

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1239 Nursing Homes

SPONSOR(S): Health & Human Services Committee and Finance & Facilities Subcommittee, Melo

TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/SB 804

FINAL HOUSE FLOOR ACTION: 80 Y's

31 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/CS/HB 1239 passed the House on March 4, 2022, and subsequently passed the Senate on March 7, 2022.

A nursing home is a facility that provides 24-hour nursing care, personal care, and custodial care to individuals who are ill or physically infirm. Nursing homes are licensed and regulated by the Agency for Health Care Administration (AHCA) under part II of ch. 400, F.S., and must meet conditions of participation (COPs) established by the federal Centers for Medicare and Medicaid Services (CMS) to participate in the Medicare and Medicaid programs.

The CMS COPs do not include minimum staffing requirements. Instead, CMS requires nursing homes to conduct and document a facility assessment to determine the resources necessary to care for its residents competently during day-to-day operations and emergencies. However, Florida law requires nursing homes to meet the following minimum staffing requirements:

- A weekly average of 3.6 hours of direct care per resident per day provided by a combination of certified nursing assistants (CNAs) and licensed nursing staff.
- 2.5 hours of direct care per resident per day provided by CNAs. A facility may not staff at a ratio of less than one CNA per 20 residents.
- 1.0 hour of direct care per resident per day provided by licensed nurses. A facility may not staff at a ratio of less than one licensed nurse per 40 residents.

The bill reduces required CNA direct care from 2.5 hours to 2 hours per resident per day, and retains current law requiring 1 hour of licensed nurse direct care per resident per day. For the remaining 0.6 hours of the required 3.6 weekly average of total hours of direct care, the bill allows nursing homes to count care provided by any combination of the following categories of disciplines and professions: nursing; dietary; therapeutic; mental health; and paid feeding assistants.

The bill requires nursing homes to maintain records documenting compliance with minimum staffing requirements for at least five years, and makes evidence of such compliance inadmissible as evidence of compliance with federal standards.

Certain changes in a nursing home's ownership must be approved by AHCA. For a change of ownership (CHOW), the bill makes the transferee liable for any unsatisfied adverse final judgment against the transferor if AHCA approves the CHOW before the judgment is due and paid. Upon filing the CHOW application, the transferor must provide written notice to each pending claimant. Within 30 days of receipt of the written notice, the bill allows a claimant to object to the application under certain circumstances, and AHCA must consider the objection in its decision to approve or deny a CHOW application.

The bill has no fiscal impact on state or local government.

The bill was approved by the Governor on April 6, 2022, ch. 2022-61, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Nursing Home Staffing Requirements

A nursing home is a facility that provides 24-hour nursing care, personal care, or custodial care to individuals who are ill or physically infirm.¹ Nursing homes are licensed and regulated by the Agency for Health Care Administration (AHCA) under part II of ch. 400, F.S. Nursing homes are required to meet certain conditions of participation (COPs) established by the federal Centers for Medicare and Medicaid Services (CMS) in order to qualify to participate in the Medicare and Medicaid programs.²

Federal Staffing Requirements

The CMS COPs do not include minimum staffing requirements. Instead, CMS requires nursing homes to conduct and document a facility assessment to determine the resources necessary to care for its residents competently during day-to-day operations and emergencies.³ Nursing homes must review and update the assessment at least annually and whenever there is a change that would require a substantial modification to any part of the facility assessment. The facility assessment must include:

- The facility's resident population.
- The facility's resources, including:
 - services provided, such as physical therapy, pharmacy, and specific rehabilitation therapies; and
 - all personnel, including managers, staff, and volunteers, as well as their education and training and any competencies related to resident care.⁴

While CMS does not set staffing minimums, it does require nursing homes to report staffing data to CMS. The CMS COPs requires nursing homes to electronically submit complete and accurate direct care staffing information, including the following:

