



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

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**12 VAC 5-381 Home Care Organization Regulations**  
**Virginia Department of Health**  
**Town Hall Action/Stage: 5783 / 9969**  
July 19, 2023

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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 the potential economic impacts as of the date of this analysis.<sup>1</sup>

## **Summary of the Proposed Amendments to Regulation**

Pursuant to Chapter 470 of the 2021 Acts of Assembly, Special Session I (legislation)<sup>2</sup>, the State Board of Health (Board) proposes to 1) allow the use of interactive audio or video technology for supervision of home care attendants who provide personal care services. Additionally, the Board, at its discretion, proposes to 2) allow licensed practical nurses (LPNs) and registered nurses (RNs) to provide this legislatively mandated remote supervision, 3) set the frequency of contact for such supervision to every 15 days for audio and every 30 days for visual contact, 4) establish rules to safeguard privacy against the risks of using of audio or video technology as part of supervision, 5) allow LPNs to provide in-home supervision in addition to RNs, and 6) increase the frequency of in-home supervision from once at least every 90 days to once at least every 60 days.

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<sup>1</sup> 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.

<sup>2</sup> <https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0470&212+ful+CHAP0470>

## **Background**

Home care organizations (HCOs) provide in-home personal care or skilled care services to their clients (for personal care) or patients (for skilled care). The substantive changes taking place in this action pertain to personal care services specifically. Currently, these services are provided by an attendant at a client's residence according to a plan of care that is developed by an RN. Furthermore, attendants must be supervised in person at least once every 90 days by an RN in the client's home. The RN develops the plan of care at the beginning of the service following an in-home, on-site visit which may count as the first in-home on-site supervision of the attendant; this is to be followed by three more in-home assessments in a given year (i.e., one plus three supervisions).

The 2021 legislation directed the Board to promulgate regulations for HCOs that govern the delivery of personal care services to allow supervision of home care attendants providing personal care services by a licensed nurse through use of interactive audio or video technology. One of the proposed changes would implement that mandate. The legislation does not specify what kind of nurses could provide supervision beyond requiring that it be by "a licensed nurse," does not specify any frequency for such remote supervision, and does not include any language regarding privacy issues surrounding such supervision.

The Board has chosen to exercise discretion by setting parameters for these unaddressed aspects of remote supervision on its own. The Board thus proposes to allow both LPNs and RNs to provide remote supervision, with a required contact with the attendant every 15 days for audio and every 30 days for visual contact, and to also require client consent and disclosures for remote supervision.

Finally, the Board proposes to allow LPNs to provide in-home supervision in addition to RNs, and to increase the frequency of in-home on-site supervision from at least once every 90 days (i.e., one plus three supervisions/year) to at least once every 60 days (i.e., one plus five supervisions/year) to provide consistency with federal requirements for home health agencies.

## **Estimated Benefits and Costs**

The proposed regulation would provide discretion to the RN who is tasked with developing the plan of care on whether supervision should be in-person at the client's residence or provided remotely. The main advantage of the legislatively mandated remote supervision of

personal care attendants option compared to in-home supervision is avoidance of travel time and expenses involved in the latter. Any savings from travel times would help the health care workforce that the Board believes is under strain both statewide and nationally. However, while HCOs may save on travel costs with remote supervision, if they choose this method they may also have to expend capital on remote supervision technologies and ongoing costs in support of those technologies.

