

# ARKANSAS REGISTER

## Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



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For Office

Use Only:

Effective Date \_\_\_\_\_ Code Number \_\_\_\_\_

Name of Agency Department of Human Services

Department Division of Provider Services and Quality Assurance

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Statutory Authority for Promulgating Rules Arkansas Code Annotated 20-76-201

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Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Jack Tiner jack.tiner@dhs.arkansas.gov

12/17/2021

Contact Person

E-mail Address

Date

### CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted  
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)



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December 17, 2021

Date

## **520 DIRECT CARE STAFFING REQUIREMENTS AND FLEXIBILITIES FOR NURSING FACILITIES**

### **520.1 Definitions**

For purposes of this section, the following definitions apply:

- a. "Average direct care hours per resident day" means the total number of hours of direct care services provided by direct care staff in a month, divided by the number of calendar days in that month, and the facility's average daily resident census for that month.
- b. "Certified nursing facility" means a nursing facility licensed by the Department of Human Services that is certified to participate in the federal Medicare program as a skilled nursing facility, or in the Arkansas Medicaid Program as a nursing facility, or both.
- c. "Direct care services" means nursing and nursing-related services; clinical, diagnostic, therapeutic, and rehabilitative services; physical, occupational, respiratory, and speech therapy services; delegated physician tasks; behavioral health services; care management, care coordination, and care transition activities; medication administration; assistance with activities of daily living; assessment, evaluation, planning, and implementation of care plans; coordination and consultation with residents' physicians and other healthcare providers; and other services and supports provided for nursing facility residents in response to individual resident needs. However, the meaning of "direct care services" does not include food preparation, laundry, housekeeping, or other maintenance of a nursing facility's physical environment.
- d. "Direct care staff" means a person who provides any direct care services to a nursing facility resident through interpersonal contact with residents or resident care management, including without limitation a licensed nurse; nurse aide; medication assistant; physician; physician assistant; licensed physical or occupational therapist or licensed therapy assistant; registered respiratory therapist; licensed speech-language pathologist; infection preventionist; and other healthcare professionals licensed or certified in the state of Arkansas.
- e. "Division" means the Division of Provider Services and Quality Assurance.
- f. "Federal direct care data system" means the national online data reporting system operated by the Centers for Medicare and Medicaid Services and used by nursing facilities participating in the federal Medicare program, or the Arkansas Medicaid Program, or both to electronically report detailed and standardized direct care and other staffing information.
- g. "Licensed nurse" means any registered nurse, licensed practical nurse, advanced practice registered nurse, or registered nurse practitioner licensed in the state of Arkansas.
- h. "Medicare and Medicaid requirements of participation" means the federal requirements established by the Centers for Medicare and Medicaid Services under

42 U.S.C. 1320a-7j, 42 U.S.C. 1395i-3, and 42 U.S.C. 1396r, that a licensed nursing facility is required to follow to be certified as compliant with and participate in the federal Medicare program as a skilled nursing facility, or the Medicaid program as a nursing facility, or both, as existing on January 1, 2021.

- i. "Medication assistant" means a medication assistive person who is qualified and certified under Arkansas Code § 17-87-701 et. seq. Alternatively referred to as medication assistant-certified in rules of the Arkansas Board of Nursing.
- j. "Private pay-only nursing facility" means a licensed nursing facility that is not certified to participate in the federal Medicare program as a skilled nursing facility or in the Arkansas Medicaid Program as a nursing facility.
- k. "Universal worker" means a certified nurse aide (CNA) who is designated by a skilled nursing facility as a universal worker and who performs both CNA direct care service duties and non-direct care tasks such as food service, laundry, and housekeeping, and other non-direct care services to meet the needs of residents.
- l. "Variance" means granting an alternate requirement or modifying a requirement in place of a requirement established in rule.
- m. "Waiver" means the grant of an exemption from a requirement established in rule.

#### **520.2 Condition of Licensure**

- a. As a condition of licensure by the department, a nursing facility, except a private pay-only nursing facility, shall be certified to participate in the federal Medicare program as a skilled nursing facility, or in the Arkansas Medicaid program as a nursing facility, or in both.
- b. As a condition of licensure by the department, a private pay-only nursing facility shall (1) comply with all state requirements applicable to a private pay-only nursing facility, including rules promulgated by the department, and (2) cooperate with department audits, inspections, and document requests.

