



Virginia Department of Planning and Budget **Economic Impact Analysis**

12 VAC 5-371 Regulations for the Licensure of Nursing Facilities
Virginia Department of Health
Town Hall Action/Stage: 5983 / 9667
December 29, 2022

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 19. The analysis presented below represents DPB's best estimate of these economic impacts.¹

Summary of the Proposed Amendments to Regulation

Pursuant to Chapters 712² and 772³ of the 2022 *Acts of Assembly*, the State Board of Health (Board) proposes to incorporate in this nursing home licensure regulation an exemption from the certificate of public need rules for facilities that may request a temporary increase in their bed capacity to respond to public health emergencies and to specify the information needed to evaluate such requests.

Background

Prior to the COVID-19 pandemic, Va. Code § 32.1-102.2.A.6 provided the Board or the Commissioner of Health with limited authority to grant an exemption from the requirement for a certificate of public need for a temporary increase in the total number of beds in an existing hospital or nursing home for no more than 30 days when a natural or man-made disaster has caused the evacuation of a hospital or nursing home and a public health emergency exists due to

¹ Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

² <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0712>

³ <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0772>

a shortage of hospital or nursing home beds. Va. Code § 32.1-127.B.24, which applies to hospital and nursing home licensure and inspection, provided the same authority to grant exemptions for licenses for temporary increases in bed capacity.

However, this authority was insufficient for the Board or the Commissioner to grant an exemption from the certificate of public need rules for a temporary increase in nursing home or hospital beds in order to respond to the COVID-19 pandemic. Instead, during the pandemic, the Virginia Department Health (VDH) utilized an alternative authorization process pursuant to Executive Orders 52 (2020), 84 (2022), 11 (2022), and 16 (2022). According to VDH, normal state controls (i.e. existing certificate of need and licensing statutes and regulations) on the hospital and nursing home bed inventory in the Commonwealth have proven to be too inflexible during certain public health emergencies where demand for beds outstrips both the existing inventory and the mandated processes by which additional inventory can be authorized.

In order to address these concerns, the 2022 General Assembly passed Chapters 712 and 772, which amended Va. Code §§ 32.1-102 and 32.1-127. This legislation requires the Board to amend its regulation about exemptions for certificates of public need and hospital and nursing home licenses for a temporary increase in the total number of beds in an existing hospital or nursing home to include “a temporary increase in the total number of beds resulting from the addition of beds at a temporary structure or satellite location operated by the hospital or nursing home, provided that the ability remains to safely staff services across the existing hospital or nursing home.” These Acts also allowed the exemption to be triggered by an emergency order pursuant to Va. Code § 32.1-13 or § 32.1-20 for the purpose of suppressing a nuisance dangerous to public health or a communicable, contagious, or infectious disease or other danger to the public life and health.⁴ Lastly, the duration of this exemption was amended to be either “a period of no more than the duration of the Commissioner's determination plus 30 days...when the Commissioner has determined that a natural or man-made disaster has caused the evacuation of a hospital or nursing home and that a public health emergency exists due to a shortage of hospital or nursing home beds” or “a period of no more than the duration of the emergency order entered pursuant to § 32.1-13 or § 32.1-20 plus 30 days.”

⁴ See <https://law.lis.virginia.gov/vacode/title32.1/chapter1/section32.1-13/> and <https://law.lis.virginia.gov/vacode/title32.1/chapter1/section32.1-20/>.

Consequently, the Board has initiated an action to implement the mandated changes in the certificate of public need regulations.⁵ However, this regulation on nursing home licensure must also be amended to reflect the same changes as licenses are issued for a specific capacity which may be temporarily increased as directed by the legislation.

In short, this regulatory action would amend this nursing home licensure regulation to align it with the legislation and with the proposed changes to the certificate of public need regulations in 12 VAC 5-220.

Estimated Benefits and Costs

The main impact of the proposed change is to amend the regulatory text to incorporate the Board's or the Commissioners authority and discretion to grant temporary nursing home bed capacity and collect the information required for temporary bed increase requests as per the certificate of public need regulations so that there is consistency among regulations as well as the legislation.

As with the regulatory action to amend the certificate of public need regulations, the main benefit of the changes proposed here would be to implement a legislative mandate to create an expeditious process by which hospitals and nursing homes can request temporary beds in responding to public health emergencies while ensuring that the Commissioner and VDH have sufficient information to take action on the request. There does not appear to be any significant costs associated with the proposed regulatory changes as the authority and discretion provided to the Commissioner or the Board to grant exemption from the licensing rules for a temporary bed capacity are mandated by the legislation and the information to be provided with an application is the same as what had been requested in the process utilized under executive orders.

Businesses and Other Entities Affected

The proposed changes apply to existing nursing homes. According to VDH, there are 287 nursing homes. Between 2020 and 2022, 57 facilities (49 percent of all inpatient hospitals and one percent of all nursing homes) added over 3,700 temporary beds under the executive orders in response to COVID-19 pandemic. None of the affected entities appear to be disproportionately affected.

⁵ <https://townhall.virginia.gov/L/ViewAction.cfm?actionid=5982>

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.⁶ An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. As noted above, the impact of the proposed changes is to align the regulatory text in this licensure regulation with other regulations and Va. Code. Thus, no adverse impact is indicated.

Small Businesses⁷ Affected:⁸

VDH does not have any data to estimate how many nursing homes may, if any, meet the definition of “small business.” However, the proposed amendments do not appear to adversely affect small businesses.

Localities⁹ Affected¹⁰

The County of Bedford operates a nursing home. However, the proposed amendments do not appear to introduce costs for local governments.

Projected Impact on Employment

The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property

No impact on the use and value of private property or real estate development costs is expected from promulgation of the proposed regulatory amendments.

⁶ Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define “adverse impact,” state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

⁷ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

⁸ If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

⁹ “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

¹⁰ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.