH proposed items, SEIU suggests the following additional elements be included:
- The facility must provide a staffing inventory that contains the current number of nursing staff by job classification, job status, and for each shift; and the productive hours worked and resident days for the prior month to reflect the SNF’s current staffing patterns and hours per resident day. While the minimum staffing requirement applies for a 24 hour period, for purposes of this exercise we ask for a summary of the past month since a facility’s resident census can fluctuate substantially.

Sample Nursing Staff Inventory (Total Nursing staff employed by shift for a 7 day week) & Current Nursing Hours per Resident Day

Job Classification	Shift 1 (7 am to 3 pm)				Shift 2 (3 pm to 11 pm)				Shift 3 (11 pm to 7 am)				Total
	Full-time	Part-Time	Agency Full-time	Agency Part-time	Full-time	Part-Time	Agency Full-time	Agency Part-time	Full-time	Part-Time	Agency Full-time	Agency Part-time	
RN	1			1	1				1				4
LVN	5				3				2				10
CNA	15				11				6				32
NA in training	0												0
Psych Tech	0												0

Total Nursing Productive Hours for Past Month	3,780	-	-	120	2,700	-	-	-	1,620	-	-	-	8,220
NA Productive Hours for Past Month	2,700				1,980				1,080				5,760
Total Resident Days for Past Month													2,420
Nursing Hours Per RD	1.562	0.000	0.000	0.050	1.116	0.000	0.000	0.000	0.669	0.000	0.000	0.000	3,397
NA Hours per Resident Day	1.116	0.000	0.000	0.000	0.818	0.000	0.000	0.000	0.446	0.000	0.000	0.000	2,380

- The facility must provide information on the current nursing job vacancies, such as the number of vacancies for each job classification, whether the position is full-time or part-time, which shift, the hourly salary and benefits information.

Sample Summary of Current Nursing Job Vacancies

Job Classification	Full-time	Part-Time	Shift Hours	Starting Hourly Salary	Benefits Description (w/in first 3 months of employment)	Date Vacancy Posted
RN	X		7 am-3 pm	\$35	Provide 80% of cost of individual health insurance premium; 7 sick days, 2 weeks vacation, 401k match up to 3%	5/31/18
LVN	X		7 am-3 pm	\$27	Provide 80% of individual health insurance premium cost; 7 sick days, 2 weeks vacation, 401k match up to 3%	6/15/18
CNA	X		7 am-3 pm	\$14	Provide 80% of cost of individual health insurance premium; 7 sick days, 2 weeks vacation, 401k match up to 3%	6/1/18
CNA		X	3 pm – 7 pm	\$14	3.5 sick days, 1 week vacation, 401k match up to 3%	6/1/18

- The facility must demonstrate that they are offering a base hourly wage that is at least at the 75th

percentile for the job classification for their defined geography (BLS MSA or OSHPD HFWA).

- The facility must show evidence that they advertised the job opportunity on at least 4 healthcare profession recruitment websites, in addition to their facility or corporate website, the Employment Development Department (EDD) website, and in the local newspaper, and must provide documentation such as invoices and copies of the job opportunity postings.
- The facility must submit staff turnover rates for each nursing job classification for each of the past 12 months to measure the facility's ability to offer a stable workplace environment and retain staff. The facility must demonstrate that its turnover level for the job classification is below the average for their HFWA or other sub-county geography during the preceding year.
- The facility must submit staff retention rates for each nursing job classification for each of the past 12 months to measure the facility's ability to offer a stable workplace environment and retain staff and must demonstrate that its retention level for the job classification is above the average for their HFWA or other sub-county geography during the preceding year. The OSHPD annual financial data contains a labor report for each facility which contains the average number of employees, total employees over the course of the reporting year, employees with continuous service, turnover percentage, and continuous service employees as a % of average employees. This data can be easily viewed by HFWA.
- The facility must provide a nursing staff hiring report for the preceding 12 months, which lists the vacant position, how many people applied for the position, how many people were interviewed for the position, and for all those offered the position, how many years of experience did they have, what was the salary offered, did the person accept the job, and if the person accepted the job are they still employed at the facility currently. Such information is helpful to compare facilities recruitment to other facilities that apply for a waiver and determine if the facility's difficulty with recruitment is due to the salary offered or a workforce shortage.

