

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 483

[CMS-3121-F]

RIN 0938-AM55

Medicare and Medicaid Programs; Requirements for Long Term Care Facilities; Nursing Services; Posting of Nurse Staffing Information

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: In this rule, we finalize provisions specified in the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) that establish new data collection, posting, and recordkeeping requirements for skilled nursing facilities (SNFs) and nursing facilities (NFs). It requires that on a daily basis for each shift, SNFs and NFs must post nurse staffing data for the licensed and unlicensed staff directly responsible for resident care in the facility. Facility census information must also be posted. This final rule is also part of a broader communication outreach initiative by CMS to provide beneficiaries, their families, and the public with access to updated data and other information that can assist them in making healthcare decisions.

DATES: The provisions of this final rule are effective on December 27, 2005.

FOR FURTHER INFORMATION CONTACT: Anita Panicker, (410) 786-5646, or Jeannie Miller, (410) 786-3164.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

Medicare and Medicaid-participating nursing homes are regulated by sections 1819 and 1919 of the Social Security Act (the Act), added by Title IV, subtitle C of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (Pub. L. 100-203, December 22, 1987).

On February 27, 2004 we published a proposed rule in the *Federal Register* entitled "Medicare and Medicaid Programs; Requirements for Long Term Care Facilities; Nursing Services; Posting of Nurse Staffing Information" (69 FR 9282). In the proposed rule, we presented our proposal to implement section 941 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) by establishing a new data collection and recordkeeping requirement for SNFs

and NFs. Section 941 of BIPA, which was effective January 1, 2003, requires SNFs and NFs to post daily, for each shift, the number of licensed and unlicensed nursing staff directly responsible for resident care in the facility, and it requires the information to be displayed clearly in a visible place. Additionally, section 941 of BIPA requires the Secretary of Health and Human Services (the Secretary) to specify a "uniform manner" for display of this information.

In the February 27, 2004 proposed rule, we proposed that SNFs and NFs be required to: (1) On a daily basis, use a CMS-specified form at the end of each shift to indicate the number of full-time equivalents (FTEs) of registered nurses, licensed practical nurses, licensed vocational nurses, and certified nurse aides (CNAs) directly responsible for resident care; (2) verify or determine the resident census on a daily basis, (3) post the completed form in a prominent place readily accessible to residents and visitors; (4) make the form available to the public upon request; and (5) maintain the forms for a minimum of 3 years or as required by State law, whichever is greater. The requirements in this final rule were revised based on the comments we received on the proposed rule.

To date, we have also taken the following actions to educate providers and clarify the requirements to implement section 941 of BIPA:

- An October 10, 2002 letter to State Agency Directors, which can be found at <http://www.cms.hhs.gov/medicaid/survey-cert/SC0303.pdf>.
- Presentation of information at a national nursing home conference.
- Publication of a notice on an electronic bulletin board used by nursing homes.
- A December 24, 2002 letter to nursing homes, which can be found at <http://www.cms.hhs.gov/medicaid/bipa/bipanh.asp>.

II. Ongoing Research on Nursing Home Quality Improvement

In November 2001, the Secretary announced an initiative to focus on efforts to address quality of care improvement for nursing homes. The Nursing Home Quality Initiative, implemented nationwide in November 2002, represents a broad-based program that includes our continuing regulatory and enforcement systems, new and improved consumer information, community-based nursing home quality improvement programs and partnerships, and collaborative efforts to promote quality awareness and improvement.

Working with quality measurement experts, the National Quality Forum and a diverse group of nursing home industry stakeholders, we adopted a set of nursing home quality measures. The Nursing Home Quality Initiative combines new information for consumers about the quality of care provided in individual nursing homes with current resources available to nursing homes to improve the quality of care in their facilities data for comparison, deficiency survey results and staffing information about the nation's Medicare and Medicaid-certified nursing homes through the Nursing Home Compare Web site, which is updated quarterly.

The main components of the initiative are nursing home quality measures derived from resident assessment data. This information is routinely collected by nursing homes at specified intervals during a resident's stay (using the Minimum Data Set or MDS). These measures provide additional information to help consumers make informed decisions about nursing home care options. Publication of the measures is intended to motivate nursing homes to improve care delivery and encourage discussions about quality between consumers and clinicians.

Additional CMS-sponsored quality improvement information may be found in the "Nursing Home Compare" section of our Web site at <http://www.medicare.gov>.

The primary purpose of Nursing Home Compare is to provide detailed information about the past performance of every Medicare- and Medicaid-certified nursing home in the country. Nursing Home Compare contains the following sections of detailed information:

- *About the Nursing Home:* including the number of beds and type of ownership.
- *Quality Measures:* including the percentage of residents with pressure (bed) sores, percentage of residents with physical restraints, and more.
- *Inspection Result Information:* including health and safety deficiencies found during the most recent State nursing home survey and from recent complaint investigations.
- *Nursing Home Staff Information:* including the average number of hours worked by registered nurses, licensed practical or vocational nurses, and certified nurse aides per resident per day.

Each nursing home is required to report nursing staff totals to its State survey agency during the annual survey. We receive this information from the State survey agencies and convert the nursing staff hours reported into the

number of staff hours per resident per day. We report the total nursing staff hours per resident per day, as well as the total nursing staff hours per resident per day for registered nurses, licensed practical nurses, and licensed vocational nurses. (Facility staffing measures reflected in Nursing Home Compare may be updated or revised in the future.)

