

**EMERGENCY RULES****DEPARTMENT OF HUMAN SERVICES  
DIVISION OF PROVIDER SERVICES AND QUALITY ASSURANCE  
AMENDING ADMINISTRATIVE RULES**

**NUMBER AND TITLE:** Direct Care Staffing Requirements update pursuant to Act 715 of 2021

**PROPOSED EFFECTIVE DATE:** October 1, 2021

**STATUTORY AUTHORITY:** Arkansas Code §§ 20-76-201, 20-77-107, 20-10-203, 20-10-1402, and 25-10-129.

**NECESSITY AND FUNCTION:** Act 715 of 2021 modernizes staffing standards and reporting requirements for nursing facilities. Currently, facilities adhere to outdated rules and reporting requirements. This emergency rule provides the framework for how reporting should be conducted, when reporting should be made to DHS, requirements for waivers and variances, and how different facilities should respond to the law. Because staffing requirements impact the safety and welfare of nursing home residents, during an ongoing pandemic, it is imperative that the updated rules be instituted immediately. This emergency rule shall be effective October 1, 2021, and a permanent rule will be promulgated with an effective date of January 1, 2022.



Martina Smith, Director  
Division of Provider Services and Quality Assurance

**Promulgation date:** October 1, 2021

**Contact Person:** Mac Golden  
P. O. Box 1437, Slot S295  
Little Rock, AR 72203-1437  
(501) 563-7634  
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## STATEMENT OF EMERGENCY

The Director of the Division of Provider Services and Quality Assurance (DPSQA) of the Department of Human Services announces an emergency rule under Arkansas Code § 25-15-204(c). Act 715 of 2021 modernizes staffing standards and reporting requirements for nursing facilities. The following details the necessity for this emergency rule pursuant to Act 715.

**Background:** Act 715 of 2021 modernizes staffing standards and reporting requirements for nursing facilities. Currently, facilities adhere to rules and reporting requirements via a database built upon the outdated rules. This emergency rule allows DHS to provide guidance to nursing home facilities as to what is required by them under Act 715. This emergency rule provides the framework for how reporting should be conducted, when reporting should be made to DHS, requirements for waivers and variances, and how different facilities should respond to the law. Because staffing requirements impact the safety and welfare of nursing home residents, it is imperative that the updated rules be instituted immediately. A clear explanation and understanding of the law and the rules are important to the public health of Arkansas's nursing home residents.

**Statement of Emergency:** Pursuant to Act 715 of the Ninety-Third General Assembly of 2021, and based on the above, an emergency exists to bring Arkansas into compliance with Act 715 to provide for the health, safety and welfare of nursing facility residents during an ongoing pandemic. DPSQA repeals and replaces Section 520 of the Rules for Nursing Homes. This emergency rule shall be effective October 1, 2021, and a permanent rule will be promulgated with an effective date of January 1, 2022.

**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, 5<sup>th</sup> 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.)

N/A

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

October 1, 2021

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?

<b><u>Current Fiscal Year</u></b>		<b><u>Next Fiscal Year</u></b>	
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**

**Next Fiscal Year**

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

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**

**Next Fiscal Year**

\$ 0

\$ 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**

**Next Fiscal Year**

\$ 159,638

\$ 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;

**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; and

**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 (10) 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.**

**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 skilled 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 skilled 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.

- 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 or reporting requirements in subsections 520.4 and 520.5 for any 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.

PROPOSED

**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 skilled 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 skilled 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.

- 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 or reporting requirements in subsections 520.4 and 520.5 for any 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.

## **520 MINIMUM DIRECT CARE STAFFING REQUIREMENTS**

### **520.1 DEFINITIONS**

For purposes of this rule, and unless otherwise specified herein, the following definitions shall apply. The following definitions are independent of, and in no way are intended to modify, amend or otherwise change, the definitions set forth in the Reimbursement Methodology.

**520.1.1** *Direct care staff* means any licensed or certified nursing staff who provides direct, hands-on care to residents in a nursing facility. *Direct care Staff* shall not include therapy personnel or individuals acting as Director of Nursing for a facility.

**520.1.2** *Midnight census* means the number of residents occupying nursing home beds in a nursing facility at midnight of each day.

**520.1.3** *Day shift* means the period of 7:00 a.m. to 3:00 p.m., or, in the event of flex staffing, the first shift to begin after midnight.

**520.1.4** *Evening shift* means the period of 3:00 p.m. to 11:00 p.m., or, in the event of flex staffing, the second shift to begin after midnight.

**520.1.5** *Night shift* means the period of 11:00 p.m. to 7:00 a.m., or, in the event of flex staffing, the third shift to begin after midnight.

**520.1.6** *Therapy personnel* shall include certified or licensed Medicare Part A Therapy personnel when they are performing, or billing for, Medicare Part A therapy services.

**520.1.7** *Flex staffing* means the ability to vary the beginning and ending hours of a shift from the times set forth in **520.1.3** through **520.1.5**.

**520.1.8** *Pattern of failure* means a facility did not meet the minimum staffing requirements for more than twenty percent (20%) of the total number of shifts for any one month.

**520.1.9** *Resident census* means the midnight census as defined in **520.1.2** taken prior to the shift in question.

### **520.2 RATIO OF DIRECT CARE STAFF TO RESIDENTS—COMPUTATION**

**520.2.1** Minimum staffing computations shall be performed using the following method:

Step 1—Determine the midnight census for the date the shift begins.

~~Step 2—Divide the census by the ratio of direct care staff required for the shift being computed. The result will be the **total number of direct care staff required for the shift.**~~

~~Step 3—Divide the census by the required ratio of licensed personnel for the shift being computed. The result will be the **total number of licensed direct care staff required for the shift.**~~

~~Step 4—Subtract the results of Step 3 from the results of Step 2. The result will be the **total number of remaining direct care staff required for the shift.**~~

**520.2.2** All computations shall be carried to the hundredth place. If the computations result in other than a whole number of direct care staff for a shift, the number shall be rounded up to the next whole number when the computation, carried to the hundredth place, is fifty-one hundredths (.51) or higher.

**520.2.3** Facilities shall have no less than one (1) licensed personnel per shift for direct care staff as of July 1, 2001.

### **520.3 MINIMUM DIRECT CARE STAFF RATIOS**

**5.20.3.1** Beginning October 1, 2003, facilities shall maintain the following direct care staff to resident ratios:

**520.3.1.1 Day Shift:** One (1) direct care staff to every six (6) residents; of which there shall be one (1) licensed nurse to every forty (40) residents.

**520.3.1.2 Evening Shift:** One (1) direct care staff to every nine (9) residents; of which there shall be one (1) licensed nurse to every forty (40) residents.

