

**State of California
Office of Administrative Law**

In re:
Department of Public Health

Regulatory Action:

Title 22, California Code of Regulations

Adopt sections:

Amend sections: 72329.2

Repeal sections:

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Government Code Section 11349.3


OAL Matter Number: 2019-0114-02

**OAL Matter Type: Certificate of Compliance
(C)**

This certificate of compliance rulemaking action by the California Department of Public Health makes permanent, with modifications, regulatory changes originally adopted in emergency action 2018-0619-02 to implement minimum staffing requirements for skilled nursing facilities as established by statutes 2017, chapter 52 (SB 97).

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 2/27/2019.

Date: February 27, 2019



**Kevin D. Hull
Senior Attorney**

**For: Debra M. Cornez
Director**

**Original: Dr. Karen Smith, Director
Copy: Anita Shumaker**

NOTICE PUBLICATION/REGULATIONS SUBMISSION



(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2018-1004-03	REGULATORY ACTION NUMBER 2019-0114-02C	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

<p>2019 JAN 14 P 1:26</p> <p>OFFICE OF ADMINISTRATIVE LAW</p>	<p>NOTICE</p> <p>REGULATIONS</p>
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ENDORSED - FILED
In the office of the Secretary of State
of the State of California

FEB 27 2019
3:22 PM

AGENCY WITH RULEMAKING AUTHORITY California Department of Public Health	AGENCY FILE NUMBER (if any) DPH-17-011
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A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON Anita Shumaker	TELEPHONE NUMBER 916-440-7718	FAX NUMBER (Optional) 916-696-6220
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER 2018, 42-2	PUBLICATION DATE 10/19/2018

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Skilled Nursing Facility 3.5 Direct Care Hours	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) Z2018-0619-02E, 2018-1210-01EE
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT AMEND Section 72329.2 REPEAL
TITLE(S) 22	

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input checked="" type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1) December 18, 2018 through January 2, 2019

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY		
<input checked="" type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON Anita Shumaker	TELEPHONE NUMBER 916-440-7718	FAX NUMBER (Optional) 916-636-6220	E-MAIL ADDRESS (Optional) Anita.Shumaker@CDPH.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 1/14/19
TYPED NAME AND TITLE OF SIGNATORY Keith Van Wagner	

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ENDORSED APPROVED
FEB 27 2019
Office of Administrative Law

**Methodology to Indicate Changes to
DPH-17-011P – Skilled Nursing Facilities 3.5 Direct Care Hours**

Changes to the proposed regulations are indicated as follows:

- Text **added** to the proposed regulation is indicated in red double underline
- Text **removed** from the proposed regulation is indicated in ~~red double strikethrough~~

Title 22. Social Security
Division 5. Licensing and Certification of Health Facilities, Home Health Agencies,
Clinics, and Referral Agencies
Chapter 3. Skilled Nursing Facilities
Article 3. Required Services

Amend Section 72329.2 as follows:

§ 72329.2. Nursing Service – Staff.

(a) Each facility, except those skilled nursing facilities that are a distinct part of a general acute care facility or a state-owned hospital or developmental center, shall employ sufficient nursing staff to provide a minimum of 3.5 direct care service hours per patient day, except as set forth in Health and Safety Code section 1276.9. Skilled nursing facilities shall ~~have~~provide a minimum of 2.4 certified nurse assistant hours per patient day ~~for certified nurse assistants to~~ meet the requirements of this subdivision.

(1) Facilities that are a distinct part of a general acute care facility or a state-owned hospital or developmental center shall continue to meet the standard set forth in Health and Safety Code section 1276.5.

(2) Facilities which provide care for persons with mental health disorders and in which psychiatric technicians provide patient care shall meet the following standards:

(A) ~~If~~For patients ~~are not~~ certified for special treatment programs, facilities shall employ sufficient staff to provide a minimum of 3.5 direct care service hours per patient day.

(B) For patients certified for special treatment programs, facilities shall employ sufficient staff to provide a minimum of 2.3 nursing hours per patient day for each patient certified to the special treatment program, exclusive of additional staff required to meet the staffing standards of the special treatment program.