NFs are required to have adequate staff to give appropriate care to all residents. SNFs and NFs must have at least one registered nurse for at least 8 consecutive hours per day, 7 days per week, and either a registered nurse, licensed practical nurse or licensed vocational nurse, and other nursing personnel on duty 24 hours per day, unless a waiver has been granted in accordance with § 483.30(c) or § 483.30(d). Certain States may have more stringent nurse staffing specifications than the Federal requirements.

Section 4801(e)(17)(B) of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) (Pub. L. 101-508, November 5, 1990) required the Secretary to report the results of a study to the Congress on the appropriateness of establishing minimum caregiver-to-resident and supervisor-to-nurse ratios for Medicare- and Medicaid-certified nursing homes. The purpose of the study was to examine the analytic justification for establishing minimum nurse staffing ratios for nursing homes. The study, entitled "Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes," (Report to Congress, July 2000) was conducted in two phases. Phase I of the study <http://www.cms.hhs.gov/Medicaid/reports/rp700hmp.asp> examined whether an association exists between staffing levels in nursing homes and quality of care. Phase II of the study (<http://www.cms.hhs.gov/medicaid/reports/rp1201home.asp>) examined the cost and benefits associated with establishing staffing minimums and expanding the data used in the multivariate analysis from three States to a more representative national sample. It included an exploration of more refined case mix classification methods and case studies to validate Phase I findings, while examining related issues affecting certified nurse aide recruitment and retention. In both Phase I and Phase II studies, the phrase "nurse staffing" referenced all three categories of nurses and nurse aides: registered nurses, licensed practical nurses, and nurse aides. Based upon these studies, we do not believe sufficient evidence exists to warrant minimum nurse staffing ratio requirements. Abt Associates and CMS

staff have completed a draft report with options for: (1) Collecting more accurate staffing data; (2) auditing the data collected; (3) transmitting the data; and (4) configuring the data so that they can be informative to the public when placed on our website.

Consistent with our November 2002 initiative to disseminate reliable information on nursing home quality for Medicare and Medicaid beneficiaries, our objective in finalizing the February 27, 2004, proposed rule is to make staffing information available to the public to assist them in making informed decisions when choosing health care providers. This regulation provides consumers with staffing information on a day-to-day basis.

III. Provisions of the February 27, 2004 Proposed Rule

On February 27, 2004, we published a proposed rule in the **Federal Register** entitled "Medicare and Medicaid Programs; Requirements for Long Term Care Facilities; Nursing Services; Posting of Nurse Staffing Information" (69 FR 9282). Below we summarize and discuss the proposed changes to the general conditions and requirements in § 483.30, Nursing services.

We proposed to revise § 483.30 by adding a new paragraph (e) that would require nursing homes to post nurse-staffing information in accordance with section 941 of BIPA, specified as sections 1819(b)(8) and 1919(b)(8) of the Act. We proposed daily collection requirements for staffing information, identified categories of staff for which the provision would apply, and established record keeping specifications, that is, a specific form SNFs and NFs would use to display staffing information by shift. We also proposed requiring SNFs and NFs to make this information available to the public upon request and maintain the forms for 3 years or as required by State law, whichever is greater.

In the February 27, 2004 proposed rule, we also noted that neither section 1819(b)(8) nor section 1919(b)(8) of the Act specifies what constitutes "licensed and unlicensed nursing staff." In the proposed rule, we interpreted "licensed and unlicensed nursing staff" to mean registered nurses, licensed practical nurses or licensed vocational nurses (as the term(s) are defined under State law), and certified nurse aides.

We also proposed to revise § 483.30 by adding a requirement that SNFs and NFs collect and display the resident census for each day. While collection of resident census information is not specifically required under section 941 of BIPA, we believe that collection of

this information is authorized under our general statutory authority as defined in sections 1819(f)(1) and 1919(f)(1) of the Act. These sections require the Secretary to "assure that requirements which govern the provision of care [in both SNFs and NFs] * * * and the enforcement of those requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." We believe the addition of census information makes the nurse staffing data more meaningful and useful to the public and is in line with our rulemaking authority. Providing resident census data along with nurse staffing data gives consumers a context and information they can use to interpret the data and reach conclusions regarding the nurse staffing levels in relation to the resident population.

We proposed to add a new § 483.30(e)(1) that would specify the contents and format of the information in accordance with the statutory authority provided by BIPA, which mandates that the information must be "displayed in a uniform manner." Proposed § 483.30(e)(1) through § 483.30(e)(3) would require that the nurse staffing and census information:

- Include current nurse staffing numbers calculated as full time equivalents (FTEs) for each shift;
- Include the daily resident census;
- Be posted on the CMS Daily Nurse Staffing Form; and
- Be displayed in a prominent place readily accessible to residents and visitors.

IV. Analysis of and Responses to Public Comments Received on the February 27, 2004 Proposed Rule

We received a total of 82 timely items of correspondence from individuals, providers, national and regional health care professional associations and advocacy groups, State and local health organizations, labor unions, health care law firms, and others. Summaries of the public comments received and our responses to those comments are set forth below under the appropriate subject headings. The first section, "Information Requirements," includes comments and responses that primarily relate to the proposed requirements in § 483.30(e)(1), that is, the proposed requirement to calculate full time equivalents (FTEs) for nursing staff and the proposed requirement to determine or verify resident census. The second section, "Form Use and Posting Requirements," contains comments and responses regarding the requirements in § 483.30(e)(2), that is, the proposed

CMS-specified form and the proposed requirements for displaying the form. The third section, "Public Access and Data Retention Requirements," includes comments and responses regarding the proposed requirements in § 483.30(e)(3) for maintaining data and making them publicly available. The fourth section, "General Comments" includes comments about the preamble discussion and other issues that fall outside the specified requirements of the February 27, 2004, proposed rule.