**520.3.1.3 Night Shift:** One (1) direct care staff to every fourteen (14) residents; of which there shall be one (1) licensed nurse to every eighty (80) residents.

#### **Beginning October 1, 2003**

**Example** The facility has a census of eighty two (82) residents as of midnight on December 10, 2003, and is computing the required direct care staff for the day shift of December 11, 2003. The day shift has a direct care staff to resident ratio of one (1) direct care staff to every six (6) residents, of which there shall be one (1) licensed staff member to every forty (40) residents.

Step 1: Census of 82

Step 2:  $82 \div 6 = 13.67$  [**Round to 14; total number of direct care staff required**]

Step 3:  $82 \div 40 = 2.05$  [**Round to 2; number of licensed direct care staff required**]

Step 4:  $14 - 2 = 12$  [**Number of remaining direct care staff required**]

Total number of direct care staff for the day shift: 14  
Total number of licensed direct care staff for the day shift: 2  
Total number of remaining direct care staff for the day shift: 12

**Example** The facility has a census of ninety seven (97) residents as of midnight on January 3, 2004, and is computing the required direct care staff for the evening shift. The evening shift has a direct care staff to resident ratio of one (1) direct care staff to every nine (9) residents, of which there shall be one (1) licensed staff member to every forty (40) residents.

Step 1 — Census of 97

Step 2 —  $97 \div 9 = 10.77$  [**Round to 11; total number of direct care staff required**]

Step 3 —  $97 \div 40 = 2.42$  [**Round to 2; number of licensed direct care staff required**]

Step 4 —  $11 - 2 = 9$  [**Number of remaining direct care staff required**]

Total number of direct care staff for the evening shift: 11  
Total number of licensed direct care staff for the evening shift: 2  
Total number of remaining direct care staff for the evening shift: 9

**Example** The facility has a census of one hundred forty two (142) residents as of midnight on December 7, 2003, and is computing the required direct care staff for the night shift. The night shift has a direct care staff to resident ratio of one (1) direct care staff to every fourteen (14) residents, of which there shall be one (1) licensed staff member to every eighty (80) residents.

Step 1 — Census of 142

Step 2 —  $142 \div 14 = 10.14$  [**Round to 10; total number of direct care staff**]

Step 3 —  $142 \div 80 = 1.77$  [**Round to 2; number of licensed direct care staff**]

Step 4 —  $10 - 2 = 8$  [**Number of remaining direct care staff**]

Total number of direct care staff for the night shift: 10  
Total number of licensed direct care staff for the night shift: 2  
Total number of remaining direct care staff for the night shift: 8

## **520.4 — EXCEPTIONS TO MINIMUM STAFFING RATIOS**

**520.4.1** Upon an increase in a facility's resident census, the facility shall be exempt from any corresponding increase in staffing ratios for a period of nine (9) consecutive shifts beginning with the first shift following the midnight census for the date of the expansion of the resident census.

**520.4.2** When residents are relocated or transferred from facilities due to natural disaster, emergency or as a result of state or federal action, the Department of Human Services may waive, for a period of no more than three (3) months from the date of transfer, some or all of any required increase in direct care

staff for the facility or facilities to whom the residents are relocated or transferred. Waivers will only be granted for good cause shown, and upon telephone, facsimile or written request. A grant of a waiver is within the sole discretion of the Office of Long Term Care. Facilities may apply for a waiver by writing the Director of the Office of Long Term Care. The written request should state, at a minimum:

- a.—The date of the transfer for each resident;
- b.—The number of residents transferred for each date in which residents were received from another facility;
- c.—The anticipated date by which the facility will be able to meet the increased number of minimum staff for the total number of residents of the entire facility, including all residents received in transfer;
- d.—The name of the facility from which the residents were transferred; and
- e.—A brief explanation as to why the facility's staffing cannot be increased prior to the anticipated increase date set out in c, above.

## **520.5 STAFFING REPORTS**

**520.5.1** By the fifth (5<sup>th</sup>) day of each month, each nursing facility or nursing home shall submit a written report of all shifts for the preceding month to the Office of Long Term Care, utilizing form **DMS-718**.

**520.5.2** In addition, each report shall designate the shifts in which minimum staffing standards were not met, as set forth in form **DMS-718**.

## **520.6 FLEX STAFFING**

**520.6.1** Flex staffing permits facilities to vary the beginning and ending hours for shifts, so that facilities may maximize staff time to the benefit of residents. Regardless whether a facility employs shifts of greater duration than specified in these rules—such as ten (10) or twelve (12) hour shifts—for purposes of computing minimum staffing ratios the facility shall base their computations on three shifts of equal length. Facilities can, however, designate that their shifts will begin earlier or later than specified in Sections **520.1.3** through **520.1.5**.

**5.20.6.2** When facilities utilize flex staffing, the shifts must meet the staffing requirements set forth herein for the entire period of the shift. As way of example only, if a facility begins a shift at 5:30 a.m., the minimum staffing requirements for that shift, which would end at 1:30, would be minimum staffing requirements for the Day Shift as set forth in Sections **520.1.3** through **520.1.5**, and those minimums must be maintained throughout the entire shift.



**5.20.6.3** ~~The Office of Long Term Care shall be notified in writing when a facility implements a flex staffing schedule. The written notice shall state the beginning and ending hours of each shift under the flex staffing.~~

#### **5.20.7 PENALTIES**

~~Violations of these rules shall be punishable in accordance with Ark. Code Ann. § 20-10-1407 and 20-10-1408.~~

#### **5.20.8 RESIDENT CARE NEEDS AND INCREASES IN STAFFING**

~~The staffing standards set forth in Section 520.3 are *minimum* requirements that facilities must meet at all times, except as provided herein. In the event that the Office of Long Term Care determines that sufficient personnel are not employed or available to meet resident care needs, the Office of Long Term Care may require the facility to either increase staff on a per shift basis or reduce resident census. In such cases, the Office of Long Term Care will notify the facility in writing of its determination, including the basis for the determination. In addition, the Office of Long Term Care will state the number of additional staff that must be employed or available and the date by which the additional staff must be employed or available; the amount by which the resident census must be reduced and the date by which that reduction must be achieved; or both.~~

~~In the event that the Director of the Office of Long Term Care determines that minimum staffing standards should be increased pursuant to Ark. Code Ann. § 20-10-1409(b)(2), the Director of the Office of Long Term Care shall certify the determination and any proposed regulatory increases to minimum staffing standards to the Director of the Division of Medical Services, who shall notify the Director of the Department of Human Services and the Legislative Council of the determination, and whether sufficient appropriated funds exist to fund the costs, as defined as direct care costs by the Long Term Care Cost Reimbursement Methodology of the Long Term Care Provider Reimbursement Manual as in effect January 12, 2001, to be incurred by the proposed changes to the minimum staffing standards.~~