(b) A facility may request a waiver to address individual patient needs in accordance with section 1276.65(c)(2) of the Health and Safety Code as long as the facility continues to meet the minimum 3.5 direct care service hour requirement.

(1) The facility shall submit a ~~written request for a waiver~~ application with substantiating information to the Department using the Department's online application and containing the following information by April 1 of each year:

(A) To request a waiver for a facility that does not have a subacute care unit approved by the Department of Health Care Services or for portions of a facility not approved as a subacute care unit by the Department of Health Care Services:

(i) The average daily census at the facility, excluding any patients in a subacute care unit approved by the Department of Health Care Services.

(ii) A copy of the facility's Minimum Data Set Facility Level Quality Measure Report and Minimum Data Set Facility Characteristics Report, dated no earlier than 30 days prior to submission of the waiver application.

(iii) The level of direct caregiver staffing the facility will provide if granted a waiver, including the number and type of staff.

(iv) An analysis of the resident needs at the facility, including a description of the assessment tools used, how the tools were applied, and the outcomes used to determine resident needs.

(B) To request a waiver for a subacute care unit approved by the Department of Health Care Services:

(i) A current, valid contract with the Department of Health Care Services to provide subacute care.

(ii) The most recent audit findings from the Department of Health Care Services related to determining compliance with the staffing requirements set forth in title 22, California Code of Regulations, division 53, section 51215.5.

~~(2) Until the Department adopts final regulations, the facility shall request the waiver by using the program flexibility procedures specified in section 72213, and the Department shall process the request as required by section 1276 of the Health and Safety Code. When evaluating waiver requests, the Department shall consider: resident quality of care at the facility and the needs and acuity level of the residents.~~

(A) The substantiating information submitted by the facility.

(B) Resident quality of care at the facility.

(C) The facility's compliance history.

(D) The needs and acuity levels of residents at the facility.

(23) If there is a change in the substantiating information submitted pursuant to subdivisions (b)(1)(A)(iv) or (b)(1)(B)(i) of this section, the facility shall notify the Department within 15 days of the change.

(4) A request for a waiver with substantiating information included shall be updated and resubmitted annually by April 1 of each year.

(35) The facility shall post the letter of acknowledgement from the Department confirming receipt of a waiver request, as a notice of a pending waiver application. The notice shall be posted immediately adjacent to the facility's license.

(46) A facility with an approved waiver must post the waiver immediately adjacent to the facility's license.

(57) Facilities shall provide written notice of approved or pending waivers to all residents prior to execution of an admission agreement. The notice shall be either a true copy of the approval letter or a letter from the Department acknowledging receipt of a waiver request.

(8) The Department may revoke approval of a patient needs waiver at any time if the facility does not comply with the terms and conditions of the waiver and the Department determines that the non-compliance poses a significant risk to the health, safety, or welfare of patients.

(c) The facility may request a waiver for the 2.4 hours per patient day for certified nurse assistants requirement or the 3.5 direct care service hours requirement in accordance with section 1276.65(l) of the Health and Safety Code as long as the facility continues to meet the 3.2 nursing hours per patient day requirement.

(1) The facility shall submit a written request for a waiver with substantiating information to the Department pursuant to the All Facility Letter issued by the Department pursuant to Health and Safety Code section 1276.65(l).

(d) Implementation of this section shall be contingent on an appropriation in the annual Budget Act and continued federal approval of the Skilled Nursing Facility Quality Assurance Fee, in accordance with Health and Safety Code section 1276.65(i).

(e) Implementation of this section shall not affect the authority of the Department to continue to implement section 14126.022 of the Welfare and Institutions Code by means of All Facility Letters.

Note: Authority cited: Sections 1275, 1276.5, 1276.65 and 131200, Health and Safety Code.
Reference: Sections 1276, 1276.5, 1276.65, 1276.9, 131050, 131051 and 131052, Health and Safety Code; and Section 14126.022, Welfare and Institutions Code.