A. Information Requirements, Proposed § 483.30(e)(1)

In § 483.30(e)(1), we proposed requiring that SNFs and NFs on a daily basis, at the end of each shift, calculate the number of full time equivalents (FTEs) for the following licensed and unlicensed nursing staff directly responsible for resident care: (A) Registered nurses (RN); (B) Licensed practical nurses (LPN) or licensed vocational nurses (LVN) (as defined under State law); and (C) Certified nurse aides. In addition we proposed requiring SNFs and NFs to determine or verify the resident census on a daily basis.

1. Using Full Time Equivalents (FTEs)

Comment: A number of commenters voiced their disagreement with the proposal to require facilities to post staffing data according to FTEs. Commenters stated that the requirement "goes beyond the law" and pointed out that section 941 of BIPA requires only that nursing facilities post the number of licensed and unlicensed staff for each shift every day. In addition, commenters pointed out that in our December 24, 2002 memorandum sent to nursing facilities, we gave facilities discretion with respect to how the nurse staffing and census data are to be displayed, provided that the required information is displayed in a uniform manner in a clearly visible place.

Commenters further indicated that the use of FTEs may make it difficult for families and the public to understand, and staff time will be wasted explaining FTEs to visitors.

Response: We agree with the commenters that displaying nurse staffing totals using FTEs could be confusing and may not accurately represent the number of staff providing care during a given time period. For example, 1 LPN FTE during an 8-hour (3 p.m. to 11 p.m.) shift could mean that 1 LPN worked the entire 8-hour shift. However, it could also mean that 2 LPNs worked 4 hours each from 3 p.m. to 7 p.m. and that no LPNs worked in the unit from 7 p.m. to 11 p.m. Clearly,

displaying FTEs does not provide sufficient information to determine the number of staff present at a given point in time, which is important for families and visitors to know.

Therefore, instead of requiring facilities to post FTEs, in this final rule we are requiring facilities to post the number of nursing staff by category (RN, LPN or LVN, and CNA) providing direct care to residents during each shift and the actual hours worked by the staff during each shift (for example 7 p.m. to 11 p.m.). More specific information about the required data and the method for displaying the data are presented later in this preamble.

2. Suggestions for Additional Data

Comment: A few commenters stated that staffing level data would not be helpful to the public unless information about resident acuity was included. One commenter indicated that without consideration of the acuity of the residents the posting of staffing will be meaningless.

Response: We agree that it would be valuable to have the acuity information posted along with the staffing data. However, there are wide variations in the types of populations served in SNFs and NFs. In addition, there are no accepted standardized measures of resident acuity that can be applied across all facilities. Therefore, in this final rule, we are not requiring facilities to post resident acuity level data.

Comment: One commenter stated that instead of posting the number of staff, the facility should post the number of hours of training and the type of training the staff receives.

Response: We appreciate the comment, but requiring the posting of information about staff training is not within the scope of this regulation, which is to develop requirements for implementation and codification of the requirements of section 941 of BIPA, which requires the posting of specific nurse staffing information. We would point out that requiring facilities to identify the number of each category of nursing staff (that is RN, LPN, LVN and CNA) provides the public with some degree of knowledge about their education and training.

Comment: Many commenters stated that nurse staffing data are not sufficient to inform families and the public about the quality of care in a facility.

Response: While we are in agreement with commenters who noted that the provision of nurse staffing data alone is insufficient to evaluate quality of care within a facility, we are currently conducting a wide range of regulatory and research activities focused on

nursing home quality assessment and improvement. For example, at our Nursing Home Compare website, we present quality measures, deficiency information, and other basic information about facility performance. We also encourage consumers to visit facilities.

Nurse staffing information is critical data to help consumers make informed decisions when selecting a facility. Census information provides a basis for consumers to understand the relative number of nursing staff providing direct care to all of the residents during each shift. We believe that implementing the nurse staffing requirements in section 941 of BIPA, as well as establishing a requirement for collecting and posting census data offers the public access to updated data and other information that can assist them in making healthcare decisions.

Comment: Some commenters stated they would like the nurse staffing form to include all the staff working on a particular shift, including medical records reviewers, MDS coordinators, directors of nursing, persons conducting interdisciplinary team meetings, and others who work with residents at some level.

Response: Activities such as data collecting, conducting and coordinating meetings, and reviewing records are outside the scope of BIPA requirements. However, facilities may choose to provide that information separately as part of the same documentation that is used to display nurse-staffing data. Therefore, in this final rule, facilities have been given discretion with respect to the manner in which the nurse staffing and census data are displayed, provided that the required information is displayed in a uniform manner in a clearly visible place.

Comment: One commenter suggested that we require staff-to-resident ratios on the form.

Response: As we stated in the preamble of the February 27, 2004 proposed rule, we do not believe sufficient evidence exists to warrant minimum nurse staffing ratio requirements. In addition, the level of care needed and the resident acuity level varies from facility to facility, which limits the utility of those data. However, a facility is not prevented from posting that information should they choose to do so. Therefore, in this final rule facilities have been given discretion with respect to the manner in which the nurse staffing and census data are displayed, provided that the required information is displayed in a uniform manner in a clearly visible place.

Comment: Some commenters stated the forms should include the names of each staff member at work during the shift.

Response: We appreciate the comment but do not believe that facilities should be required to post names of staff. Such a requirement would increase the paperwork and recordkeeping burden on SNFs and NFs without serving the purpose of making staff level information available. We believe collecting and updating staff data would be more time consuming. In this final rule, facilities have been given discretion to create their own document that may include more information than the mandated data.