~~In no event shall minimum staffing standards be increased unless sufficient appropriated funds exist to fund the costs to be incurred by the proposed increases to minimum staffing standards.~~

**MINIMUM STAFFING REPORTING FORM**

**THIS REPORT MUST BE TYPED. All fields must be completed for each reporting period. Indicate any shift in which minimum staffing requirements were not met by placing an asterisk beside the number of personnel for that shift for each category in which minimum staffing was not met. For example, if minimum staffing was not met for the Day Shift of the third day of the month because of insufficient direct care staff that were not licensed staff, an asterisk would be placed after the numbers in both the Total and Other fields.**

**Facility: \_\_\_\_\_ Month/Year: \_\_\_\_\_ Signature of Person Preparing this Report: \_\_\_\_\_**

Day	Census	Day Shift Direct Care Staff			Evening Shift Direct Care Staff			Night Shift Direct Care Staff		
		Total	Licensed	Other	Total	Licensed	Other	Total	Licensed	Other
1										
2										
3										
4										
5										
6										
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9										
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## 5.20.9 POSTING

### 5.20.9.1 Definitions. For purposes of this rule:

- (a) ~~Hall~~ means a corridor or passageway in a facility containing one or more resident rooms.
- (b) ~~Wing~~ means a section of a facility devoted to resident care and containing one or more resident rooms.
- (c) ~~Corridor~~ means a passageway with one or more resident rooms opening onto it.
- (d) ~~Unit~~ means one hall, one wing, or one corridor.
- (e) ~~Daily Staffing Log~~ means form DMS 7780.
- (f) ~~Day Shift~~ means the period of 7:00 a.m. to 3:00 p.m. The facility may allow employees to begin their work shift up to two (2) hours prior to, or up to two (2) hours following, 7:00 a.m. to meet patient care needs.
- (g) ~~Evening Shift~~ means the period of 3:00 p.m. to 11:00 p.m. The facility may allow employees to begin their work shift up to two (2) hours prior to, or up to two (2) hours following, 3:00 p.m. to meet patient care needs.
- (h) ~~Night Shift~~ means the period of 11:00 p.m. to 7:00 a.m. The facility may allow employees to begin their work shift up to two (2) hours prior to, or up to two (2) hours following, 11:00 p.m. to meet patient care needs.
- (i) ~~Accessible~~ means that the Daily Staffing Log shall not be obscured or blocked, partially or in whole, by any object; shall be located between four feet (4') to five feet (5') as measured from the floor; and shall be posted on a wall of each hall, wing or corridor that is not obstructed, blocked or is in any manner behind any fixture, nurses' station or other object. Encasing the Daily Staffing Log in a clear or transparent cover, binder or other similar object is permissible.

5.20.9.2 The facility shall complete, post and maintain Daily Staffing Logs utilizing form DMS 7780, and in conformity with the instructions contained in that form and these rules.

5.20.9.3 The Daily Staffing Log shall be conspicuously posted on each hall, wing and corridor in a manner that makes it accessible at all times.

5.20.9.4 The DMS 7780 shall be retained and filed by the facility until the next standard survey by the Office of Long Term Care or one year from the month the specific form is completed, whichever is greater. All DMS 7780s filed by the facility shall be available for review by any interested person within seventy-two (72) hours of receipt of a written request.

5.20.9.5 A violation of any provision of this rule shall be a Class C violation in accordance with Ark. Code Ann. § 20-10-205 and 20-10-206.

### DAILY STAFFING LOG

Facility \_\_\_\_\_

Hall, Wing or Corridor \_\_\_\_\_

Date \_\_\_\_\_

Shift (Day, Evening, Night) \_\_\_\_\_

Total Hours Worked \_\_\_\_\_

Census (Of Unit at Beginning of Shift) \_\_\_\_\_

Staff (RN/LPN CNA/RNA/Other)	Time In	Signature	Time Out	Time Worked

Total Hours: \_\_\_\_\_  
RNs    LPNs    CNAs    Others

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Administrator/DON/Designee \_\_\_\_\_ Date \_\_\_\_\_

## Instructions for Completing Form DMS-7780

As required by Ark. Code Ann. § 20-10-1401 *et seq.*, a copy of the Form DMS-7780 is to be completed and posted daily as specified in these instructions and LTC Section 520.9.

### Start a new Log with each Day Shift.

1. ~~Date~~ Enter the current date.
2. ~~Facility~~ Enter facility name.
3. ~~Hall, Wing or Corridor~~ Specify the hall, corridor, or wing that the Log covers. See Section 520.9.1.
4. ~~Shift Sign-In Sheet~~ Staff will sign in at the beginning of each shift and sign out at the end of each shift on the Shift Sign-In Sheet in the section designated for their licensure or certification status. On the log, each person will:
  - ~~specify his/her time in~~
  - ~~sign name~~
  - ~~specify time out~~

RNs, LPNs and RNAs working as CNAs will sign in under the section for their licensure, but the facility shall denote on the form that they are working as CNAs for that shift by placing "(CNA)" after their name. Likewise, RNs working as LPNs will sign in under the RN section, but the facility shall denote on the form that they are working as LPNs by placing "(LPN)" after their name.
5. ~~Today's Residents on Unit~~ At the beginning of each shift, the Charge Nurse or designee will enter the number of residents on that unit as of 12:01 a.m. of the date of the report. See Section 520.9.1 for the definition of shifts.
6. ~~Comments~~ The Administrator or designee may enter comments explaining any discrepancies between required and actual staffing.
7. ~~Post the log~~ See Sections 520.9.1(a), (b), (c), (e), and (i), and 520.9.3.
8. ~~Review~~ The Administrator, DON or Designee will sign and date each staffing log prior to filing.
9. ~~Save and file the logs for audit by OLTC~~ See Section 520.9.4.

