

DEPARTMENT OF HUMAN SERVICES, DIVISION OF PROVIDER SERVICES AND QUALITY ASSURANCE

SUBJECT: Direct Care Staffing Requirements update pursuant to Act 715 of 2021

DESCRIPTION:

Statement of Necessity

Section 520 of the Rules for Nursing Homes is being updated to reflect changes due to Act 715 of 2021. Section 520 covers Minimum Direct-care Staffing requirements. Act 715 of 2021 changes staffing standards and reporting requirements for nursing facilities.

Rule Summary

DPSQA amends Section 520 of the Rules for Nursing Homes. The new Section 520 changes the rules and reporting requirements to comply with Act 715. This rule provides guidance to nursing home facilities as to how reporting should be conducted, when reporting should be made to DHS, requirements for waivers and variances, and how facilities should respond to the law.

Act 715 directs that the Rules for Nursing Homes, as applied to Medicare and Medicaid certified nursing facilities, be consistent with federal staffing and data reporting requirements. DPSQA changes the staff to resident ratios and eliminates the penalties associated with those standards. DPSQA also amends the reporting requirements for actual average direct care hours per resident.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on October 18, 2021. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Holly Johnson, Senior Assistant Attorney General, Office of Arkansas Attorney General Leslie Rutledge, Medicaid Fraud Control Unit

1. Pursuant to the directions outlined for public comments in the September 17, 2021, Memorandum (Direct Care Staffing Requirements update pursuant to Act 715 of 2021), please find the following:

520.1 Definitions: Under parts (c) and (d), the word "skilled" is added to "nursing facilities" with respect to "direct care services" and "direct care staff" but does not appear in Act 715.

RESPONSE: Correct. The State of Arkansas has both skilled nursing facilities and nursing facilities; thus, it is appropriate to use nursing facilities to include all facilities.

2. Under part (h), “as existing on January 1, 2021” is not included. **RESPONSE:** This can be added.

3. This section does not include definitions for “nurse aide”, “nursing facility”, and “nursing staff”. **RESPONSE:** Definitions will be updated at the beginning of the manual.

4. 520.4 Average Direct Care Hours Per Resident Day: Certified Nursing Facilities: Under part (c), what states that the facility shall file an amended monthly report with the department within fifteen (15) days of the federal direct care data system reporting deadline for the quarter?

RESPONSE: DHS and AHCA agreed to fifteen days, as the Act used the word “promptly.” This was an attempt to define the word “promptly.” The language in the Act states: “When necessary to correct monthly report data following quarterly data validation and based on the final staffing data reported in the federal direct care data system for the applicable quarter, a certified nursing facility shall promptly file an amended monthly report with the department.”

5. 520.6 Certified Medication Assistants: Under part (b), will the person be able to perform both functions during the same shift, a different shift, or in what manner? **RESPONSE:** Yes.

6. 520.9 Waivers and Variances: Under part (a), the word “certified” is left out. **RESPONSE:** This can be added.

7. Under part (c), is there a time frame in which a request should be made? **RESPONSE:** No, because it can vary.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

1. Section 520.9(a) states that, in certain scenarios, “the department may temporarily waive the average direct care hours per resident day standard or reporting requirements.” I see that Act 715 provides that the Department may temporarily waive the average direct care hours per resident day standard. What is the authority for temporarily waiving reporting requirements?

RESPONSE: We agree with this assessment. We cannot waive the reporting requirements. This should be changed. [The agency provided an updated version of the rule.]

2. Is there specific authority for the provisions of § 520.9(b)(1), regarding temporary waivers/variances of rules during specific emergency scenarios? **RESPONSE:** No.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on September 16, 2021. The proposed effective date for permanent promulgation is January 1, 2022.

FINANCIAL IMPACT: The agency indicated that this proposed rule has a financial impact.

Per the agency, the total cost to implement this rule is \$562,501 for the current fiscal year (\$159,638 in general revenue and \$402,863 in federal funds) and \$750,001 for the next fiscal year (\$212,850 in general revenue and \$537,151 in federal funds). The total estimated cost to state, county, and municipal government to implement this rule is \$159,638 for the current fiscal year and \$212,850 for the next fiscal year.