Comment: Some commenters stated that the nurse staffing form should include the name and signature of the person who completes it, so that the public knows to whom questions should be directed.

Response: Facilities may wish to include contact information for someone who can answer questions. (This is likely to be the nursing supervisor on each shift, not necessarily the person who completed the information that is posted.) Facilities certainly may post information that is not required under this final rule. However, in this final rule, to minimize the burden of these requirements, we are not specifically requiring that facilities include that information.

3. Impact of the Requirements on Facilities

Comment: Many commenters expressed their concern that the process of collecting and posting of data will take nursing staff away from resident care.

Response: We appreciate the commenters' concerns. However, this final rule does not require that nursing staff complete and update this information, and we do not expect that preparing and posting the information will take much time. Clerical staff should be able to prepare and post the data quickly. Therefore, we are not requiring specific personnel to collect, verify, or post the data that have to be displayed daily.

4. Clarification of Terms

Comment: Some commenters were not sure how to determine which nursing staff should be included under section 941 of BIPA. They asked for clarification of the meaning of "directly responsible for resident care."

Response: In this final rule, we clarify the term "directly responsible for resident care" to mean that an individual is providing direct care to

residents or is directly responsible for care provided to residents. Providing direct care means that an individual has responsibility for the residents' total care or some aspect of the residents' care. Resident contact is an intrinsic part of direct care. "Directly responsible for resident care" includes, but is not limited to, such activities as assisting with activities of daily living (ADLs), performing gastro-intestinal feeds, giving medications, supervising the care given by CNAs, and performing nursing assessments to admit residents or notify physicians about a change in condition.

For example, when an RN is assigned to submit MDS data to a State agency for the day, that RN would not be regarded as providing direct care. However, if the same RN is assigned to the unit for providing resident care, then the hours worked by the RN in the unit would be included in the posted data. Therefore, in this final rule, we require only the data related to the number of direct care staff on each shift be posted.

5. Survey Issues

Comment: Many commenters stated that this data collection is a redundant process as the facilities already collect and report those data to surveyors.

Response: We are aware that facilities are required to provide information, including the actual number of direct care staff and direct care hours worked to us. Therefore, this final rule codifies section 941 of BIPA, which specifically requires the posting of nurse staffing information. The purpose of this final regulation is to make the data available to the public on a daily basis. Facilities should be able to reduce the burden by providing surveyors with the staffing level data they collect and post every day for families and the public. This would eliminate the need to collect the data twice.

Comment: Many commenters stated that CMS needs an enforcement mechanism to ensure accuracy of the data. Some commenters suggested that the data be transmitted to CMS for validation and others stated that surveyors must validate it. Other commenters stated that the validation is much more reliable when family members or others who are in the facility visiting at a particular time check the validity of the posted data, as they can verify the number of staff working at a given time.

Response: As we discussed in the preamble of the February 27, 2004 proposed rule, we would expect facilities to retain this information in order to be able to produce it if requested by a State Agency, the public, or CMS. While surveyors are aware of

the nurse staff posting requirements and can check for compliance at any time and report their findings to us, we do not currently require them to do so. (We are currently working to update nursing home survey requirements and revise the State Operations Manual (SOM) to provide additional guidance for surveyors and facilities.) Sending the information to us would not serve the purpose of validating the accuracy of the displayed information. Family members, ombudsmen, and others visiting the facilities will be able to verify the accuracy of the data posted, as they can check the number of nursing staff in realtime.

6. Resident Census Data

We proposed at § 483.30(e)(1)(ii) that SNFs and NFs determine or verify the resident census on a daily basis. Forty percent of the comments we received included a comment about posting of census data.

Comment: Many commenters supported the presentation of the census data on the staffing form.

Response: We appreciate your comments and agree that providing resident census data gives families and residents a frame of reference by which they can view the nurse-staffing level data. The number of nursing staff alone, without the census data, may not be meaningful. Census information provides a basis for inferring the number of nursing hours available to residents. In this final rule, we require that census data be posted daily.

Comment: Some commenters did not support the posting of census data and stated that it is of little value if staffing ratio or acuity of the resident population is not captured.

Response: Although we do not require that resident acuity level be posted, we believe it is important for consumers to have information about the number of residents in the facility to provide a context for understanding of the nurse-staffing data. Facilities that have been posting nurse staffing information since BIPA was implemented report that posting staff data has helped them, as it has addressed families' questions regarding the number of staff working at a given time. Acuity levels across facilities vary tremendously, and currently there are no generally accepted standard measures. Additionally, requiring the posting of this information is beyond this scope of the statute. Therefore, in this final rule, we require census data to be posted daily.

B. Form Use and Posting Requirements, Proposed § 483.30(e)(2)

We proposed at § 483.30(e)(2)(i) to require SNFs and NFs to use a CMS-specified form (Daily Nurse Staffing Form) to enter the information specified in paragraph (e)(1) of this section, and we proposed at § 483.30(e)(2)(ii) to require that the completed Daily Nurse Staffing Form be posted in a prominent place readily accessible to residents and visitors.

Approximately 90 percent of commenters had comments concerning the proposed requirement for use of the CMS-specified form; about 30 percent of commenters had comments about where the form should be posted.

1. CMS-Specified Form

Comment: Many commenters expressed concerns that the CMS-specified form does not meet their facility's staffing patterns, and that the calculations would be very burdensome if a facility does not use standard 8-hour shifts or has overlapping shifts. Commenters stated that the nursing shortage has caused them to use 2-hour shifts and 4-hour shifts to help meet the needs of their residents. Others stated

that nurses may work 12 hours just on a weekend to cover the shortage in a facility. Commenters stated that alternate staffing patterns cannot be captured on the proposed CMS-specified form. Some commenters also stated that requiring the use of a CMS-specified form does not conform to the information in the December 24, 2003 CMS State agency directors' letter.