1 State of Arkansas  
2 93rd General Assembly  
3 Regular Session, 2021  
4

# A Bill

HOUSE BILL 1776

5 By: Representatives Evans, F. Allen, Barker, Beaty Jr., Bentley, M. Berry, Boyd, Bryant, Cavanaugh,  
6 Cloud, Clowney, Coleman, Dalby, M. Davis, Dotson, Eaves, K. Ferguson, C. Fite, V. Flowers, D. Garner,  
7 Haak, Hawks, M. Hodges, Jean, Jett, L. Johnson, Ladyman, Lundstrum, Maddox, J. Mayberry,  
8 McCollum, Miller, Pilkington, Ray, Richardson, B. Smith, Speaks, Underwood, Vaught, Warren, Wing,  
9 Womack  
10 By: Senators D. Wallace, B. Ballinger, Bledsoe, L. Chesterfield, A. Clark, B. Davis, J. Dismang, L. Eads,  
11 Flippo, T. Garner, Gilmore, K. Hammer, J. Hendren, Hester, Hill, B. Johnson, D. Sullivan  
12

## For An Act To Be Entitled

13  
14 AN ACT TO MODERNIZE AND STRENGTHEN NURSING FACILITY  
15 STAFFING STANDARDS AND REPORTING REQUIREMENTS; TO  
16 ELIMINATE OUTDATED AND EXTRANEOUS STATE REQUIREMENTS  
17 THAT DUPLICATE HIGHLY PROSCRIPTIVE FEDERAL STAFFING  
18 AND DATA REPORTING REQUIREMENTS THAT ALL MEDICARE AND  
19 MEDICAID NURSING FACILITIES FOLLOW; TO PROVIDE FOR A  
20 MINIMUM AVERAGE NUMBER OF DIRECT CARE HOURS PER  
21 RESIDENT PER DAY; AND FOR OTHER PURPOSES.  
22

## Subtitle

23  
24  
25 TO MODERNIZE AND STRENGTHEN NURSING  
26 FACILITY STAFFING STANDARDS AND REPORTING  
27 REQUIREMENTS.  
28

29  
30 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
31

32 SECTION 1. DO NOT CODIFY. Legislative findings and intent.

33 (a) The General Assembly finds that:

34 (1) Every state-licensed nursing facility certified to  
35 participate in the federal Medicare program, the Arkansas Medicaid Program,  
36 or both, must adhere to comprehensive, highly proscriptive federal



1 regulations, which are enforced by both the Centers for Medicare and Medicaid  
 2 Services and the Department of Human Services in its role under federal law  
 3 as the state survey agency;

4 (2) Except for one (1) private pay facility that is subject to  
 5 state-level regulation only, every licensed nursing facility in this state is  
 6 Medicare-certified, and all but two (2) are dually certified in the federal  
 7 Medicare program and the Arkansas Medicaid Program;

8 (3) Federal requirements include standards, safeguards, and  
 9 detailed, transparent data reporting on direct care staffing, with modern  
 10 definitions of direct care services and staffing;

11 (4) Under federal law, Medicare and Medicaid nursing facilities  
 12 are required to provide each resident with necessary direct care services  
 13 based on individual assessments and individual, person-centered care plans,  
 14 regardless of any requirements on facility staffing levels; and

15 (5) Current Arkansas laws and Department of Human Services rules  
 16 on nursing facility staffing practices and staff reporting, which were first  
 17 adopted decades ago:

18 (A) Are outdated and extraneous;

19 (B) Duplicate highly proscriptive federal regulations all  
 20 nursing facilities must meet to participate in the federal Medicare program  
 21 or the Arkansas Medicaid Program;

22 (C) Unnecessarily restrict the use of modern staffing  
 23 practices permitted under federal regulations; and

24 (D) Fail to recognize the full range of professions  
 25 available to care for the complex skilled needs of elderly nursing facility  
 26 residents, including medication assistants, nurse practitioners, licensed  
 27 therapists, physician assistants, and infection preventionists.

28 (b) It is the intent of the General Assembly to:

29 (1) Remove the outdated, extraneous, and duplicative state laws;

30 (2) Remove the unnecessarily restrictions regarding the use of  
 31 modern staffing practices permitted under federal regulations; and

32 (3) Recognize the full range of professions available to care  
 33 for the complex skilled needs of elderly nursing facility residents.

34  
 35 SECTION 2. Arkansas Code § 20-10-211 is repealed.

36 ~~20-10-211. Facilities — Regulation of staffing.~~

1           ~~(a) The agency responsible for licensure and certification of long-~~  
 2 ~~term care facilities shall promulgate appropriate rules prescribing minimum~~  
 3 ~~staffing requirements for all long-term care facilities in the state. The~~  
 4 ~~agency shall conform to the requirements of the Arkansas Administrative~~  
 5 ~~Procedure Act, § 25-15-201 et seq., and other appropriate state laws in~~  
 6 ~~promulgating and placing rules into effect.~~

7           ~~(b) Failure to comply with the rules promulgated by the appropriate~~  
 8 ~~agency pursuant to subsection (a) of this section shall be cause for~~  
 9 ~~revocation or suspension of the license or certification of any long-term~~  
 10 ~~care facility.~~

11           ~~(c)(1) This section shall apply only to licensed nursing homes.~~

12                     ~~(2) This section shall not be applicable to any facility of the~~  
 13 ~~Division of Developmental Disabilities Services or to any other facility~~  
 14 ~~operated by the State of Arkansas or any agency of the state.~~

15  
 16           SECTION 3. Arkansas Code §§ 20-10-1401 and 20-10-1402 are amended to  
 17 read as follows:

18           20-10-1401. Definitions.

19           As used in this subchapter:

20                     ~~(1) "Day shift" means the period of 7:00 a.m. to 3:00 p.m.;~~

21                     ~~(2)(A) "Direct care staff" means any nurse aide or licensed~~  
 22 ~~nurse who provides direct, hands-on care to nursing facility residents.~~

23                             ~~(B) "Direct care staff" shall not include:~~

24                                     ~~(i) Therapy personnel or personnel listed in § 20-~~  
 25 ~~10-1404; or~~

26                                     ~~(ii) Medication assistive persons as defined in §~~  
 27 ~~17-87-701;~~

28                     ~~(3) "Evening shift" means the period of 3:00 p.m. to 11:00 p.m.;~~

29                     ~~(4) "Midnight census" means the number of patients occupying~~  
 30 ~~nursing home beds in a nursing facility at midnight of each day;~~

31                     ~~(5) "Night shift" means the period of 11:00 p.m. to 7:00 a.m.;~~

32                     ~~(6) "Nurse aide" means any person who meets the requirements~~  
 33 ~~according to regulations adopted pursuant to 42 C.F.R. § 483.75(e), as it~~  
 34 ~~existed on January 1, 2005; and~~

35                     ~~(7)(A) "Nursing facility" means any building, structure, agency,~~  
 36 ~~institution, or other place for the reception, accommodation, board, care, or~~



1 ~~treatment of more than three (3) unrelated individuals who, because of~~  
 2 ~~physical or mental infirmity, are unable to sufficiently or properly care for~~  
 3 ~~themselves, and for which reception, accommodation, board, care, and~~  
 4 ~~treatment a charge is made.~~

