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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) Chapter citation(s)	22VAC40-73
VAC Chapter title(s)	Standards for Licensed Assisted Living
Action title	Amendments to establish a minimum amount of liability insurance
Date this document prepared	April 17, 2024

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). Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The Department of Social Services (DSS) was directed in Chapter 580 of the 2023 Acts of Assembly to promulgate emergency regulations that require all assisted living facilities (ALF) to maintain a minimum amount of liability insurance, as determined by the Board of Social Services on the basis of the number of residents for which ALF are licensed, and provide notice of such insurance, upon request, to any resident or prospective resident.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

ALF Assisted Living Facilities
 DSS Department of Social Services
 VAC Virginia Administrative Code

Mandate and Impetus (Necessity for Emergency)

Explain why this rulemaking is an emergency situation in accordance with § 2.2-4011 A and B of the Code of Virginia. In doing so, either:

- a) *Indicate whether the Governor’s Office has already approved the use of emergency regulatory authority for this regulatory change.*
- b) *Provide specific citations to Virginia statutory law, the appropriation act, federal law, or federal regulation that require that a regulation be effective in 280 days or less from its enactment.*

As required by § 2.2-4011, also describe the nature of the emergency and of the necessity for this regulatory change. In addition, delineate any potential issues that may need to be addressed as part of this regulatory change.

Chapter 580 of the 2023 Acts of Assembly amends § 63.2-1805 of the Code of Virginia. Enactment Clause 2 of Chapter 580 requires DSS to promulgate regulations to implement the provisions of Chapter 580 within 280 days from its enactment. Chapter 580 requires all ALF to maintain a minimum amount of liability insurance according to licensed capacity tiers. No additional issues need to be addressed as a part of this regulatory change.

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 or Acts and 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.

The State Board of Social Services has the legal authority to adopt regulations and requirements for licensed assisted living facilities in accordance with §§ 63.2-217, 63.2-1732, and 63.2-1805 of the Code of Virginia. The Code of Virginia mandates promulgation of regulations for the activities, services, and facilities to be employed by persons and agencies required to be licensed, which shall be designed to ensure that such activities, services, and facilities are conducive to the well-being of aged or disabled adults residing in ALF. This regulatory action will provide the requirements for the minimum amounts of liability insurance based on tiers determined by the licensed capacity of the ALF pursuant to § 63.2-1805.

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.

This action will amend this regulation as required by Chapter 580 of the 2023 Acts of Assembly, which amended § 63.2-1805 of the Code of Virginia and requires DSS to utilize emergency authority to promulgate regulations that require all ALF to maintain a minimum amount of liability insurance.

This action is essential to protect the health, safety, and well-being of aged or disabled adults residing in ALF to require a minimum amount of liability insurance to compensate residents or other individuals for injuries and losses from the negligent acts of the facility.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.

Amendments to this chapter will remove the existing requirement which requires a minimum amount of liability insurance coverage to be maintained by ALF for the purposes of disclosure as required by 22VAC40-73-50 and will add the requirement that all ALF are to maintain liability insurance coverage in the amounts based upon the licensed capacity of the facility. These amendments will also clarify the requirements of notifying residents and prospective residents of the minimum liability insurance coverage maintained by the ALF.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantage to the public is that residents of ALF will have a financial recourse in the event of injuries or losses due to a negligent act of the facility. The primary advantage to the ALF is financial coverage in the event of a lawsuit by a resident. There could be a disadvantage to the ALF as this will be an additional expense if the facility has not previously maintained liability insurance. There are no advantages or disadvantages to the agency or Commonwealth, as this action requires licensed ALF to maintain a minimum amount of liability insurance.

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.

There are no other alternatives to the proposed regulatory action, as the action was directed by Chapter 580 of the 2023 Acts of Assembly, which amended § 63.2-1805 of the Code of Virginia, and is necessary to protect the health and safety of vulnerable adults residing in ALF.

Periodic Review and

Small Business Impact Review Announcement

This NOIRA is not being used to announce a periodic review or 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.

DSS 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 Kristopher Drew, Licensing Consultant, DSS Division of Licensing Programs, 5600 Cox Road, Glen Allen, VA 23060, kristopher.drew@dss.virginia.gov, office 434-443-0754, fax 804-726-7132. 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 not be held following the publication of the proposed stage of this regulatory action.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the emergency regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
Throughout chapter		The terms “his and him” are used.	Removes or replaces the terms with “the resident” for clarification.
45		This section addresses the minimum amount for liability insurance.	Changes to the title of this section clarify that this section requires liability insurance coverage.

			<p>Adds the requirement that ALF shall maintain liability insurance based on licensed capacity tiers pursuant to § 63.2-1805. Tier I requires a minimum of \$250,000 for facilities licensed for 25 residents or less. Tier II requires a minimum of \$400,000 for facilities licensed for 26-75 residents. Tier III requires a minimum of \$500,000 for facilities licensed for 76-150 residents and tier IV requires a minimum of \$1,000,000 for facilities licensed for 151 or more residents.</p> <p>Removes the requirement that facilities shall not disclose insurance is in place unless it is the minimum amount of coverage since this regulatory change requires all ALF to maintain a certain amount of liability insurance based on licensed capacity.</p> <p>Adds the requirement that all ALF are required to provide a statement that the facility maintains liability insurance on the liability insurance statement form provided by the department.</p> <p>Amendments in this section ensure consistency with state law and the intent is to protect the residents.</p>
50		This section addresses the disclosure requirements to residents and prospective residents.	<p>Removes the requirement for disclosure of minimum amounts of liability insurance.</p> <p>Amendments in this section ensure consistency with state law.</p>
390		This section addresses the resident agreement requirements for residents and prospective residents.	<p>Removes the requirements that reference the option that the facility maintains liability insurance and adds that all ALF are required to maintain liability insurance coverage based on licensed capacity pursuant to § 63.2-1805.</p> <p>Amendments in this section ensure consistency with state law and that residents are made aware they can request the liability insurance statement from the ALF.</p>