Sample Nursing Staff Recruitment and Hiring Report

Position	Applied	Interviewed	Length of Entire Recruitment & Hiring Process	Offered Position	Experience	Salary Offered	Position Accepted?	Currently Employed
CNA 1	10	9	6 weeks	Yes	3 years	\$15	Yes	Yes
CNA 1	10	9	6 weeks	Yes	2 years	\$13	No	N/A
CNA 2	15	14	7 weeks	Yes	1 year	\$13	No	N/A
CNA 2	15	14	7 weeks	Yes	3 months	\$12	Yes	No

- The facility must provide detailed use of registry services, including the range of hourly/daily rates paid to the temporary agency/contractor for each job classification.
- After a survey is developed for all facilities with nursing staff vacancy information, CDPH should compare the facility's vacancy information to that of facilities in the same HFWA or sub-county geography to determine if the facility has more vacancies than the norm, which is an indication of other factors outside of a workforce shortage.

Recommendations on Plans Specifying How Facilities will Meet Residents' Needs

SEIU supports the following recommendations made by California Advocates for Nursing Home Reform (CANHR) in their comment letter to CDPH of:

- “In developing its plan, a facility shall be required to conduct an updated assessment of each resident; prepare updated care plans for each resident; and quantify, both individually and collectively, the direct caregiving staffing resources needed to fully meet the residents’ needs. The findings shall be summarized in the plan.”
- “Prior to acting on the waiver, CDPH shall conduct an onsite investigation to verify the facility’s assertions that it is fully able to meet residents’ needs and ensure quality of care” if they are granted a staffing waiver.

Evaluation of Waiver Requests

SEIU 2015 appreciates the factors that CDPH proposes to consider in evaluating waiver applications, but we propose that the guidelines outlined in this section be more clearly defined to show how CDPH will review applicants on each measure, and how they will determine if a SNF has complied with each one.

Recommendations on Evaluation of Waiver Requests

- When a waiver application is received by CDPH, they should notify all affected parties including the facility’s resident council, family council, the local ombudsman program, the union representative (if there is one for that particular facility), and any other related stakeholders that a waiver application has been received and is under review. In its notification, CDPH should inform all parties of the date by which a decision will be made if the waiver is granted or denied, and will notify all parties when the decision has been made, with details about why that decision was made.
- SEIU Local 2015 proposes that the following measures be used as determination of a SNF being non-compliant with state and federal regulations:
 - The SNF’s current Centers for Medicare and Medicaid (CMS) Nursing Home Compare Five-Star overall rating is at or below 2 stars⁵
 - The SNF is designated as a CMS Special Focus Facility
 - CDPH has substantiated complaints on insufficient staffing, neglect or abuse at the SNF within the past 12 months
 - During the prior three years, the SNF has received one or more California citations, been subject to federal or California enforcement actions, received deficiencies or administrative penalties for insufficient staffing, been cited for harm-level or substandard quality of care deficiencies, or been the subject of any law enforcement charges or prosecutions (as recommended in CANHR’s comment letter)
- SEIU Local 2015 agrees with CANHR’s recommendations that a SNF’s application for a workforce shortage waiver should trigger an onsite investigation of the facility, and we believe the following things should be investigated:
 - The adequacy of its staffing and care
 - Resident and family concerns of the waiver application
 - The accuracy and credibility of the facility’s assertions that it is fully able to meet residents’ needs and ensure quality of care

The information gathered during the onsite investigation should be used in conjunction with all other received data and information from the SNF to make a determination if a waiver shall be granted.

- SEIU recommends that a central office be responsible for evaluating all of the incoming waiver

⁵ According to Nursing Home Compare, approximately 22% of nursing facilities in California have an overall star rating of 1 or 2 stars. The star ratings may be downloaded at: <https://data.medicare.gov/Nursing-Home-Compare/Star-Ratings/ax9d-vq6k>

applications, rather than each district field office. It is important that there is consistency in determining whether a facility should be granted a waiver. The CDPH waiver evaluation staff should determine if the facility provided complete and accurate documentation of the workforce shortage, demonstrated adequate recruitment efforts to address the workforce shortage.

- SEIU agrees with CANHR's recommendations that if CDPH determines a facility submitted false information in its application, it shall deny the waiver request, and that CDPH "shall deny waiver applications if its inspection and review determine that the quality of resident care is, or is likely to be, compromised in any way by the facility's failure to meet California's minimum staffing requirements."