The agency indicated that there is a new or increased cost or obligation of at least \$100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined. Accordingly, the agency provided the following written findings:

(1) a statement of the rule's basis and purpose;

Act 715 changed the staffing standards that required a particular ratio of staff to residents. Act 715 also eliminated the penalties associated with such standards. Previously, if those ratios were not met, DHS could issue penalties to the facilities for a failure to meet those standards. In the previous FY, DHS collected \$210,500 in penalties from nursing facilities.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

Act 715 changed the staffing standards that required a particular ratio of staff to residents. Act 715 also eliminated the penalties associated with such standards. Previously, if those ratios were not met, DHS could issue penalties to the facilities for a failure to meet those standards. In the previous FY, DHS collected \$210,500 in penalties from nursing facilities.

(3) a description of the factual evidence that:

(a) justifies the agency's need for the proposed rule; and

(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

Act 715 changed the staffing standards that required a particular ratio of staff to residents. Act 715 also eliminated the penalties associated with such standards. Previously, if those ratios were not met, DHS could issue penalties to the facilities for a failure to meet those standards. In the previous FY, DHS collected \$210,500 in penalties from nursing facilities.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

None.

(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

None.

(6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response;

Act 715 changed the staffing standards that required a particular ratio of staff to residents. Act 715 also eliminated the penalties associated with such standards. Previously, if those ratios were not met, DHS could issue penalties to the facilities for a failure to meet those standards. In the previous FY, DHS collected \$210,500 in penalties from nursing facilities.

(7) an agency plan for review of the rule no less than every ten years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:

(a) the rule is achieving the statutory objectives;

(b) the benefits of the rule continue to justify its costs; and

(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

Act 715 changed the staffing standards that required a particular ratio of staff to residents. Act 715 also eliminated the penalties associated with such standards. Previously, if those ratios were not met, DHS could issue penalties to the facilities for a failure to meet those standards. In the previous FY, DHS collected \$210,500 in penalties from nursing facilities.

LEGAL AUTHORIZATION: The Department of Human Services, Office of Long-Term Care, located within the Division of Provider Services and Quality Assurance, is “the unit of state government primarily responsible for the inspection, regulation, and licensure of long-term care facilities.” Ark. Code Ann. § 20-10-203. It may promulgate rules “as it shall deem necessary or desirable to” accomplish its duties. Ark. Code Ann. § 20-10-203. The Department has the general authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12); *see also* Ark. Code Ann § 20-10-203(b). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

This rule implements provisions of Act 715 of 2021. The Act, sponsored by Representative Brian Evans, modernized and strengthened nursing facility staffing standards and reporting requirements. Per the Act, “the Department shall promulgate rules as necessary to carry out the provisions of [Ark. Code Ann. § 20-10-1402],” which addresses staffing standards. *See Ark. Code Ann. § 20-10-1402, as amended by Act 715.*

**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS
WITH THE ARKANSAS LEGISLATIVE COUNCIL**

DEPARTMENT/AGENCY Department of Human Services
DIVISION Division of Provider Services and Quality Assurance
DIVISION DIRECTOR Martina Smith
CONTACT PERSON Mac Golden
ADDRESS P. O. Box 1437, Slot S295 Little Rock, AR 72203-1437
PHONE NO. 501-320-6383 FAX NO. 501-404-4619 E-MAIL Mac.E.Golden@dhs.arkansas.gov
NAME OF PRESENTER AT COMMITTEE MEETING Martina Smith
PRESENTER E-MAIL Martina.Smith@dhs.arkansas.gov

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Jessica C. Whittaker
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

- *****
1. What is the short title of this rule? Direct Care Staffing Requirements update pursuant to Act 715 of 2021
2. What is the subject of the proposed rule? See Attached.
3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No
If yes, please provide the federal rule, regulation, and/or statute citation. _____
4. Was this rule filed under the emergency provisions of the Administrative Procedure Act?
Yes No
If yes, what is the effective date of the emergency rule? October 1, 2021
- When does the emergency rule expire? January 29, 2022
- Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act?
Yes No

5. Is this a new rule? Yes No
If yes, please provide a brief summary explaining the regulation. _____

Does this repeal an existing rule? Yes No
If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does. _____

Is this an amendment to an existing rule? Yes No
If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."**

See attached.