5 ~~(B) However, "nursing facility" shall not include:~~

6 ~~(i) The offices of private physicians and surgeons;~~

7 ~~(ii) Residential care facilities;~~

8 ~~(iii) Assisted living facilities;~~

9 ~~(iv) Intermediate care facilities for individuals~~  
 10 ~~with developmental disabilities;~~

11 ~~(v) Hospitals;~~

12 ~~(vi) Institutions operated by the United States~~  
 13 ~~Government or licensed by the Division of Developmental Disabilities Services~~  
 14 ~~of the Department of Human Services; or~~

15 ~~(vii) Any facility that is conducted by and for~~  
 16 ~~those who rely exclusively upon treatment by prayer alone for healing in~~  
 17 ~~accordance with the tenets or practices of any recognized religious~~  
 18 ~~denomination.~~

19 (1) "Average Direct Care Hours Per Resident Day" means the total  
 20 number of hours of direct care services provided by direct care staff in a  
 21 month, divided by the number of calendar days in that month and the  
 22 facility's average daily resident census for that month;

23 (2) "Certified nursing facility" means a nursing facility  
 24 licensed by the Department of Human Services that is certified to participate  
 25 in the federal Medicare program as a skilled nursing facility or in the  
 26 Arkansas Medicaid Program as a nursing facility, or both;

27 (3)(A) "Direct care services" means:

28 (i) Nursing and nursing-related services;

29 (ii) Clinical, diagnostic, therapeutic, and  
 30 rehabilitative services;

31 (iii) Physical, occupational, respiratory, and  
 32 speech therapy services;

33 (iv) Delegated physician tasks;

34 (v) Behavioral health services;

35 (vi) Care management, care coordination, and care  
 36 transition activities;

- 1                   (vii) Medication administration;
- 2                   (viii) Assistance with activities of daily living;
- 3                   (ix) Assessment, evaluation, planning, and
- 4 implementation of care plans;
- 5                   (x) Coordination and consultation with residents'
- 6 physicians and other healthcare providers; and
- 7                   (xi) Other services and supports provided for
- 8 nursing facility residents in response to individual resident needs.

9                   (B) "Direct care services" does not include food  
 10 preparation, laundry, housekeeping, and other maintenance of a nursing  
 11 facility's physical environment;

12                   (4) "Direct care staff" means a person who provides any direct  
 13 care services to a nursing facility resident through interpersonal contact  
 14 with residents or resident care management, including without limitation:

- 15                   (A) A licensed nurse;
- 16                   (B) A nurse aide;
- 17                   (C) A medication assistant;
- 18                   (D) A physician;
- 19                   (E) A physician assistant;
- 20                   (F) A licensed physical or occupational therapist or
- 21 licensed therapy assistant;
- 22                   (G) A registered respiratory therapist;
- 23                   (H) A licensed speech-language pathologist;
- 24                   (I) An infection preventionist; and
- 25                   (J) Other licensed or certified healthcare professionals;

26                   (5) "Federal direct care data system" means the national online  
 27 data reporting system operated by the Centers for Medicare and Medicaid  
 28 Services and used by nursing facilities participating in the federal Medicare  
 29 program or the Arkansas Medicaid Program, or both, to electronically report  
 30 detailed and standardized direct care and other staffing information;

31                   (6) "Licensed nurse" means any registered nurse, licensed  
 32 practical nurse, advanced practice registered nurse, or registered nurse  
 33 practitioner;

34                   (7) "Medicare and Medicaid requirements of participation" means  
 35 the federal requirements established by the Centers for Medicare and Medicaid  
 36 Services under 42 U.S.C. 1320a-7j, 42 U.S.C. 1395i-3, and 42 U.S.C. 1396r, as

1 existing on January 1, 2021, that a licensed nursing facility is required to  
 2 follow to be certified as compliant with and participate in the federal  
 3 Medicare program as a skilled nursing facility or the Arkansas Medicaid  
 4 Program as a nursing facility, or both;

5 (8) "Medication assistant" means any medication assistive person  
 6 who is qualified and certified under § 17-87-704;

7 (9) "Nurse aide" means any certified nurse aide or nurse aide in  
 8 training consistent with federal and state nurse aide proficiency, training,  
 9 education, and use requirements;

10 (10) "Nursing facility" means any entity licensed as a nursing  
 11 facility by the department;

12 (11) "Nursing staff" means any licensed nurses, nurse aides, or  
 13 medication assistants who are employed or contracted by a nursing facility;  
 14 and

15 (12) "Private pay-only nursing facility" means a nursing  
 16 facility licensed by the department that is not certified to participate in  
 17 the federal Medicare program as a skilled nursing facility or in the Arkansas  
 18 Medicaid Program as a nursing facility.

19  
 20 20-10-1402. Staffing standards.

21 ~~(a) The Department of Human Services shall not issue or renew a~~  
 22 ~~license of a nursing facility unless that facility employs the direct care~~  
 23 ~~staff needed to provide continuous twenty-four-hour nursing care and service~~  
 24 ~~to meet the needs of each resident of the nursing facility and the staffing~~  
 25 ~~standards required by all state rules and federal regulations.~~

26 ~~(b)(1) Except for nursing facilities that the Office of Long-Term Care~~  
 27 ~~designates or certifies as Eden Alternative nursing facilities or Green House~~  
 28 ~~Project nursing facilities, the staffing standard required by this subchapter~~  
 29 ~~shall be the minimum number of direct care staff required by nursing~~  
 30 ~~facilities and shall be adjusted upward to meet the care needs of residents.~~

31 ~~(2)(A) The office shall promulgate staffing standards for~~  
 32 ~~nursing facilities that the office designates or certifies as Eden~~  
 33 ~~Alternative nursing facilities or Green House Project nursing facilities.~~

34 ~~(B) The department may develop a reimbursement methodology~~  
 35 ~~or amend the reimbursement methodology in existence as of July 31, 2007, to~~  
 36 ~~provide payment for staff that provides services or care to residents in the~~

1 ~~designated or certified Eden Alternative nursing facilities or Green House~~  
2 ~~Project nursing facilities.~~

3 ~~(c) If a facility varies shift hours from the shift hours listed in §~~  
4 ~~20 10 1401, the facility shall meet the staffing requirements for the shift~~  
5 ~~listed in § 20 10 1403.~~

6 (a) As a condition of licensure by the Department of Human Services, a  
7 nursing facility, except a private pay-only only nursing facility, shall:

8 (1)(A) Be certified to participate in the federal Medicare  
9 program as a skilled nursing facility or in the Arkansas Medicaid Program as  
10 a nursing facility, or in both.

