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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Board of Health
Virginia Administrative Code (VAC) Chapter citation(s)	12VAC5-375
VAC Chapter title(s)	Certified Nursing Facility Staffing Standards Regulation
Action title	Promulgation of New Regulation to Implement Chapters 482 and 483 of the 2023 Acts of Assembly
Date this document prepared	August 24, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

Chapters 482 and 483 of the 2023 Acts of Assembly (Acts of Assembly) amends §§ 32.1-27.1 and 32.1-127 of the Code of Virginia and adds § 32.1-27.2, which requires the State Board of Health (Board) to promulgate regulations to effectuate the act, specifically minimum staffing standards for certified nursing facilities and administrative sanctions for non-compliance. This legislation excludes certified nursing facilities that only participate in Medicare and licensed nursing homes that do not participate in Medicare or Medicaid at all, as well as creating numerous exceptions to the applicability of the staffing standards. There is no already existing chapter that would best fit this mandate because Chapters 482 and 483 specifically state that the new regulations cannot be part of the licensing regulations that are already in existence, so the Board intends to promulgate a new regulatory chapter for these standards.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

“Board” means the State Board of Health

“[Certified nursing facility](#)” means any skilled nursing facility, skilled care facility, intermediate care facility, nursing or nursing care facility, or nursing home, whether freestanding or a portion of a freestanding medical care facility, that is certified as a Medicare or Medicaid provider, or both, pursuant to § 32.1-137.

“DMAS” means the Department of Medical Assistance Services

“VBP” means Value Based Purchasing

“VDH” means the Virginia Department of Health

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation, (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

The 10th enactment clause within Chapters 482 and 483 (2023 Acts of Assembly) requires the Board to promulgate regulations to effectuate the act. Section 32.1-27.2 of the Code of Virginia requires the Board to establish administrative sanctions for the minimum staffing standards for certified nursing facilities. Subsection B of § 32.1-127 of the Code of Virginia requires eligible Certified Nursing Facilities to participate in the Virginia Medicaid Nursing Facility Value-Based Purchasing (VBP) program to provide at least 3.08 hours of case mix-adjusted total nurse staffing hours per resident per day on average as determined by DMAS.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

Code of Virginia § 32.1-27.2 allows the Commissioner to impose administrative sanctions for certified nursing facilities who fail to comply with staffing mandates.

Section 32.1-127 requires the Board to promulgate regulations requiring each certified nursing facility eligible to participate in the VBP program to provide at least 3.08 hours of case mix-adjusted total nurse staffing hours per resident per day on average as determined annually by DMAS for its VBP program.

Enactment clause 10 of Chapters 482 and 483 require the Board to promulgate regulations consistent with the provisions of the acts.

More generally, pursuant to § 32.1-12 of the Code of Virginia, the Board has the authority to make, promulgate, and enforce such regulations and provide for reasonable variances and exemptions therefrom as may be necessary to carry out the provisions of Title 32.1 of the Code of Virginia and other laws of the Commonwealth administered by it, the State Health Commissioner, or the Department of Health.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The Board has determined that the regulations are essential to protect the health, safety, and welfare of citizens because the General Assembly enacted Chapters 482 and 483 requiring the Board to adopt regulations for the minimum staffing standards and administrative sanctions of certified nursing facilities. The Board may address other potential issues as the regulation is developed and as can be raised during the public comment period.

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

This new regulatory chapter would, at minimum, include the following as directed by Chapters 482 and 483: Imposition of administrative sanctions for failure to meet the staffing standards; Prohibition on the imposition of administrative sanctions except after reasonable notice and an opportunity to be heard pursuant to the APA; Requirements for each certified nursing facility eligible to participate in the Value Based Payor (VBP) program to provide at least 3.08 hours of case-mix adjusted total nurse staffing hours per resident per day on average as determined annually by DMAS; and exemptions for the imposition of iterative administrative sanctions for failing to meet the staffing mandate.

The intention of the Board is to ensure the regulatory language fulfills the Board's responsibilities under § 32.1-127 of the Code of Virginia. Revisions to the regulation content may be proposed based on public comments received.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

No alternative was considered because the General Assembly requires the Board to adopt regulations governing the minimum staffing standards of certified nursing facilities.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it as necessary for your agency. Otherwise, delete the paragraph below and insert “This NOIRA is not being used to announce a periodic review or a small business impact review.”

This NOIRA is not being used to announce a periodic review of a small business impact review.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia, describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to:

Rebekah Allen, Senior Policy Analyst

Virginia Department of Health, Office of Licensure and Certification

9960 Mayland Drive, Suite 401

Henrico, VA 23233;

email: regulatorycomments@vdh.virginia.gov;

fax: (804) 527-4502.

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.