The proposed frequency of remote supervision is least once every 15 days for audio and at least once every 30 days for video communication. However, the Virginia Department of Health (VDH) does not have data on the current average or median length of remote supervision. Therefore, whether more frequent supervision required for remote contact would result in more time in total per case than the total time currently spent under on-site supervision (excluding the travel time) is not known. Moreover, the fact that LPNs would also be allowed to provide supervision in addition to the RNs, should reduce costs because LPN compensation is lower than RN compensation on average (\$35.02/hour vs \$51.99/hour).<sup>3</sup> Allowing LPNs to supervise would also effectively expand the pool of nurses who can provide that service. In 2022, there were 119,222 RNs and 28,789 LPNs licensed in Virginia.<sup>4</sup>

Remote supervision may also impact patient care. VDH believes that requiring supervision to be more frequent when supervision is performed remotely (i.e., through audio or visual means) will ensure that the lack of in-person visitation will not compromise client or patient health and safety. Also, the RN who develops the plan of care is required to provide justification if remote supervision is to be utilized. Moreover, the client may refuse remote supervision or withdraw his or her previous permission. These factors should mitigate any potential negative impact on patient care from remote supervision.

In summary, remote supervision would provide flexibility to the HCOs in complying with supervision requirements, but the plan of care would have to provide a rationale for its use and the client may refuse it. Thus, remote supervision would likely be utilized when it benefits all parties involved.

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<sup>3</sup> Source VDH.

<sup>4</sup> <http://www.dhp.virginia.gov/media/dhpweb/docs/hwdc/nurse/0001RN20221.pdf>  
<http://www.dhp.virginia.gov/media/dhpweb/docs/hwdc/nurse/0002LPN2022.pdf>

The proposed regulation would also increase the frequency of in-home, on-site supervision from at least once every 90 days (i.e., one plus three supervisions/year) to at least once every 60 days (i.e., one plus five supervisions/year) to be consistent with the federal requirements for home health agencies. This change would add two additional visits/year. Consequently, there would be more travel time and expenses plus the cost for the nurse's time. As mentioned before, VDH does not have information on travel time and expenses. However, assuming that each reassessment would take 45 minutes per client,<sup>5</sup> labor costs per case would increase by \$53 to \$78 per year,<sup>6</sup> for the additional two visits, depending on the type of nurse. On the other hand, more frequent visits may improve patient care. Moreover, this change would bring HCOs into alignment with federal requirements for home health agencies. VDH believes aligning reassessment frequency with federal requirements would make it easier for HCOs to either acquire federal certification as a home health agency or to become accredited - either option would then allow them to apply for an exemption from licensure and ongoing licensure fees.

Finally, the proposed regulation would establish new requirements in order to strike a balance between permitting remote supervision and the privacy concerns that may arise from it. According to the Board, remote interactive supervision requires audio and video technology that typically has recording capabilities. As a result, the Board recognizes that clients and patients may be concerned if they believe that the use of remote supervision could compromise their privacy. The Board's view is that while a degree of privacy compromise already occurs when in-person on-site supervision takes place, the compromise is limited to those persons physically at a client's or patient's residence. In contrast, remote supervision may potentially increase these privacy concerns. The Board sought to address any potential privacy concerns by allowing the client or patient to either refuse remote supervision or to withdraw consent for remote supervision without fear of termination from care, and by requiring separate consent for any recording, storage, and other non-care-related use of remote supervision.

However, the regulatory language as presently drafted is unclear and raises some questions about how these new requirements will be implemented. For example, the regulation

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<sup>5</sup> Ibid.

<sup>6</sup> \$35.02 LPN hourly wage x 0.75 hour \* 2 visits = \$52.53, \$51.99 RN hourly wage \* 0.75 hour \* 2 visits = \$77.98

does not indicate whether the individual receiving services has a right to obtain a copy of the recording; whether consent to “recording” also implies “storage” since, by definition, the recording has to be stored for a minimum amount of time; whether there is a recordkeeping requirement specifying the length of storage for recordings; the proper methods of both storage and disposal of the recordings; whether the person providing the services (the attendant) can refuse to be recorded is unclear.

The lack of clarity on these issues may create uncertainty for all parties involved. The required additional consent for remote supervision, and a separate one for recordings, would also add to HCOs’ administrative costs. Perhaps more importantly, HCOs and information gathered or generated during current in-home supervisions may already be subject to a section of the regulation (12VAC5-381-230.C.2) that requires each client to be “[a]ssured *confidential treatment of his medical and financial records as provided by law.*” Accordingly, if the medical records created during remote supervision are already protected under this provision, then the new language addressing consent may duplicate language already in the regulation.