#### **520.3 Consistency with Federal Requirements**

- a. Under 42 U.S.C. 1395i-3 and 42 U.S.C. 1396r, a certified nursing facility (1) is subject to federal requirements of participation and (2) must demonstrate substantial compliance with applicable federal requirements to receive and maintain certification necessary to participate in Medicaid, Medicare, or both.
- b. As required under Arkansas Code § 20-10-1402(d)(2), department rules applicable to certified nursing facilities (1) apply to conditions and processes of state licensure and (2) may not exceed or duplicate federal requirements of participation, including staffing and data reporting requirements, except average direct care hours per resident day requirements under Arkansas Code § 20-10-1402(a)(2) and (b).

#### **520.4 Average Direct Care Hours Per Resident Day; Certified Nursing Facilities**

- a. Each certified nursing facility shall:

1. Provide each month direct care services by direct care staff equivalent to at least three and thirty-six hundredths (3.36) average direct care hours per resident day; and
  2. On or before the fifteenth day of each month, a certified nursing facility shall report electronically to the department the facility's actual average direct care hours per resident day for the prior month.
- b. Hours used in determining actual average direct care hours per resident day for each month shall be:
1. Consistent with the certified nursing facility's final staffing data submission to the federal direct care data system for the applicable quarter, and
  2. Based on all direct care services labor categories and all direct care staff job codes specified in the most recent CMS instructions for the federal direct care data system.
- c. If necessary to correct one (1) or more of the three (3) monthly reports following data validation and based on the final staffing data reported to the federal direct care data system for the applicable quarter, the facility shall promptly file an amended monthly report(s) with the department within fifteen (15) days of the federal direct care data system reporting deadline for the quarter.
- d. The monthly reports shall show the following information:
1. The full name and license number of the reporting nursing facility.
  2. The month and year for which the report is provided and whether the report is an original or amended report for that month.
  3. For each direct care job code for which the facility had staff (employed, contracted, agency, or consultants) providing any direct care services in the month, the total number of direct care hours by all staff in that job code combined. For example, for the certified nurse aide (CNA) job code, the report would show (a) the aggregate total of all direct care hours provided by all the facility's CNAs combined and (b) not the granular information, such as hours by individual staff person, reported to the federal direct care day system.
  4. Grand total of direct care services hours provided in the month.
  5. The number of calendar days in the monthly reporting period.
  6. Average daily resident census for the month (the sum of the total of each daily resident census for all days in the month divided by the number of calendar days in the month).
  7. The average direct care hours per resident day for the month (the grand total of direct care services hours provided in the month divided by the average daily resident census for the month).

8. For the month, the difference between the actual average direct care hours per resident day and the three and thirty-six hundredths (3.36) average direct care hours per resident day standard required under Arkansas Code § 20-10-1402(a)(2), with an indication of whether the actual hours provided met or exceeded the standard or did not meet the standard.
- e. The monthly reporting under this section is not intended to duplicate or exceed the comprehensive federal direct care data system, require reporting at the level of detail required by the federal direct care data system, or require reporting not otherwise necessary to meet Arkansas Code § 20-10-1402(b).
- f. Consistent with Arkansas Code § 20-10-1402(e), this section does not require or advise any specific or minimum number of nursing staff hours, direct care staff hours, or hours of other services for any nursing facility resident. The services an individual resident receives is based on baseline and comprehensive, person-centered care plans required under 42 CFR § 483.21 and are governed by the services and staffing-related requirements in 42 CFR Part 483 Subpart B.
- g. To ensure compliance with the requirements of this subsection, the department may:
  1. Audit the monthly reports and request documentation from a certified nursing facility;
  2. Review a facility's quarterly submissions to federal direct care data system;
  3. Compare a facility's monthly reports under this subsection with its corresponding quarterly submissions to the federal direct care data system;
  4. Review the results of federal audits of facility submissions to the federal direct care data system; and
  5. Request demonstrations of the vendor payroll and other systems nursing facilities commonly use to report direct care hours.