Duration of Waivers

We are extremely concerned with the allowance of three consecutive waiver renewals as this extends the time in which a SNF may operate below the required staffing levels to an unreasonable degree.

Recommendations on Duration of Waivers

- SEIU recommends that a facility may only be granted two consecutive waivers. If a facility applies for second waiver, more stringent criteria must be applied in the evaluation process to determine whether a facility should receive an additional year of a waiver. For example, the facility must show compliance with their submitted action plan to address the workforce shortage and demonstrate measurable improvement in nursing staff levels over the previous 12 months.
- We further recommend that waivers for a workforce shortage should only be granted in the first three years of implementation of SB 97 to ensure that no SNF is operating below the new staffing requirements for an unacceptable length of time.

Terminating Waivers

SEIU Local 2015 agrees with CANHR's assertion that CDPH must address the issue of terminating waivers.

Recommendations on Terminating Waivers

We agree with CANHR's recommendations on the posting of the terms and conditions of a SNF's waiver in prominent locations within the facility, and that during inspections by CDPH, a waiver may be terminated if evidence is found that violates the terms of the waiver or that compromises the safety and care of residents. A SNF with an approved waiver must submit monthly reports to CDPH to demonstrate that they are taking steps to resolve the staffing shortage. The reports need to be posted in areas accessible to residents, families, staff, and the public. The reports must be submitted in a timely manner in order for the SNF to continue to receive its waiver status.

- SEIU Local 2015 proposes that the following measures be used to terminate a SNF's waiver:
 - Direct care staffing hours fall below 3.2 hours per resident day
 - CDPH should review CMS Payroll Based Journal (PBJ) staffing data for facilities that are granted waivers to ensure they are not staffing below 3.2 hprd. If a facility has a waiver for the overall 3.5 hprd requirement but not the 2.4 C.N.A. hprd requirement, PBJ data should be used to verify that the facility is not falling below the 2.4 C.N.A. hprd requirement. PBJ data is released on a quarterly basis and the review should be done at least quarterly.
 - The SNF's CMS Five-Star overall rating decreases to at or below 2 stars.
 - CDPH substantiates a complaint on insufficient staffing, neglect or abuse at the facility while the waiver is in effect
 - The facility receives one or more California citations, is subject to federal or California enforcement

actions, receives deficiencies or administrative penalties for insufficient staffing, is cited for harm-level or substandard quality of care deficiencies, or is the subject of any law enforcement charges or prosecutions (as recommended by CANHR)

- A quarterly reevaluation by CDPH of any other inspection or investigation determines that resident quality of care is compromised by the waiver or the lack of sufficient staff to meet residents' needs (as recommended by CANHR)

Posting and Notification Requirements

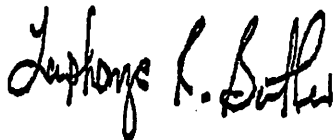
The posting and notification requirements of the waiver guidelines should be more clearly defined so that all affected individuals and groups have access to and can easily read a SNF's approved workforce shortage waiver.

Recommendations on Posting and Notification Requirements

- CDPH should notify all affected parties in writing including the facility's resident council, family council, the local ombudsman program, the union representative (if there is one for that particular facility), and any other related stakeholders when a waiver is approved for that facility within two business days. The SNF that was granted the waiver should notify all residents and their designated representatives and the nursing staff in writing of the waiver approval within two business days.
- The waiver should be posted in multiple areas throughout the SNF, including break rooms, public areas, and any other locations that are easily accessible by residents, staff, and visitors. The information needs to be displayed in large font and include details on the waiver, including that the facility is staffing below the 3.5 HPRD or the 2.4 CNA HPRD. The information must be made available in all languages spoken by residents and their families, as well as by staff. Copies of this information need to be available upon request by a resident or staff person, as well as any other affected party.

SEIU Local 2015 once again thanks CDPH for their commitment to conducting a collaborative stakeholder process, and we look forward to continuing to work together to ensure the successful implementation of SB 97. Please do not hesitate to contact Amanda Steele at amandas@seiu2015.org or Dionne Jimenez at dionne.jimenez@seiu.org if you have questions regarding the content of our comments.

Sincerely,



Laphonza Butler
President
SEIU Local 2015