

Workforce Shortage Waiver of 3.5 and/or 2.4 – CAHF Edits

Please note the purpose of the following draft language is to help guide our discussion of the workforce shortage waiver and in no way represents the final guidelines for this waiver.

I. Overview

Effective July 1, 2018, all freestanding skilled nursing facilities (SNFs) excluding distinct parts of general acute care hospitals (GACHs), state-owned hospitals, special treatment programs (STP), institutions for mental disorders (IMD), or developmental centers are required to increase staffing from the current 3.2 to 3.5 direct care service hours with CNAs performing a minimum of 2.4 of the 3.5 ~~those~~ hours. ~~being performed by certified nurse assistants (CNAs).~~

Health and Safety Code section 1276.65 (I) requires the California Department of Public Health (Department) to develop a waiver process for SNFs seeking a waiver of the 3.5 overall direct care service hour requirement and/or the 2.4 CNA hour requirement due to a workforce shortage. A facility with an approved waiver may not staff below to the 3.2 direct care hours. ~~service hour requirement would still require the facility to comply with the 3.2 overall direct care service hour requirement.~~ A SNF seeking a workforce shortage waiver must submit a request to the Department. The Department shall fully establish and staff a centralized application unit dedicated to processing and reviewing staffing waivers by April 1, 2018. The Department shall approve the workforce waiver on a case-by-case basis after the facility submits the waiver request and information to support the request

II. Guidelines for Waiver Application

~~(a) SNFs must submit a waiver request with evidence to support the workforce shortage. The evidence shall may include, but is not limited to the following:~~

~~(1) If there is a registered nurse (RN) shortage, identify the shortage using the Office of Statewide Health Planning and Development data identifying RN shortages in the county where the facility is located;
<https://www.oshpd.ca.gov/documents/HWDD/GIS/RNSA-Report-2017.pdf>~~

~~Or~~

~~If there is a CNA shortage, identify the shortage using the CNA shortage calculation template; and~~

~~(2) Employment Development Department reports with CNA, RN, and/or licensed vocational nurse (LVN) salary ranges in the county where the facility is located and the facility's salary ranges for CNAs, RNs, and LVNs~~

<http://www.labormarketinfo.edd.ca.gov/data/oes-employment-and-wages.html> https://www.bls.gov/oes/current/msa_def.htm#C

(a) To the extent that a facility cannot meet at least 3.5 direct care service hours per patient day from the requirement contained in subsection (c)(1)(B) of Health & Safety Code § 1276.65, and or is unable to meet the separate requirement of 2.4 direct care service hours performed by certified nursing assistants as set forth in subsection (c)(1)(C) of Health and Safety Code Section 1276.65, and the Department of Public Health (“Department”) determines that a waiver of the requirement will not endanger the health or safety of facility residents, the Department shall waive the 3.5 and or 2.4 requirement with respect to the facility if:

(1) The facility demonstrates to the satisfaction of the Department that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit and retain appropriate personnel; or

(2) The facility is located in a rural area with an inadequate supply of nursing facility services to meet area needs. Rural is defined as all areas not delineated as “urban” by the Bureau of Census; or

(3) The facility is located outside a Metropolitan Statistical Area (MSA) as defined by the Office of Management and Budget as urban.

(b) In order to support a waiver in (a)(1), SNFs ~~must~~ may submit evidence ~~of efforts~~ to address highlight the workforce shortage that ~~shall may~~ include, but is not limited to the following:

(1) A detailed description of the facility’s recruitment plan ~~to address the shortage~~, including how the facility has implemented the plan and for how long

(2) ~~Documentation of the facility’s recruitment efforts indicating~~ when, where, and how long the facility advertised the vacancies, ~~including providing a copy of the advertisement~~

(3) The length of the vacancy or vacancies

(4) ~~Information on the direct care service hours the facility is currently providing, the staffing need, and the number of vacancies~~

(5) How many applicants applied to the position(s)

(6) How many applicants the facility interviewed and hired

(7) The salary ~~offered~~ for the position

(8) ~~Other recruitment and retention activities that are tailored to the facility’s shortage~~

(8) The number of CNAs, LVNs and RNs hired in the last 12 months and the average number of CNAs, LVNs and RNs employed by the facility at the same time in that same time period.

(9) Detail the use of registry services, if available, to fill vacant positions

(10) ~~The facility’s average direct care service hours in the last 12 months~~

(c) If a facility demonstrates to the satisfaction of the Department they staffed at an average level of 3.5 nhppd or above for the previous 12 months, the Department shall grant a workforce waiver for the 2.4 direct care service hours requirement. For the July 2018 implementation of the regulations, a facility shall demonstrate information for the previous calendar year period.