- The category of work for each person on direct care staff,⁵ including, but not limited to, whether the individual is a registered nurse, licensed practical nurse, licensed vocational nurse, certified nursing assistant (CNA), therapist, or other type of medical personnel as specified by CMS;
- Resident census data; and
- Information on direct care staff turnover and tenure, and on the hours of care provided by each category of staff per resident per day, including, but not limited to, start date, end date, and hours worked for each individual.⁶

The staffing information must be reported to CMS at least quarterly.⁷

The CMS COPs also require nursing homes to post certain nurse staffing information on a daily basis, including the actual hours worked by registered nurses, licensed practical nurses or licensed vocational

¹ S. 400.021(7), F.S.

² 42 C.F.R. § 483.1.

³ 42 C.F.R. § 483.70(e).

⁴ Id.

⁵ Direct care staff are those individuals who, through interpersonal contact with residents or resident care management, provide care and services to allow residents to attain or maintain the highest practicable physical, mental, and psychosocial well-being. Direct care staff does not include individuals whose primary duty is maintaining the physical environment of the facility (for example, housekeeping).

⁶ 42 C.F.R. § 483.70(q).

⁷ Id.

nurses, and CNAs. The data must be posted in a clear and legible format in a prominent place that is readily accessible to residents and visitors. The facility must maintain the staffing data for a minimum of 18 months, or as required by state law, whichever is greater.⁸

State Staffing Requirements

Florida, along with 26 other states, has statutory requirements for staff-to-resident ratios in nursing homes.⁹ Section 400.23(3), F.S., establishes the minimum staffing requirements:

- A minimum weekly¹⁰ average of 3.6 hours of direct care per resident per day provided by a combination of CNAs and licensed nursing staff.
- A minimum of 2.5 hours of direct care per resident per day provided by CNAs. A facility may not staff at a ratio of less than one CNA per 20 residents.
- A minimum of 1.0 hour of direct care per resident per day provided by licensed nurses. A facility may not staff at a ratio of less than one licensed nurse per 40 residents.

Certified Nursing Assistants and Licensed Nurses

When computing the staffing ratio for certified nursing assistants, nursing home facilities are allowed to use uncertified nursing assistants under certain conditions to satisfy the staffing ratio requirements, if their job duties only include nursing assistant-related duties.¹¹

If approved by AHCA, licensed nurses may also be used to meet staffing requirements for CNAs if the licensed nurses are performing the duties of a CNA and the facility otherwise meets minimum staffing requirements for licensed nurses.¹² However, nurse and CNA time spent feeding is not counted towards minimum staffing.¹³

Nursing homes are required to maintain a daily chart of CNA services provided to each resident. The daily chart must document assistance with activities of daily living and eating or drinking, and must record each offering of nutrition and hydration for residents whose plan of care or assessment indicates a risk for malnutrition or dehydration.¹⁴

Nursing homes are required to document compliance with staffing requirements and daily post the names of staff on duty for the benefit of facility residents and the public.¹⁵

Paid Feeding Assistants

Section 400.141(1)(v), F.S., authorizes nursing home facilities to employ paid feeding assistants in accordance with Federal regulations¹⁶ to help residents who have no complicated feeding problems but need some assistance in eating or drinking. Paid feeding assistants are required to complete a 12-hour feeding assistant training program developed by AHCA, which must, at a minimum, provide training on:

⁸ 42 C.F.R. § 483.35(g).

⁹ In January of 2021, Finance & Facilities Subcommittee staff conducted a 50-state analysis of states that had laws on staff-to-patient ratios in nursing homes.

¹⁰ A week is defined as Sunday through Saturday.

¹¹ Sections 400.23(3)(a)2. and 400.211(2), F.S. Nursing facilities may employ uncertified nursing assistants for a single consecutive period of up to 4 months if they: are enrolled in, or have completed, a state-approving nursing assistant program; have been positively verified as actively certified and on the registry in another state with no findings of abuse, neglect, or exploitation in that state; have preliminarily passed the state's certification exam; or are employed as a personal care attendant.