Response: After reviewing the comments on the proposed mandatory form, we reviewed the issues raised by the commenters and found that many facilities have non-standard or overlapping shifts. For example 1 unit within a facility may have 1 RN working 7 a.m. to 7 p.m., 1 LPN working 7 a.m. to 3 p.m., 1 LPN working 8 a.m. to 4 p.m., 2 CNAs working 6 a.m. to 2 p.m., 4 CNAs working 7 a.m. to 3 p.m., and 2 CNAs working 7 a.m. through 7 p.m. Overlapping shifts ensure that a unit has sufficient staffing available during the busiest times of the day, for example, giving medications, preparing end stage renal disease (ESRD) patients to be transported for dialysis, or assisting residents at mealtimes. To address these varied staffing patterns, many facilities have developed their own forms to

display nurse staffing data and have found their own forms to be useful and informative.

Therefore, we have concluded that facilities should have the flexibility to develop their own documents for displaying the required information. Note that in the context of this final rule, we are using the term "document" to refer to the medium a facility may use to display nurse staffing information. The "document" may be a form or a spreadsheet, as long as all the required information is displayed in a clearly visible place. Further, the information on the document should be displayed in a uniform manner and presented in a clear and readable format. If requested, hard copies of the document must be made available to families and the public, as specified in § 483.30(e)(3)(i) of the proposed rule and § 483.30(e)(3) of this final rule.

The following is an example of one method for displaying nurse staffing information, using the information for one shift in a 24-hour period.

Name of the Facility:

Sample Nursing Home

Date: January 24, 2005

RESIDENT CENSUS AT THE START OF THE SHIFT: 88

| Shift | Category of staff | | Actual hours worked | Staffing total |
|--------------------|--------------------|----------------------------|-----------------------------------------------------------------------|--------------------|
| 7 a.m.–3 p.m. | Licensed | RN | 1 RN 7 a.m.–3 p.m. 2 RN 7 a.m.–11 a.m. 1 RN 11 a.m.–3 p.m. | 2.5 RNs. |
| | Non-Licensed | LPN/LVN CNA | 2 LPN 7 a.m.–3 p.m. 5 CNA 7 a.m.–3 p.m. | 2 LPNs. 5 CNAs. |
| 3 p.m.–11 p.m. | | | | |

2. Time Frame for Posting Information

Comment: Several commenters strongly opposed the proposal to delay calculating and posting nurse staffing data until the end of the shift. Commenters stated that data posted at the end of a shift are not of any use to resident families since it is after the fact. Some commenters pointed out that CMS agreed to the form being posted closer to the beginning of the shift in the December 24, 2003 State Agency Directors' letter.

Response: We agree that it is preferable for families and visitors to have the opportunity to view nurse-staffing data that reflects the staffing level at the time they are visiting the facility. Therefore, in this final rule, we are requiring facilities to post the information at the beginning of the shift. If any changes to the information posted are needed, they must be made as soon as possible.

Comment: Some commenters stated that the staffing sheet should show the staffing levels for the entire day, not just for one shift at a time.

Response: We agree families may be interested in knowing the staffing levels for the entire 24-period, rather than staffing levels for a single shift. However, it is also important to have accurate and updated information posted each shift. If families are interested in staffing levels for other shifts, they can ask to see data from those shifts.

Comment: One commenter expressed concern regarding identifying the first shift of the day. The commenter pointed out that a day starts after midnight; therefore, the night shift would be the first shift.

Response: Standard practice in most facilities is to consider the start of the day as the morning shift. However, there are variations in shifts among facilities. Some have night shifts starting at 10

p.m.; some at 11 p.m.; and some at 12 midnight. Additionally, the length of shifts vary among facilities. Some have 12-hour shifts and others 8-hour or even 4-hour shifts. While we are requiring uniformity in the displaying of the nurse-staffing level data for each shift, we are providing facilities with the flexibility to identify the shift breakdowns so the 24-hour staffing coverage can be determined in an accurate manner.

Comment: Many commenters stated that we should require that the staffing form be posted within 1 hour of the start of the shift; others suggested 2 hours.

Response: Although we are requiring that facilities post nurse staffing data at the beginning of the facility-specified shift, we do not believe it is necessary to dictate a particular time frame. Staffing levels may change unexpectedly, and we believe facilities should have the flexibility to ensure the

accuracy of the information before posting it.

Comment: Some commenters asked, "which census should be recorded, the census at midnight or the average census for the day?"

Response: The facility must post the census at the beginning of each shift. For example, the 7am to 3pm shift would post the census at 7am and so forth. In most facilities, the census data can be obtained from the shift report that nursing supervisors give to the next shift.

3. Clarification of Terms

Comment: Some commenters stated that the term "uniform manner" needs to be clarified, referring to the requirement that the information must be displayed in a uniform manner.

Response: "Uniform manner" means that certain required information must be displayed on or in a document of the facility's choosing in a format that assures the information can be read and clearly understood by the reader. The required information includes: (1) The name of the facility; (2) the date, (3) the resident census; (4) each facility shift for a 24 hour period; and (5) the specific hours worked, per shift, aggregated by category (registered nurses, licensed practical nurses or licensed vocational nurses (as the term(s) are defined under State law), and certified nurse aides).