#### **520.5 Average Direct Care Hours Per Resident Day; Private Pay-Only Nursing Facilities**

- a. Each private pay-only nursing facility shall:
  1. Provide each month direct care services by direct care staff equivalent to at least three and thirty-six hundredths (3.36) average direct care hours per resident day; and
  2. On or before the fifteenth day of each month, report electronically to the department the facility's actual average direct care hours per resident day for the prior month.
- b. In determining and reporting direct care hours as required:
  1. A private pay-only facility shall follow the same or substantially comparable process required of certified nursing facilities under sub-section 520.4. The

process is the same, except a private pay-only facility would not formally submit data to the federal direct care data system.

2. Unless the department approves an alternative, the private pay-only facility shall:
  - (a) Use the same or substantially comparable payroll and time tracking system capabilities or software that certified nursing facilities use to support reporting to the federal direct care data system and preparation of monthly reports under subsection 520.4;
  - (b) Produce and provide to the department quarterly direct care staffing reports consistent with the detailed quarterly reports that certified nursing facilities are required to submit to the federal direct care data system; and
  - (c) Report direct care staffing hours to the federal direct care data system when the Centers for Medicare and Medicaid Services subsequently permits non-certified licensed nursing facilities to use the system.
3. A process or system is substantially comparable if it records the same data or information and has the same capabilities or software as the federal reporting system.
- c. The department may audit these monthly reports and request documentation from the private pay-only facility to ensure compliance with the requirements of this subsection.

#### **520.6 Certified Medication Assistants**

- a. Any licensed nursing facility may elect to use certified medication assistants (medication assistants-certified) to perform the delegated nursing function of medication administration and related tasks under the supervision of a licensed nurse on the premises and consistent with the medication assistant rules of the Arkansas Board of Nursing.
- b. A person who is both a certified medication assistant and certified nurse aide may perform both functions in a nursing facility.

#### **520.7 Modern Staffing Practices Supported**

- a. A licensed nursing facility may:
  1. Engage the services of direct care staff and other personnel on a full-time or part-time basis and through employment, contracting, and staffing agencies, or any combination thereof;
  2. Use fixed schedules, flex-time, rotating shifts, split shifts, compressed workweeks, and other alternative staffing schedules; and
  3. Use the universal worker model and assign other tasks to some or all certified nurse aides, (such as food service, laundry, and housekeeping) in addition to their direct care responsibilities:

- (a) The universal worker option applies to both traditional and home-style type nursing facilities.
  - (b) For certified nurse aides serving as universal workers, the facility must ensure that direct care and non-direct care hours are properly differentiated for monthly reports under subsections 520.4 and 520.5 and quarterly reporting to the federal direct care data system.
- b. Without limitation under department rules or need of a waiver or permission from the department, a licensed nursing facility may engage in any staffing-related practice permitted under federal requirements of participation.

## **520.8 Posting of Staffing Information**

Each licensed nursing facility shall comply with the information posting requirements of 42 CFR § 483.35.

## **520.9 Waivers and Variances**

- a. In the event of a public health emergency, natural disaster, other major emergency, or severe labor shortage, the department may temporarily waive the average direct care hours per resident day standard in subsections 520.4 and 520.5 for any certified facility in a county or the state.
- b. In the event of a public health emergency, a natural disaster, or other emergency declared by the Governor or the U.S. Secretary of Health and Human Services, the department may issue a temporary waiver or variance of any rule (including any staffing-related rule) that it determines reasonable and necessary under one (1) or more of the following circumstances:
  - 1. For licensed nursing facilities and ICFs-IID to (a) provide resident care; (b) protect the health and safety of residents, staff, and visitors; (c) meet staffing needs; (d) meet new federal requirements or guidance; (e) coordinate care delivery and emergency response with hospitals, physicians, other providers, and public health or emergency management authorities; or (f) adopt alternative staffing, practices, procedures, or technology; or
  - 2. In response to any federal waiver or requirement modification issued under 42 U.S.C. 1320b-5, 42 CFR Part 483, or other federal authority.
- c. A request for a waiver or variance must be made in writing by a licensed nursing facility to the division director. The request must contain details of the reason for the waiver or variance and the potential impact to the facility if said waiver or variance is not granted.
- d. The department may approve or deny a waiver or variance request at its discretion. Approvals and denials must be made in writing.
- e. The department may extend or renew an approved waiver or variance and may impose such conditions it deems necessary to (1) protect the health and safety of facility

residents and staff, (2) meet federal requirements or guidance, or (3) best meet the intended purpose of the waiver or variance.