11 (B) A certified nursing facility is subject to the  
12 Medicare and Medicaid requirements of participation, including without  
13 limitation federal requirements related to nursing and other direct care  
14 staffing, directors of nursing, daily information posting, and staffing data  
15 reporting through the federal direct care data system; and

16 (2) Provide each month direct care services by direct care staff  
17 equivalent to at least three and thirty-six hundredths (3.36) Average Direct  
18 Care Hours Per Resident Day.

19 (b)(1) On or before the fifteenth day of each month, a certified  
20 nursing facility shall report electronically to the department the certified  
21 nursing facility's actual Average Direct Care Hours Per Resident Day for the  
22 prior month.

23 (2) Hours used in determining actual Average Direct Care Hours  
24 Per Resident Day for each month shall be consistent with the certified  
25 nursing facility's final staffing data submission to the federal direct care  
26 data system for the applicable quarter and based on all direct care services  
27 labor categories and all direct care staff job codes.

28 (3) When necessary to correct monthly report data following  
29 quarterly data validation and based on the final staffing data reported in  
30 the federal direct care data system for the applicable quarter, a certified  
31 nursing facility shall promptly file an amended monthly report with the  
32 department.

33 (4) In the event of a public health emergency, natural disaster,  
34 other major emergency, or severe labor shortage, the department may  
35 temporarily waive the Average Direct Care Hours Per Resident Day requirements  
36 for any certified nursing facility or all certified nursing facilities in a

1 county or state.

2 (5) The department may audit these reports and request  
3 documentation from the certified nursing facility to ensure compliance with  
4 the requirements of this section.

5 (c) As a condition of licensure by the department, a private pay-only  
6 nursing facility shall comply with all state requirements applicable to a  
7 private pay-only nursing facility, including rules promulgated by the  
8 department, and shall cooperate with the department audits, inspections, and  
9 document requests.

10 (d)(1) The department shall promulgate rules as necessary to carry out  
11 the provisions of this section.

12 (2) If the department promulgates rules, the rules shall:

13 (A) Apply to conditions and processes of state licensure;

14 (B) As applicable to a certified nursing facility, not  
15 exceed or duplicate Medicare and Medicaid requirements of participation,  
16 including staffing and data reporting requirements, except regarding Average  
17 Direct Care Hours Per Resident Day requirements;

18 (C) Not require permission, waivers, or otherwise restrict  
19 a nursing facility from engaging in staffing related practice permitted under  
20 Medicare and Medicaid requirements of participation, including without  
21 limitation:

22 (i) The engagement of services of direct care staff  
23 and other personnel on a full-time or part-time basis and through employment,  
24 contracting, and staffing agencies, or any combination thereof;

25 (ii) The use of fixed schedules, flex-time, rotating  
26 shifts, split shifts, compressed work weeks, and other alternative staffing  
27 schedules; and

28 (iii) The use of a universal worker model to assign  
29 nurse aides other tasks, such as food service, laundry, and housekeeping, in  
30 addition to direct care responsibilities with direct care and nondirect care  
31 hours appropriately differentiated; and

32 (D) As applicable to a private pay-only nursing facility,  
33 establish direct care services, staffing, and reporting requirements  
34 equivalent to those applicable to a certified nursing facility under this  
35 section or under Medicare and Medicaid requirements of participation.

36 (e) This section does not require or advise any specific or minimum

1 number of nursing staff hours, direct care staff hours, or hours of other  
 2 services for any nursing facility resident.

3  
 4 SECTION 4. Arkansas Code §§ 20-10-1403 through 20-10-1409 are  
 5 repealed.

6 ~~20-10-1403. Ratio of staff to residents.~~

7 ~~(a) Except for nursing facilities that the Office of Long-Term Care~~  
 8 ~~designates as Eden Alternative nursing facilities or Green House Project~~  
 9 ~~nursing facilities, all nursing facilities shall maintain the following~~  
 10 ~~minimum direct-care staffing to resident ratios:~~

11 ~~(1) One (1) direct-care staff to every six (6) residents for the~~  
 12 ~~day shift. Of this direct-care staff, there shall be at least one (1)~~  
 13 ~~licensed nurse to every forty (40) residents;~~

14 ~~(2) One (1) direct-care staff to every nine (9) residents for~~  
 15 ~~the evening shift. Of this direct-care staff, there shall be at least one (1)~~  
 16 ~~licensed nurse to every forty (40) residents; and~~

17 ~~(3) One (1) direct-care staff to every fourteen (14) residents~~  
 18 ~~for the night shift. Of this direct-care staff, there shall be at least one~~  
 19 ~~(1) licensed nurse to every eighty (80) residents.~~

20 ~~(b)(1) Licensed direct-care staff shall not be excluded from the~~  
 21 ~~computation of the ratios of direct-care staff to residents while serving in~~  
 22 ~~a staffing capacity that requires less education and training than is~~  
 23 ~~commensurate with their professional licensure.~~

24 ~~(2) Licensed direct-care staff who serve in a staffing capacity~~  
 25 ~~that requires less education and training than is commensurate with their~~  
 26 ~~professional licensure shall not be restricted from providing direct-care~~  
 27 ~~services within the scope of their professional licensure in order to be~~  
 28 ~~included in the computation of the ratios of direct-care staff to residents.~~

29 ~~(c) Nursing facilities shall provide in-service training to their~~  
 30 ~~direct-care staffs pursuant to rules promulgated by the office.~~

31 ~~(d) Upon any expansion of resident census by the facility, the~~  
 32 ~~facility shall be exempt from any increase in staffing ratios for a period of~~  
 33 ~~nine (9) consecutive shifts from the date of the expansion of resident~~  
 34 ~~census.~~

35 ~~(e)(1) The computation of the direct-care minimum staffing ratios~~  
 36 ~~shall be carried to the hundredth place.~~

1           ~~(2) If the application of the ratios listed in subsection (a) of~~  
2 ~~this section results in other than a whole number of direct care staff for a~~  
3 ~~shift or shifts, the number of required direct care staff shall be rounded to~~  
4 ~~the next higher whole number when the resulting ratio, carried to the~~  
5 ~~hundredth place, is fifty one hundredths (.51) or higher.~~

6           ~~(3) In no event shall a facility have fewer than one (1)~~  
7 ~~licensed nurse per shift for direct care staff.~~

8           ~~(4) All computations shall be based on the midnight census for~~  
9 ~~the day in which the shift or shifts begin.~~

10          ~~(f)(1) Facilities may vary the starting hour and the ending hour for~~  
11 ~~up to twenty five percent (25%) of the minimum direct care staff of the day~~  
12 ~~shift or the evening shift, or both, to meet resident care needs.~~

13          ~~(2) Before varying the starting hour and the ending hour of~~  
14 ~~direct care staff of the day shift or the evening shift, the facility shall~~  
15 ~~inform the office in writing of:~~

