



Virginia Department of Planning and Budget **Economic Impact Analysis**

12 VAC 5-371 Regulations for the Licensure of Nursing Facilities
Virginia Department of Health
Town Hall Action/Stage: 5528/8966
August 2, 2020

Summary of the Proposed Amendments to Regulation

The State Board of Health (Board) seeks to update the regulation governing the licensure of nursing facilities following a periodic review. The Board proposes to update references to outdated vaccination protocols, remove duplicative requirements, update the Documents Incorporated by Reference (DIBR), and add a section to address the statutorily mandated criminal background check.

Background

The Board undertook a periodic review of this regulation in 2017, more than a decade after the last major revisions were made. Thus, the Board proposes a number of amendments that would serve to comprehensively update the regulation. The most substantive changes are summarized as follows:

1. The Board seeks to add a new section 12 VAC 5-371-75 titled “Criminal records check” detailing the background checks that nursing homes are statutorily required to conduct for employees.¹ Accordingly, the Board seeks to add definitions of (i) “barrier crime” referring the reader to the definition of the term in §19.2-392.02 of the Code of Virginia,² (ii) “criminal record report” meaning “either the criminal record clearance with respect to

¹ See <https://law.lis.virginia.gov/vacode/title32.1/chapter5/section32.1-126.01/>. The statute has required some form of background checks for compensated employees at nursing homes since at least 1999.

² See <https://law.lis.virginia.gov/vacode/19.2-392.02/>. The definition of barrier crime as it applies to this regulation includes only the first clause (i) of the definition in statute.

convictions for barrier crimes or the criminal history record from the Central Criminal Records Exchange of the Virginia Department of State Police” and (iii) “sworn disclosure” as “a written statement or affirmation disclosing any criminal convictions or any pending criminal charges, whether within or outside the Commonwealth, by an applicant for compensated employment with a nursing facility.”

The new section mirrors the language in statute, except to provide additional clarity with regard to employees who may be hired via temporary staffing agencies. In general, nursing facilities may not hire individuals who have been convicted of a barrier crime, unless it was a single misdemeanor that did not involve abuse or neglect and occurred at least five years previously. Nursing facilities must obtain both a sworn disclosure as defined above from the employee and a criminal record report from the Virginia State Police, no more than 30 days after the employment begins.

For staff hired through temporary staffing agencies, the section would clarify that the staffing agency must screen for barrier crimes, and obtain a sworn disclosure and a criminal record report within 30 days of employing the temporary staffer. Subsequently, any nursing facility hiring a temporary staffer would only require a letter from the staffing agency stating the name of the worker, the date of initial employment, and a statement verifying that the staffer has provided a sworn disclosure and that a criminal records report has been obtained by the staffing agency within 30 days of employment.

2. The Board also proposes to add a definition of “legal representative” as “a person legally responsible for representing or standing in the place of the resident for the conduct of his affairs. This may include a guardian, conservator, attorney-in-fact under the durable power of attorney, trustee, or other person expressly named by a court of competent jurisdiction or the resident as his agency in a legal document that specifies the scope of the representative’s authority to act. A legal representative may only represent or stand in the place of a resident for the function or functions for which he has legal authority to act.” Accordingly, the Board seeks to remove the existing definitions of “guardian” and “responsible person or party” since their meaning would be subsumed under the definition of legal representative.
3. The Board seeks to clarify that certain entities licensed by the Department of Behavioral Health and Developmental Services or the Department of Social Services, or owned and

operated by the federal government or the state are exempt from this regulation (unless they wish to participate in Medicare or Medicaid). Moreover, facilities established or operated for the practice of religious tenets pursuant to § 32.1-128 of the Code of Virginia are only required to comply with the statutes and regulations on environmental protection and health safety.

4. The Board seeks to change the requirement that every nursing facility be designated by a permanent and “appropriate” name to a permanent and “unique” name in order to prevent consumer confusion that could result from facilities using identical or similar names. According to the Virginia Department of Health (VDH), nursing facilities owned and operated by the same organization may often have the same name but also include the name of the city or county they are located in so that consumers can identify the facility easily, especially when filing a complaint with VDH.
5. The Board proposes to clarify the current requirement that a nursing facility may not be licensed without first complying with the requirements for a Certificate of Public Need (COPN) as required by the Code of Virginia.³ Accordingly, it also seeks to remove a stipulation preventing nursing facilities from operating more beds than the number for which it is licensed; the stipulation being moot given that number is set by the COPN.
6. The Board seeks to require that nursing facilities provide the director of the VDH Office of Licensure and Certification (OLC) with written notification of any changes to the name, address, ownership, bed capacity, or other details that would affect the accuracy of the license at least 30 calendar days in advance of the change.
7. The Board seeks to repeal the section governing unique design solutions since the language appears to be obsolete.

In addition to the changes listed above, the board is proposing to update the references to outdated vaccination protocols and to revise the DIBR list to reflect the most current versions. The two DIBRs that the Board seeks to update are guidelines put forth by the Centers for Disease Control: (i) a set of guidelines pertaining to Health-Care-Associated Pneumonia for which the

³ See Article 1.1 in <https://law.lis.virginia.gov/vacode/title32.1/chapter4/>

only change would be to the website address, and (ii) a set of guidelines for the 2019-2020 flu season, which would replace the guidelines from 2004.

Estimated Benefits and Costs

The proposed amendments would reduce ambiguity arising from outdated references or requirements conflicting with other regulations, which may have been promulgated or revised more recently. According to VDH the proposed amendments do not impose any new requirements that were not already being implemented to comply with statute. Thus, although the revisions to the regulation are comprehensive in nature, the proposed changes do not introduce any new costs to nursing facilities, their employees, or consumers at large.

Businesses and Other Entities Affected

The proposed amendments would affect licensed nursing facilities, applicants for nursing facility licensure, current and prospective nursing facility residents, as well as current and prospective nursing facility employees. Per VDH, there were 291 licensed nursing facilities with 32,371 nursing facility beds in Virginia as of November 1, 2019.

Small Businesses⁴ Affected

Types and Estimated Number of Small Businesses Affected

As of November 1, 2019, 12 of the 291 licensed nursing facilities were believed to be small businesses, as per VDH.

Costs and Other Effects

Since the proposed amendments do not impose any additional costs, current or prospective nursing facilities that may be small businesses would not face any additional costs arising from the proposed amendments.

Alternative Method that Minimizes Adverse Impact

The proposed amendments do not create an adverse impact for any nursing facilities, including any that are small businesses.

⁴ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

Localities⁵ Affected⁶

The proposed amendments do not disproportionately affect any specific localities, nor do they introduce new costs for local governments.

Projected Impact on Employment

The proposed amendments are unlikely to affect employment by nursing facilities or temporary staffing agencies that serve nursing facilities since the background check requirements have been in place for over a decade, even if they have not been specifically included in the regulation.

Effects on the Use and Value of Private Property

To proposed amendments would not affect the value of private property. Real estate development costs would not be affected.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

⁵ “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

⁶ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.