For example: Three RNs worked for 4 hours each during an 8-hour shift, which started at 7 a.m. and ended at 3 p.m. Two of the RNs worked from 7 a.m. to 11 p.m., and one RN worked from 11 a.m. to 3 p.m. The facility's posting would show the shift (7 a.m. to 3 p.m.), the specific work hours (2 RNs from 7 a.m. through 11 p.m., and 1 RN from 11 a.m. through 3 p.m.), and the total number of RNs on duty during the shift (1.5). Note that although 3 RNs worked for some part of the shift, the total number displayed would be 1.5 because each RN worked for only half the 8-hour shift. The total number of RNs would be 3 only if all 3 RNs worked for the entire 8-hour shift.

The data should be updated at the beginning of every shift to reflect actual hours worked by registered nurses, licensed practical nurses, and nurse aides during the facility-identified shift in question and the total hours worked. The document on which the information is displayed should be clear and readable to residents and visitors.

The facilities have discretion with respect to displaying the nurse staffing and census data provided the information is in a clearly visible place and contains the required data elements.

4. Location of Form

Comment: Some commenters stated that the daily nurse staffing form should be posted on each unit.

Response: The facilities can choose to post information on each unit. We require that the nurse staffing information be posted in a visible and easily accessible area that is common to visitors and residents. If a facility posts the information on each unit, for just that unit, we would still expect all nurse staffing information to be posted in a visible and easily accessible common area.

Comment: Many commenters voiced their support for the requirement that the information is to be posted in a prominent place readily accessible to residents and visitors.

Response: We appreciate the support and agree that it is important for visitors and residents to be able to locate the information. Therefore, in this final rule, we require that the data be displayed in a clear and readable manner and be posted in a prominent place that is readily accessible to residents and visitors.

5. Format and Instructions

Comment: Some commenters stated that CMS needs to mandate the size of the paper or the size of the font to ensure that the form is readable.

Response: We are requiring facilities to display the information in a clear and readable manner. Facilities are free to use the paper and font they choose, as long as the information is displayed in a manner that meets these requirements. We believe facilities should have the flexibility to determine how best to display the information so that it is clear and readable. Therefore, in this final rule, we require that the data be displayed in a clear and readable manner.

Comment: Some commenters wanted more precise instructions for completing the required nurse staffing data.

Response: As discussed earlier, after reviewing the comments on the feasibility of using a standardized form regarding variations in shifts and staffing patterns, we have concluded that facilities must have the flexibility to capture daily nurse staffing data. This final rule does not prevent facilities from providing additional data.

C. Public Access and Data Retention Requirements, Proposed § 483.30(e)(3)

We proposed public access and data retention requirements at § 483.30(e)(3). Forty percent of the commenters had a comment about the proposed access requirements at § 483.30(e)(3)(i) that

would require SNFs and NFs to make the Daily Nurse Staffing Form(s) available to the public upon request. Sixty percent of the comments received included a comment about the proposed data retention requirements.

Comment: A few commenters agreed with the proposed requirement and suggested that facilities keep the forms in a notebook at the front desk so the public would have easy access to them. The commenters further stated that both oral and written requests to see the forms should be honored; records should be provided within 24 hours of the request; and records should be copied at costs not to exceed community photocopying standards and the actual cost of clerical time to copy the documents.

Response: Facilities have the flexibility to decide how to make the documents accessible to the public. In this final rule, we require that upon oral or written request, facilities must make the nurse staffing data available to the public for review. Furthermore, we require that facilities must provide, as requested, photocopies of the documents at a cost not to exceed the community standard.

This requirement is similar to the current requirements at 42 CFR 483.10(b)(2) that the resident or his or her legal representative has the right—(i) Upon an oral or written request, to access all records pertaining to himself or herself including current clinical records within 24 hours (excluding weekends and holidays); and (ii) After receipt of his or her records for inspection, to purchase at a cost not to exceed the community standards, photocopies of their records or any portion of them upon request after a 2 working days advance notice to the facility.

We proposed that the Daily Nurse Staffing Form(s) be maintained for a minimum of 3 years, or as required by State law, whichever is greater. It is our expectation that a SNF or NF will retain this information in keeping with standard business practices and be able to produce it if requested by the State Agency or the public.

Comment: A few commenters agreed with the proposed requirement that the forms should be retained for 3 years or as required by State law, whichever is greater. However, many other commenters stated that a requirement to maintain records for 3 years would be burdensome, unnecessary, and costly in terms of wasted time, paper, storage space, and personnel. One commenter suggested reducing the requirement to 1 year or deleting it altogether. Another commenter suggested retaining the

records only until the next certification survey.

Response: We understand the commenters' concerns and have concluded that it is not beneficial for facilities to retain the nurse staffing records for 3 years. Therefore in this final rule, we are requiring facilities to retain nurse staffing data for only 18 months. Since nursing home surveys generally are conducted every 9 to 15 months, retaining the data for 18 months ensures their availability to surveyors. It also ensures that records are available for a reasonable period of time if residents or the public want to see them.

Comment: Some commenters stated that maintaining the nurse staffing data are redundant, since staffing schedules, pay roll, and other data typically maintained by facilities would provide the same information.

Response: We understand that facilities keep certain records that would contain the same information. However, this information is not maintained in a format that would enable families and the public to determine staffing levels across the facility on a given day or days. The data, as displayed, are different from the data acquired from payroll records, as payroll records contain only the hours each staff person worked in a given pay period, not whether the staff person provided direct care to residents or performed some other duty, such as coordinating MDS data. Furthermore, section 941 of BIPA mandates that facilities post nurse staffing information daily and make the posted information available to the public. Therefore, in this final rule, we require the facilities to post daily nurse staffing data for specified direct care nursing staff.

Comment: A commenter stated that the retention of records is not necessary since the information will not be submitted to an agency.