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Arkansas Code §§ 20-76-201, 20-77-107, 20-10-203, 20-10-1402, and 25-10-129

7. What is the purpose of this proposed rule? Why is it necessary? See Attached.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

<https://humanservices.arkansas.gov/do-business-with-dhs/proposed-rules/>

9. Will a public hearing be held on this proposed rule? Yes No
If yes, please complete the following:

Date: _____

Time: _____

Place: _____

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

October 18, 2021

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

January 1, 2022

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. See Attached.

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). See Attached.

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known. Unknown

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Department of Human Services

DIVISION Division of Provider Services and Quality Assurance

PERSON COMPLETING THIS STATEMENT Jason Callan

TELEPHONE 501-320-6540 **FAX** _____ **EMAIL:** Jason.Callan@dhs.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Direct Care Staffing Requirements update pursuant to Act 715 of 2021

- 1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
- 2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes No
- 3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;

- (b) The reason for adoption of the more costly rule;

- (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

- (d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

- (a) What is the cost to implement the federal rule or regulation?

<u>Current Fiscal Year</u>		<u>Next Fiscal Year</u>	
General Revenue	\$ _____	General Revenue	\$ _____
Federal Funds	\$ _____	Federal Funds	\$ _____
Cash Funds	_____	Cash Funds	_____
Special Revenue	_____	Special Revenue	_____

Other (Identify) _____
 Total \$ _____

Other (Identify) _____
 Total \$ _____

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue \$ 159,638
 Federal Funds \$ 402,863
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____
 Total \$ 562,501

Next Fiscal Year

General Revenue \$ 212,850
 Federal Funds \$ 537,151
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____
 Total \$ 750,001

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

\$ 0

Next Fiscal Year

\$ 0

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

\$ 159,638

Next Fiscal Year

\$ 212,850

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

(1) a statement of the rule's basis and purpose;

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Summary and Statement of Necessity
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NOTICE OF RULE MAKING

The Director of the Division of Provider Services and Quality Assurance of the Department of Human Services announces for a public comment period of thirty (30) calendar days a notice of rulemaking for the following proposed rule under one or more of the following chapters, subchapters, or sections of the Arkansas Code: §§20-76-201, 20-77-107, 20-10-203, 20-10-1402, and 25-10-129.

Effective January 1, 2022:

The Director of the Division of Provider Services and Quality Assurance (DPSQA) amends Section 520 of the Rules for Nursing Homes to comply with Act 715 of the 93rd General Assembly. Act 715 directs that the Rules for Nursing Homes, as applied to Medicare and Medicaid certified nursing facilities, be consistent with federal staffing and data reporting requirements. DPSQA changes the staff to resident ratios and eliminates the penalties associated with those standards. DPSQA also amends the reporting requirements for actual average direct care hours per resident.

The proposed rule is available for review at the Department of Human Services (DHS) Office of Rules Promulgation, 2nd floor Donaghey Plaza South Building, 7th and Main Streets, P. O. Box 1437, Slot S295, Little Rock, Arkansas 72203-1437. You may also access and download the proposed rule at <https://humanservices.arkansas.gov/do-business-with-dhs/proposed-rules/>. Public comments must be submitted in writing at the above address or at the following email address: ORP@dhs.arkansas.gov. All public comments must be received by DHS no later than **October 18, 2021**. Please note that public comments submitted in response to this notice are considered public documents. A public comment, including the commenter's name and any personal information contained within the public comment, will be made publicly available and may be seen by various people.

If you need this material in a different format, such as large print, contact the Office of Rules Promulgation at 501-396-6428.

The Arkansas Department of Human Services is in compliance with Titles VI and VII of the Civil Rights Act and is operated, managed, and delivers services without regard to religion, disability, political affiliation, veteran status, age, race, color, or national origin. 4502035775



Martina Smith, Director
Division of Provider Services and Quality Assurance