¹² Section 400.23(3)(a)4., F.S., and rule 59A-4.108(7), F.A.C. The hours of a licensed nurse with dual job responsibilities may not be counted twice.

¹³ Section 400.23(3)(b), F.S.

¹⁴ Section 400.141(1)(r), F.S.

¹⁵ Section 400.23(3)(a)3., F.S.

¹⁶ 42 C.F.R. § 483.60, and 42 C.F.R. § 488.301.

- Feeding techniques;
- Assistance with feeding and hydration;
- Communication and interpersonal skills;
- Appropriate responses to resident behavior;
- Safety and emergency procedures, including the Heimlich maneuver;
- Infection control;
- Residents rights; and
- Recognizing changes in residents that are inconsistent with their normal behavior and the importance of reporting those changes to the supervisory nurse.¹⁷

Pursuant to federal regulations, paid feeding assistants must work under the supervision of a registered nurse or licensed practical nurse.¹⁸ Federal regulations also require nursing homes to maintain a record of all individuals that have successfully completed the training course.¹⁹

Of the 27 states with laws on staff-to-resident ratios in nursing homes, 10 of those states specifically prohibit nursing homes from counting paid feeding assistants toward the nursing home staff-to-resident ratio requirements of their states. The other 17 states do not specify whether or not paid feeding assistants count toward the nursing home staff-to-resident ratio requirements of their states.²⁰

Florida currently prohibits nursing homes from counting paid feeding assistants toward the nursing home staff-to-resident ratio requirements contained in s. 400.23, F.S.²¹

Staffing Enforcement

AHCA is required to conduct at least one unannounced inspection of licensed nursing homes every 15 months.²² To determine compliance with the minimum staffing requirements, AHCA reviews a facility's time cards, payroll, or computer printouts of actual time worked for the two-week period immediately preceding the inspection.

Nursing homes are required to place a self-imposed moratorium on new admissions if they fail to comply with minimum staffing requirements for two consecutive days, which must continue until the facility is in compliance with the minimum staffing requirements for six consecutive days.²³ AHCA is authorized to impose a fine of \$1,000 on a facility that fails to self-impose a moratorium for noncompliance with minimum staffing requirements.²⁴

¹⁷ Section 400.141(1)(v), F.S.

¹⁸ 42 C.F.R. § 483.60(h).

¹⁹ 42 C.F.R. § 483.160(b).

²⁰ *Supra* at note 9.

²¹ Section 400.23(3)(b), F.S.

²² 42 C.F.R. §. 488.308(a).

²³ Section 400.141(1)(n)1., F.S.

²⁴ *Id.*

Nursing Home Change of Ownership

Certain changes in nursing home ownership must be approved by AHCA. Current law requires an application for change of ownership²⁵ (CHOW) of a nursing home to comply with all aspects of an initial license application, including payment of licensure fees and submitting proof of financial ability to operate.²⁶

To initiate a CHOW, the transferor must notify AHCA in writing of the CHOW and the transferee must submit an application for initial licensure at least 60 days before the anticipated date of the CHOW.²⁷

The transferor in a CHOW is responsible and liable for:

- The lawful operation of the nursing home and the welfare of the clients served until the transferee becomes licensed; and
- All penalties imposed by AHCA against the transferor for violations occurring before the date of the CHOW.²⁸

Civil Lawsuit Judgments

Section 400.024, F.S., establishes certain restrictions on nursing homes²⁹ that have had an adverse final judgment against them which arises from a civil claim, including an arbitration award, for a claim of negligence or a violation of residents' rights, in contract or tort, or from noncompliance with the terms of a settlement agreement as determined by a court or arbitration panel.