16           ~~(A) The resident care needs to be met by the change in~~  
17 ~~starting and ending times of the shift;~~

18           ~~(B) The number of direct care staff to whom the changes~~  
19 ~~will apply;~~

20           ~~(C) The starting hour and ending hour of the shift for the~~  
21 ~~direct care staff to whom the change will apply; and~~

22           ~~(D) The length of time the variations will be used, if~~  
23 ~~known.~~

24          ~~(3)(A) The facility shall receive written approval from the~~  
25 ~~office before the facility may vary the starting hour and ending hour of a~~  
26 ~~shift for selected direct care staff.~~

27           ~~(B) The office may deny approval upon determination that:~~

28           ~~(i) The reason for the request to vary the starting~~  
29 ~~and ending time of a shift for selected direct care staff does not meet~~  
30 ~~resident care needs;~~

31           ~~(ii) The facility was in a pattern of failure for~~  
32 ~~any month in the three (3) months immediately preceding the request; or~~

33           ~~(iii) The variation will result in a period of more~~  
34 ~~than two (2) hours in which there is less than the minimum required number of~~  
35 ~~direct care staff under subsection (a) of this section.~~

36           ~~(C) The office may revoke approval to vary the starting~~

1 ~~and ending time of a shift for selected direct care staff if the office~~  
 2 ~~determines that:~~

3 ~~(i) The approval has resulted in resident care needs~~  
 4 ~~being unmet; or~~

5 ~~(ii) The facility is in a pattern of failure.~~

6 ~~(4) If a facility varies the starting and ending times for~~  
 7 ~~direct care staff of the day shift or the evening shift, or both, the~~  
 8 ~~facility shall be deemed to have met minimum staffing requirements for that~~  
 9 ~~shift if the number of direct care staff whose starting and ending times are~~  
 10 ~~varied and the number of direct care staff whose starting and ending times~~  
 11 ~~are not varied together equal the number of direct care staff required for~~  
 12 ~~the shift.~~

13  
 14 ~~20-10-1404. Director of nurses.~~

15 ~~(a) In addition to the minimum direct care staffing ratios in § 20-10-~~  
 16 ~~1403, each nursing facility shall employ a registered nurse to serve as~~  
 17 ~~director of nurses.~~

18 ~~(b)(1) The director shall be a full-time employee and shall be~~  
 19 ~~employed for no less than forty (40) hours per week.~~

20 ~~(2) An additional registered nurse shall be employed for a~~  
 21 ~~minimum of sixteen (16) hours per week to ensure coverage seven (7) days a~~  
 22 ~~week.~~

23  
 24 ~~20-10-1405. Services provided.~~

25 ~~(a) An employee designated as a member of the direct care staff shall~~  
 26 ~~not be required to provide services such as food preparation, housekeeping,~~  
 27 ~~laundry, or maintenance services except as necessary to maintain a safe and~~  
 28 ~~sanitary environment.~~

29 ~~(b) Persons employed to provide additional services such as food~~  
 30 ~~preparation, housekeeping, laundry, or maintenance services shall not be~~  
 31 ~~counted in determining the staffing ratios required by this subchapter unless~~  
 32 ~~the persons are qualified to serve as and specifically scheduled in a direct-~~  
 33 ~~care capacity.~~

34 ~~(c) A person employed to provide additional services shall count~~  
 35 ~~toward the direct care staffing ratios only for the time in which the~~  
 36 ~~facility can document that the person provides direct care services.~~



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~~20-10-1406.—Posting of personnel numbers.~~

~~(a)(1) Each nursing facility shall post daily at the beginning of each shift in a prominent place within twenty feet (20') of the main entrance of the nursing facility and in a location that is readily accessible and visible to residents and visitors the number of direct care staff on duty at each shift.~~

~~(2) The posting shall consist of a sign-in sheet signed by each staff member as the staff member reports to work, and the staff member shall indicate on the sheet the time of arrival and departure, all halls, wings, or corridors on which the staff member worked or was assigned, and the total number of hours worked.~~

~~(3) The title of the posting shall be printed in a type no smaller than 18-point type.~~

~~(4) Below the posting, the nursing facility shall post a diagram of the facility showing the location of each hall, wing, or corridor.~~

~~(b) The current number of residents shall be posted and filed with the staffing report for the same time period.~~

~~(c) These records shall be filed and saved by the nursing facility until the next survey or for eighteen (18) months, whichever is greater, and these records shall be available for review by any interested person upon a written request.~~

~~20-10-1407.—Report.~~

~~(a)(1) By the fifth day of each month, each nursing facility shall submit a written report of all shifts which failed to meet the minimum staffing requirements of this subchapter during the preceding month to the Office of Long-Term Care.~~

~~(2) Upon determination by the office that a pattern of failure to comply with the provisions of this subchapter has occurred, the nursing facility shall submit to the office on a monthly basis a report stating the ratios of direct care staff to residents for each shift, in addition to the requirements set forth in subdivision (a)(1) of this section.~~

~~(3) Each nursing facility also shall submit copies of all daily staffing logs for the same months for any reports required under subdivision (a)(1) or subsection (b) of this section.~~

1           ~~(b) The failure of a direct care staff member or members to sign the~~  
 2 ~~posted sign in sheet in accordance with § 20-10-1406 shall not be considered~~  
 3 ~~a violation of the staff resident ratios set forth in § 20-10-1403 if the~~  
 4 ~~facility has other documentation that the staff member or members provided~~  
 5 ~~direct care services for the dates and times stated by the facility.~~

6           ~~(c) The failure to meet the requirement regarding the posting of~~  
 7 ~~current staff resident ratios set forth in § 20-10-1406 or the failure to~~  
 8 ~~provide staffing reports, logs, or other documentation directly related to~~  
 9 ~~minimum staffing standards to the office or the Division of Medical Services~~  
 10 ~~of the Department of Human Services is a Class C violation in accordance with~~  
 11 ~~§ 20-10-205.~~

12           ~~(d) "Pattern of failure" means that a facility did not meet the~~  
 13 ~~minimum staffing requirements of this subchapter for more than twenty percent~~  
 14 ~~(20%) of the total number of shifts for any one (1) month.~~

15           ~~(e)(1) The division may perform staffing audits, including random~~  
 16 ~~staffing audits, of nursing facilities to determine and ensure compliance~~  
 17 ~~with the requirements of this subchapter.~~

18           ~~(2) Facilities shall provide staffing reports, logs, or other~~  
 19 ~~documentation upon request of the division.~~

20  
 21           ~~20-10-1408. Penalties.~~

22           ~~(a) Upon a determination of a pattern of failure of a facility by the~~  
 23 ~~Office of Long Term Care, the following penalties shall be applied to the~~  
 24 ~~facility:~~