Response: The commenter is correct that we are not requiring data to be submitted to an agency; however, the statute requires the information be available to the public. Therefore, in this final rule, we require that nurse staffing data to be maintained for a minimum of 18 months which will also cover the annual survey period.

V. General Comments on the Proposed Rule

A number of commenters included discussions on topics related to nurse staffing, but not specifically proposed in the February 27, 2004 rule. The comments that follow were considered out of scope and as such were not part of our consideration in this final rule.

Comment: Several commenters stated that the BIPA requirements are helpful, although some commenters expressed concerns related to specific implementation requirements. One commenter reported that posting of the nurse staffing form in their facility for the past year has posed no problem at all. The commenter stated that it has even helped the facility resolve certain issues with family members.

Response: We appreciate the support; it is encouraging to know that facilities have been able to comply with our requirements and have found the display of the information to be helpful.

Comment: A few commenters wanted to know if these requirements apply to swing beds and hospitals.

Response: The requirements in this proposed rule apply only to nursing facilities, that is, SNFs and NFs.

Comment: One commenter stated that "a better way would be to require a resident's family member or guardian to visit the resident a minimum of once per week to observe the care of the resident and report any concerns to the facility management or, if unresolved, to a liaison to the government."

Response: Family members of residents are free to visit and observe the care given to the resident and report concerns to the facility, the State survey agency or the ombudsman. Requiring a resident's family member or guardian to visit the resident a minimum of once per week is beyond the scope of this final rule.

Comment: One commenter interpreted the preamble language that discusses the Nursing Home Quality Initiative as being a part of the proposed requirement. The commenter stated that the background information contradicts itself. The referenced section states, "Although staffing is not an explicit part of this initiative * * *" and "Based upon these studies, at this time, we do not believe sufficient evidence exists to warrant minimum nurse staffing ratio requirements."

Response: We would like to clarify that the "initiative" that is being discussed is the Nursing Home Quality Initiative and is not part of this final regulation. The preamble to the February 27, 2004 proposed rule states that we do not believe sufficient evidence exists to warrant minimum nurse staffing ratio requirements based on the study discussed. In our discussion of the value of the data required by this regulation, for example we noted, "Consistent with our November 2002 initiative to disseminate and publish reliable information on nursing home quality for Medicare and Medicaid beneficiaries, our objective is

to make staffing information available to the public to assist them in making informed decisions when choosing health care providers."

Comment: One commenter stated that requiring a nursing home to post the FTE and census data does not ensure nurse staffing levels will increase due to the market demand created by an informed public.

Response: We agree with the comment. Clearly, providing information to consumers about nurse staffing levels will not be sufficient to increase staffing levels. However, the intent of the requirements in this rule is to make staffing information available to residents and visitors at any given time.

1. Staffing Ratios

Comment: A few commenters stated that they were not in agreement with the contention that the Minimum Staffing Ratios in Nursing Home Phase I and Phase II fail to provide sufficient evidence to warrant minimum staffing ratio requirements.

Response: We appreciate the comments. However, we do not believe sufficient evidence exists to warrant minimum nurse staffing ratio requirements. There exists a great variation in the population served in nursing facilities, not just in the acuity level but also in the experience and credentials of staff. Additionally, requiring a specific nurse-to-resident ratio is beyond the scope of this final rule.

Comment: Some commenters urged CMS to release Abt Associates' recommendations to the public as soon as they are made so that the facilities can implement them in a timely manner.

Response: We appreciate the comments and will share them with our staff overseeing the Abt Associate study. The study is mentioned in the preamble of this final rule as it is related to staffing, but it is not directly related to these requirements as this rule codifies the BIPA 941 requirements.

Comment: Some commenters suggested that it would be a good idea to use the data in the Online Survey Certification and Reporting (OSCAR), which is derived from the 671 Form that the State survey agency uses when conducting facility surveys.

Response: We agree that the data can be used on the 671 Form. The facilities have the flexibility to use the data to reduce the burden of collection when the same data are to be used in other documents or reports. However, this rule is focused on codifying the BIPA 941 requirements.

VI. Provisions of the Final Rule

Section 483.30(e)(1) Information Requirements

This final rule requires SNFs and NFs to post, for each shift, on a daily basis the actual hours of and total number of hours worked by, licensed and unlicensed nursing staff who are directly responsible for resident care on each shift in the facility. In the February 27, 2004 proposed rule, we noted that neither section 1819(b)(8) of the Act nor section 1919(b)(8) of the Act specifies what constitutes licensed and unlicensed nursing staff. In this final rule, we interpret the term "licensed nursing staff" to mean registered nurses (RNs); licensed practical nurses (LPNs) or licensed vocational nurses (LVNs), and "unlicensed nursing staff" to mean certified nurse aides (CNAs), as defined under State law.

As discussed in section IV of the preamble of this final rule, we use the term "directly responsible for resident care" to mean that an individual is providing direct care to residents or is supervising those who provide direct care to residents and has the responsibility for residents' total care or some aspect of residents' care. Resident contact is the intrinsic part of direct care. "Directly responsible for resident care" includes, but is not limited to, those activities as assisting with activities of daily living (ADLs), performing gastro-intestinal feeds, giving medications, supervising the care given by CNAs, and performing nursing assessments to admit residents or notifying physicians about a change in condition.

Therefore, in this final rule, we require only nursing staff assigned and responsible for direct resident care under the categories of RN, LPN/LVN and CNA to be captured in the daily nurse staffing data. This final rule does not require data collection on other staff, volunteers, or feeding assistants. This final rule provides the flexibility to facilities to post more data if they choose to do so to fit the individual facility needs.