In such an instance, the nursing home must pay the judgment creditor the entire amount of the judgment, award, or settlement and all accrued interest within 60 days after the date such judgment, award, or settlement becomes final and subject to execution unless otherwise mutually agreed to in writing by the parties. If AHCA is notified³⁰ of an unsatisfied final judgment or settlement, they may revoke or deny a renewal application or a related party CHOW application.

Within 60 days after receiving such notification, AHCA must notify the nursing home by certified mail, return receipt requested, that it is subject to disciplinary action unless, within 30 days after the date of mailing the notice, the nursing home:

- Shows proof that the unsatisfied judgment or settlement has been paid in the amount specified;
- Shows proof of the existence of a payment plan mutually agreed upon by the parties in writing;
- Furnishes AHCA with a copy of a timely filed notice of appeal;
- Furnishes AHCA with a copy of a court order staying execution of the final judgment; or
- Shows proof that they are seeking indemnification from an insurer or another party by furnishing AHCA with a copy of an order from a court or arbitration panel.

²⁵ Section 408.803(5), F.S. A change of ownership is an event in which: the licensee sells or otherwise transfers its ownership to a different individual or entity as evidenced by a change in federal employer identification number or taxpayer identification number; or 51 percent or more of the ownership, shares, membership, or controlling interest of a licensee is in any manner transferred or otherwise assigned.

²⁶ Section 408.806, F.S. Section 408.810(8), F.S., provides an exemption from furnishing proof of financial ability to operate for a CHOW applicant who has been licensed for at least five years, and: The ownership change is a result of a corporate reorganization under which the controlling interest is unchanged and the applicant submits organizational charts that represent the current and proposed structure of the organized corporation; or the ownership change is due solely to the death of a person holding a controlling interest, and the surviving controlling interests continue to hold at least 51 percent of ownership.

²⁷ Section 408.807, F.S.

²⁸ Id.

²⁹ Licensee means an individual, corporation, partnership, firm, association, governmental entity, or other entity that is issued a permit, registration, certificate, or license by AHCA and that is legally responsible for all aspects of the operation of the nursing home facility.

³⁰ Section 400.024(2), F.S., deems that AHCA is notified of an unsatisfied judgment or settlement when a certified copy of the judgment and a certified copy of a valid judgment lien certificate, filed in accordance with ss. 55.202³⁰ and 55.203³⁰, F.S., are served to the AHCA by a process server or received by certified mail, return receipt requested.

If AHCA is placed on notice and such proof is not provided by the nursing home, AHCA must issue an emergency order declaring that the facility lacks financial ability to operate and a notice of intent to revoke or deny a license. In addition, if the license is subject to renewal, AHCA may choose to deny the license renewal unless the final judgment is satisfied.

For a CHOW, AHCA does not have discretion and must deny a CHOW application unless the final judgement is satisfied.

Nursing Home Financial Reports

Nursing homes are required to submit financial data to AHCA pursuant to s. 408.061(5)-(6), F.S. Nursing homes are required to report, within 120 days after the end of its fiscal year, its actual financial experience for that fiscal year, including expenditures, revenues, and statistical measures. Such data may be based on internal financial reports, if certified complete and accurate by the chief financial officer of the nursing home. This actual experience must include the fiscal year-end balance sheet, income statement, statement of cash flow, and statement of retained earnings and must be submitted to AHCA in addition to the information filed in the uniform system of financial reporting.³¹

Effect of the Bill

Staffing Requirements

The bill makes the following changes to the minimum staffing requirements for nursing homes.

Requirement	Current Law	Effect of the Bill
Minimum Average of Total Direct Care Hours	<ul style="list-style-type: none"> • 3.6 daily care hours • Based on weekly average of hours provided by CNAs and licensed nurses. 	<ul style="list-style-type: none"> • 3.6 daily care hours • Based on weekly average of hours provided by CNAs and licensed nurses, <i>and</i> the following categories of direct care services: physician; pharmacy; dietary; therapeutic; dental; podiatry; and mental health.
Direct Care by CNAs	Minimum of 2.5 hours provided by CNAs per resident per day.	Minimum of 2.0 hours provided by CNAs per resident per day.
Direct Care by Nurses	Minimum of 1.0 hours provided by nurses per resident per day.	No change
Direct Care by Other Staff	N/A	Maximum 0.6 hours provided by non-CNAs/non-nurses per resident per day. (3.6 hrs. total minimum - 2.0 hrs. minimum CNA - 1.0 hr. minimum nurse = 0.6 hr.)