25           ~~(1) When the pattern of failure is more than twenty percent~~  
 26 ~~(20%) but less than twenty five percent (25%) of the total number of shifts~~  
 27 ~~for any one (1) month, the facility shall be assessed a fine of two thousand~~  
 28 ~~five hundred dollars (\$2,500);~~

29           ~~(2) When the pattern of failure is twenty five percent (25%) or~~  
 30 ~~higher but less than thirty percent (30%) of the total number of shifts for~~  
 31 ~~any one (1) month, the facility:~~

32           ~~(A) Shall be assessed a fine of five thousand dollars~~  
 33 ~~(\$5,000); and~~

34           ~~(B)(i) Shall be prohibited from admitting new residents~~  
 35 ~~for a period of at least two (2) weeks beginning the next business day after~~  
 36 ~~notification by the office to the facility of the pattern of failure and~~

1 continuing until the next business day after the facility submits a report  
2 establishing that the facility was not in a pattern of failure for the time  
3 during which the facility was prohibited from admitting new residents.

4 (ii) If the office subsequently determines that the  
5 facility did not meet the minimum staffing standards requirements as alleged  
6 in the report from the facility, the office shall prohibit the facility from  
7 admitting new residents for a period of at least two (2) weeks, and  
8 continuing until the next business day after the facility submits a new  
9 report establishing that the facility was not in a pattern of failure for the  
10 time in which the facility was prohibited from admitting new residents;

11 (3) When the pattern of failure is thirty percent (30%) or  
12 higher of the total number of shifts for any one (1) month in a three-month  
13 reporting period, the facility:

14 (A) Shall be assessed a fine of seven thousand five  
15 hundred dollars (\$7,500); and

16 (B)(i) Shall be prohibited from admitting new residents  
17 for a period of at least two (2) weeks beginning the next business day after  
18 notification by the office to the facility of the pattern of failure and  
19 continuing until the next business day after the facility submits a report  
20 establishing that the facility was not in a pattern of failure for the time  
21 during which the facility was prohibited from admitting new residents.

22 (ii) If the office subsequently determines that the  
23 facility did not meet the minimum staffing standards requirements as alleged  
24 in the report from the facility, the office shall prohibit the facility from  
25 admitting new residents for a period of at least two (2) weeks and continuing  
26 until the next business day after the facility submits a new report  
27 establishing that the facility was not in a pattern of failure for the time  
28 in which the facility was prohibited from admitting new residents; and

29 (4) If after five (5) days' notice from the office of the  
30 imposition of a denial of new admissions, a facility admits new residents  
31 during a period in which the facility is prohibited from admitting new  
32 residents, the facility shall be assessed a fine of twenty five thousand  
33 dollars (\$25,000) per new resident admitted.

34 (b) The penalties stated in this subchapter are supplemental to any  
35 provisions in state or federal laws, rules, or regulations.

36 (c) Appeals from the imposition of any remedy imposed under this

1 ~~subchapter shall be made pursuant to § 20-10-208.~~

2 ~~(d)(1) When residents are relocated from facilities due to natural~~  
3 ~~disaster or as a result of state or federal action, the Department of Human~~  
4 ~~Services may waive some or all of the provisions of §§ 20-10-1403 and 20-10-~~  
5 ~~1404 for facilities to which the residents are relocated.~~

6 ~~(2) Any waiver shall be limited to no more than three (3) months~~  
7 ~~from the date of transfer.~~

8  
9 ~~20-10-1409. Staffing standards—Definition.~~

10 ~~(a) The staffing standards as set forth in § 20-10-1403 are to be~~  
11 ~~construed as nursing facility staffing standards above the 1989 standards~~  
12 ~~established by the Office of Long-Term Care.~~

13 ~~(b)(1) If the Secretary of the Department of Human Services determines~~  
14 ~~that the reimbursement methodology or available funding is insufficient or~~  
15 ~~unable to pay for the minimum staffing standards under § 20-10-1403, the~~  
16 ~~office, by rule, may modify the requirements of § 20-10-1403 to ensure~~  
17 ~~minimum staffing funds.~~

18 ~~(2) If the Director of the Office of Long-Term Care determines~~  
19 ~~that the minimum staffing standards under § 20-10-1403 or § 20-10-1404 have~~  
20 ~~become insufficient at any time to ensure the health, safety, or welfare of~~  
21 ~~nursing facility residents, by rule, the office may increase minimum staffing~~  
22 ~~standards or otherwise promulgate rules to ensure the health, safety, or~~  
23 ~~welfare of the nursing facility residents.~~

24 ~~(c)(1)(A) If the Director of the Office of Long-Term Care determines~~  
25 ~~that minimum staffing standards should be increased pursuant to subdivision~~  
26 ~~(b)(2) of this section, the Director of the Office of Long-Term Care shall~~  
27 ~~certify the determination and any proposed regulatory increases to minimum~~  
28 ~~staffing standards to the Director of the Division of Medical Services, who~~  
29 ~~shall notify the Secretary of the Department of Human Services and the~~  
30 ~~Legislative Council of the determination and whether sufficient appropriated~~  
31 ~~funds exist to fund the costs to be incurred by the proposed changes to the~~  
32 ~~minimum staffing standards.~~

33 ~~(B) As used in this subsection, “costs” means direct-care~~  
34 ~~costs as defined in the Centers for Medicare & Medicaid Services Provider~~  
35 ~~Reimbursement Manual as in effect January 12, 2001.~~

36 ~~(2) In no event shall minimum staffing standards be increased~~

1 ~~unless sufficient appropriated funds exist to fund the costs to be incurred~~  
2 ~~by the proposed increases to minimum staffing standards.~~

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5 **APPROVED: 4/14/21**  
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STATE OF ARKANSAS  
BUREAU OF  
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MEMORANDUM

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**TO:** Members, ALC – Executive Subcommittee

**CC:** Marty Garrity, Director, Bureau of Legislative Research;  
Jessica Whittaker, Administrator, Administrative Rules Review Section, Legal Services Division

**FROM:** Lacey Johnson, Legislative Attorney, Administrative Rules Review Section, Legal Services Division

**DATE:** September 9, 2021

**SUBJECT:** Legal Authorization for the Department of Human Services’ Emergency Promulgation of Direct Care Staffing Requirements Update Pursuant to Act 715 of 2021

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The Department of Human Services, Office of Long-Term Care<sup>1</sup> is “the unit of state government primarily responsible for the inspection, regulation, and licensure of long-term care facilities,” and 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 emergency 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.

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<sup>1</sup> The Office of Long-Term Care is located within the Division of Provider Services and Quality Assurance.