In addition, SNFs and NFs must post the resident facility census and update the data as needed.

Section 483.30(e)(1) Required Data Elements

On a daily basis, at the beginning of the shift, NFs and SNFs must post the following data:

1. Facility Name
2. Current Date
3. Resident Census
4. Facility-specific shifts for the 24-hour period, (for example 7 a.m.

through 3 p.m., 3 p.m. through 11 p.m., and 11 p.m. to 7 a.m.).

5. Categories of nursing staff employed or contracted by the facility, per shift.

6. Actual time worked for the specified categories of nursing staff, including split shifts.

7. Number of nursing staff working per shift

Section 483.30(e)(2) Posting Requirements

In the February 27, 2004 proposed rule, we proposed that SNFs and NFs post, on a CMS-specified form, information on a daily basis that includes the date, the name of the facility, the total number of licensed and unlicensed nursing staff who are directly responsible for resident care and the specific hours they work. However, in this final rule, we deleted the required use of a CMS-specific form. Nurse staffing data must be displayed in a clear and readable format and be posted in a prominent place readily accessible to residents and visitors. However, we are not mandating a specific form be used, and we are providing facilities the flexibility to use the form or format which best meets their needs.

We proposed requiring facilities to post a CMS-specified form at the end of the shift. However, this final rule requires facilities to post nurse staffing information at the beginning of the shift. In addition, we do not require facilities to post the number of FTEs on the form because we determined, based on public comments received on the February 27, 2004 proposed rule, that the process of calculating FTEs would be burdensome for facilities and the data collected might not be comprehensible to residents and visitors.

Section 483.30(e)(3) Public Access and Data Retention Requirements

SNFs and NFs must make their daily nurse staffing records available to the public for review at a cost not to exceed the community standard.

Section 483.30(e)(4) Facility Data Retention Requirements

SNFs and NFs must maintain nurse staffing records for 18 months or as required by State law, whichever is greater. This covers the annual survey period and gives the surveyors the opportunity to verify the records if they choose to do so.

VII. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-

day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Below is a summary of the information collection requirements in this regulation:

Section 483.30 Nursing Services

In summary, section 483.30(e)(2) requires that long-term care facilities use the CMS-specified form (Daily Nurse Staffing Form) to enter the information specified in paragraph (e)(1) of this section; and to post the completed Daily Nurse Staffing Form in a prominent place readily accessible to residents and visitors.

The burden associated with this requirement is the time and effort it will take for the facility to complete the form and post it. Currently, there are 16,473 participating nursing homes. We estimate a total of 5 minutes to fill in the information per day. We further estimate that it will require facilities 30.42 hours each on an annual basis to meet these collection requirements.

Section 483.30(e)(3) requires the facility to make the information required in § 483.30(e)(1)–(2) available to the public and to maintain documentation.

The burden associated with this requirement will be the time it will take for the facility to retrieve the documented information being requested. We believe this requirement to be usual and customary business practice; therefore, the burden for this collection requirement is exempt under 5 CFR 1320.3(b)(2) and 5 CFR 1320.3(b)(3).

VIII. Regulatory Impact

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of

the Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), and Executive Order 13132. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any one year). This rule does not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. According to the Small Business Administration (SBA) approximately 53 percent of all SNFs and NFs generate revenues of \$11.5 million or less in a one year period, and are considered small entities. Individuals and States are not included in the definition of small entities. The only burden associated with this rule is the information collection burden associated with collecting and posting nurse staffing data. We are not preparing an analysis for the RFA because we have determined that this rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals because it applies only to SNFs and NFs.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of \$110 million. The only burden associated with this rule is the information collection burden associated with collecting and posting

nurse staffing data. This final rule will have no consequential effect on the governments mentioned or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation will not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 483

Grant programs-health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR part 483 as follows:

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

■ 1. The authority citation for part 483 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 483.30 is amended by adding paragraph (e) to read as follows:

§ 483.30 Nursing services.

* * * * *

(e) *Nurse staffing information*—(1) *Data requirements.* The facility must post the following information on a daily basis:

- (i) Facility name.
- (ii) The current date.
- (iii) The total number and the actual hours worked by the following categories of licensed and unlicensed nursing staff directly responsible for resident care per shift:

- (A) Registered nurses.
- (B) Licensed practical nurses or licensed vocational nurses (as defined under State law).
- (C) Certified nurse aides.
- (iv) Resident census.

(2) *Posting requirements.* (i) The facility must post the nurse staffing data specified in paragraph (e)(1) of this section on a daily basis at the beginning of each shift.

- (ii) Data must be posted as follows:

(A) Clear and readable format.

(B) In a prominent place readily accessible to residents and visitors.

(3) *Public access to posted nurse staffing data.* The facility must, upon oral or written request, make nurse staffing data available to the public for review at a cost not to exceed the community standard.

(4) *Facility data retention requirements.* The facility must maintain the posted daily nurse staffing data for a minimum of 18 months, or as required by State law, whichever is greater.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: April 21, 2005.

Mark B. McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Approved: June 16, 2005.

Michael O. Leavitt,

Secretary.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 622

[Docket No. 050729208-5267-02; I.D. 060805B]

RIN 0648-AP51

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Comprehensive Amendment to the Fishery Management Plans of the U.S. Caribbean

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement a comprehensive amendment prepared by the Caribbean Fishery Management Council (Council) to amend its Reef Fish, Spiny Lobster, Queen Conch, and Coral Fishery Management Plans (FMPs). The comprehensive amendment is designed to ensure the FMPs are fully compliant with the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This final rule redefines the fishery management units for the FMPs; establishes seasonal closures; imposes gear restrictions and requirements;