As depicted in the table above, the bill reduces the number of hours of required CNA direct care from 2.5 hours to 2 hours per resident per day. The bill retains current law requiring 1 hour of licensed nurse direct care per resident per day. In total, at least 3 hours of direct care per resident per day must be provided by CNAs and licensed nurses.

³¹ Section 408.061(2), F.S., requires AHCA to specify a uniform system of financial reporting for each type of facility based on a uniform chart of accounts. Such systems must, to the extent feasible, use existing accounting systems and shall minimize the paperwork required of facilities. As a part of such uniform system of financial reporting, AHCA may require the filing of any information relating to the cost to the provider and the charge to the consumer of any service provided in such facility, except the cost of a physician’s services which is billed independently of the facility.

For the remaining 0.6 hours of the required 3.6 weekly average of total hours of direct care, the bill allows nursing homes to count care provided by any combination of the following categories of disciplines and professions: nursing; dietary; therapeutic; mental health; and paid feeding assistants.

The bill also authorizes nursing homes to count paid feeding assistants towards the overall 3.6 hour weekly average minimum staffing requirement. Current law prohibits nursing homes from counting paid feeding assistants towards any of the minimum staffing requirements.

Current law requires nursing homes to post daily the names of all staff on duty. The bill requires nursing homes to post daily the hours worked by registered nurses, licensed practical nurses, and CNAs. Further, the bill requires nursing homes to maintain records documenting compliance with minimum staffing standards for at least five years.

Legal proceedings for noncompliance with federal staffing requirements are often rebutted by nursing homes who provide proof of compliance with state staffing requirements as evidence of compliance with federal staffing requirements. The bill provides that evidence of a facility's compliance with state minimum staffing requirements is not admissible as evidence of compliance with federal staffing requirements.

Change of Ownership

When a nursing home changes ownership it may be difficult for a claimant to recoup an unsatisfied final judgment because they are unaware of the change or unable to identify the new owner. The bill adds several requirements to assist claimants in recovering unsatisfied final judgments under such circumstances.

Specifically, in a change of ownership (CHOW), the bill makes the transferee liable for unsatisfied adverse final judgments against the transferor where final payment is not yet due. Upon filing a CHOW application, the transferor must provide written notice to each pending claimant. The bill allows a claimant to object to the application within 30 days of receipt of the notice, if the claimant has reason to believe that the approval of the application would facilitate a fraudulent transfer or allow the transferor to avoid financial responsibility. AHCA must consider the objection in its decision to approve or deny a CHOW application. Further, if a claim is pending in arbitration at the time the CHOW is filed, the claimant may file a petition to enjoin the transfer in circuit court.

Nursing Home Financial Reports

The bill provides that forms filed with AHCA pursuant to s. 408.061(5)-(6), F.S., and the information disclosed within the forms, are not privileged or protected from use in administrative, civil or criminal proceedings.

The bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive fiscal impact on nursing homes resulting from the reduction in the number of hours of required CNA direct care from 2.5 hours to 2 hours per resident per day.

The bill may have a negative fiscal impact on nursing homes due to an increase in litigation costs related to the inadmissibility of evidence of compliance with state minimum staffing requirements as evidence of compliance with federal staffing requirements.

The bill may have a positive fiscal impact on claimants with unsatisfied judgments against nursing homes as the bill enhances their opportunity to recoup such judgments.

D. FISCAL COMMENTS:

None.