~~(c) SNFs must provide a detailed plan that specifies actions the facility will take to resolve its workforce shortage, how the facility will implement those actions, and time frames and deadlines for completing each stage of the action plan.~~

~~(d) SNFs must provide a detailed plan that specifies how the facility will meet residents' needs and ensure quality care despite the workforce shortage. The plan shall include, but is not limited to:~~

~~(1) An assessment of each resident, and the direct care staffing resources needed to fully meet resident needs.~~

III. Evaluation of Waiver Requests

(a) In evaluating workforce shortage waiver applications under Section II

(a)(1), the Department will ~~may~~ consider: whether the facility:

~~(1) Complies with state and federal regulations. A facility shall may be considered non-compliant if:~~

~~(A) During the prior three years, the Department substantiated a complaint or finding of abuse or neglect; or~~

~~(B) During the prior three years, the facility received: two more A-citations, one AA citation, or quality of care violations with scope and severity of G or higher.~~

~~(i) Depending on the facility's compliance history, the Department may conduct an onsite visit to investigate quality of care concerns.~~

~~(1) During the prior year, the Facility received two or more A, or one or more AA citations, related to quality of care violations with event dates that occurred in the prior 12 months.~~

~~(2) On the most recent annual recertification survey the Facility was found to have substandard quality of care and was not found to be in compliance on the first revisit.~~

~~(2) (3) Had its license suspended or revoked during the prior three years~~

~~(3) Provided complete and accurate documentation of the workforce shortage~~

~~(4) Demonstrated recruitment efforts to address the workforce shortage~~

~~(5) Is located in a rural area or underserved area~~

~~(6) Provided an acceptable plan to achieve compliance with the 3.5 and/or 2.4 staffing standard based on the particular situation of the facility~~

- (b) ~~The Department will~~ may consider a facility's history of compliance with the staffing requirements of 3.2 nhppd.
- (c) In evaluating a workforce shortage waiver renewal application, in addition to the factors listed above, the Department will consider whether the facility effectively implemented the action plan and met its action plan completion dates in a good faith attempt to comply with the 3.5 and/or 2.4 staffing standards. ~~The Department will also consider whether the facility had substantiated violations, including staffing violations, A or AA citations, or quality of care violations while the waiver was in effect.~~

IV. Processing Waiver Requests

- (a) When the Department receives a workforce shortage waiver request, the Department will send the facility an acknowledgement letter by mail and electronic email within 2 business days of receipt.
- (b) The Department may request ~~also send a letter requesting~~ additional information from the facility to assist in evaluating the waiver request.
- (c) ~~The Department will~~ may also send written notice of any waiver applications to the state and local Ombudsman offices and request information about any resident care complaints or concerns at the facility.
- (d) ~~When the~~ The Department has completed shall complete its review within 10 business days. ~~the~~ The Department will inform the facility in writing whether it has approved or denied the waiver, and of any conditions or limitations pertaining to the Department's decision. The facility shall not fall below 3.2 nhppd while awaiting the Department's decision.
 - (1) The Department will determine whether to approve or deny waiver requests on a case-by-case basis.
 - (2) ~~The Department will~~ may review whether the facility met its targets-facility's efforts for resolving its workforce shortage at waiver renewal.
 - (3) A facility seeking an initial waiver more than seven months prior to its licensure renewal date will need to resubmit their waiver request at the time of licensing renewal.
 - (4) A facility seeking to extend a waiver beyond the first year must resubmit a new application, at the time of their license renewal.
 - (5) ~~The Department will not grant more than twothree consecutive waiver renewals.~~

~~(6) If the Department denies a waiver request, the facility cannot appeal the decision and must wait one year from the date of the denial letter before reapplying. may challenge the denial through an administrative appeal. The facility shall file the administrative appeal within 10 business days with the Office of Administrative Hearings and Appeals 1029 J Street, Suite 200, MS 0016 Sacramento, CA 95814 or Facsimile (916) 323-4477. The Office of Administrative Hearings and Appeals shall review and decide on the appeal within 10 business days of the filing.~~

V. Waiver Approvals

- ~~(a) If the Department approves the facility's request for a waiver, the facility shall not staff below 3.2 direct care service hours for the duration of the waiver.~~
- (b) If approved, the facility must post the waiver in a public location within the facility. The Department will enter the facility's waiver status in the Electronic Licensing Management System (ELMS) and post the waiver status on the Department's website with other facility-specific consumer information.
- ~~(c) Facilities shall also provide written notice of waivers to potential residents prior to admission.~~

VI. Waiver Revocations

- ~~(a) The Department shall may terminate the waiver if determines the facility does not meet the terms of the waiver.~~
- ~~(b) The Department shall may terminate the waiver if the facility receives: one of the following:~~
 - ~~(1) Substantiated findings of substandard quality of care related to insufficient staffing;~~
 - ~~(2) Substantiated findings of abuse or neglect;~~
 - ~~(3) A or AA citations; or~~
 - ~~(4) Quality of care violations with a scope and severity of G or higher.~~
 - (1) Two A or one AA citation related to quality of care where the event occurred while the waiver was in place
 - (2) On the most annual Recertification Survey during waiver implementation, the facility is found to be in substandard quality of care and is not in compliance after the first revisit