### **Businesses and Other Entities Affected**

The proposed regulation applies to 1,800 HCOs<sup>7</sup> that offer personal care services and their customers. VDH does not have sufficient data to estimate how many clients receive personal care services from an HCO. No affected entity appears to be disproportionately affected.

The Code of Virginia requires the DPB to assess whether an adverse impact may result from the proposed regulation.<sup>8</sup> 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 remote supervision is an additional method of supervision that is optionally available to HCOs, and the clients can refuse it. Thus, remote supervision is unlikely to make any involved party worse off.

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<sup>7</sup> Data source: VDH

<sup>8</sup> 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.

The proposal to allow LPNs to perform in-home supervision could provide some cost savings to HCOs due to relatively lower wages, but the increase in the frequency for supervision will likely increase the compliance costs. So, the net effect of this change on HCOs is not known.

However, the substitution of LPNs for RNs in supervision would generate additional demand for LPNs, but have a negative impact on demand for RNs. Moreover, since the language proposed to address the privacy concerns is not clear and may thus introduce uncertainty for the HCOs and their clients (and even for the Board when enforcing this regulation), and may duplicate existing protections, an adverse impact on RNs, HCOs, and clients appears to be indicated.

### **Small Businesses<sup>9</sup> Affected:<sup>10</sup>**

Based on anecdotal evidence, VDH believes nearly all HCOs would be small businesses. As discussed above, an adverse impact on HCOs is indicated due to the addition of new requirements designed to address privacy concerns. Thus, those proposed amendments appear to adversely affect small businesses.

#### Types and Estimated Number of Small Businesses Affected

Nearly all of 1,800 HCOs that offer personal care services are believed to be small businesses.

#### Costs and Other Effects

As noted above, the proposed language regarding privacy concerns raised by remote supervision is not clear and may duplicate existing protections in this regulation and in HIPAA. Since most of the HCOs are small businesses, an adverse impact on small businesses is indicated.

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<sup>9</sup> 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.”

<sup>10</sup> 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.

### Alternative Method that Minimizes Adverse Impact

DPB has investigated how the federal government and other states address remote supervision and similar issues, such as how electronic communications are incorporated into the meaning of face-to-face or telehealth services. The research reveals that generally the regulating entity amends the definition of supervision to include remote supervision.<sup>11</sup> That way, remote supervision while providing personal care services would become subject to the exact privacy standards as in-home supervision without needing any further language. DPB believes that such an alternative approach would improve clarity, eliminate uncertainty, eliminate unneeded consent forms, and shorten the length of the regulation.

### **Localities<sup>12</sup> Affected<sup>13</sup>**

The proposed amendments do not disproportionately affect particular localities or introduce costs for local government.

### **Projected Impact on Employment**

Allowing LPNs to supervise remotely in addition to RNs would shift some labor demand from RNs to LPNs. However, remote supervision would eliminate travel time involved in nurses' visits and reduce the demand for nurse labor, and more frequent in-home supervision would add to the demand. The net of these opposing two effects on total employment is not known.

### **Effects on the Use and Value of Private Property**

The proposed remote supervision would likely provide some cost savings to the HCOs, but increased frequency for supervision is estimated to add to the compliance costs. So, the net effect of this change on HCOs' profitability and consequently on their asset values is not known. No effect on real estate development costs is expected.

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<sup>11</sup> <https://codes.ohio.gov/ohio-administrative-code/rule-5160-46-04>,  
[https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-B/part-410/subpart-B/section-410.32#p-410.32\(b\)\(3\)\(ii\)](https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-B/part-410/subpart-B/section-410.32#p-410.32(b)(3)(ii)),  
<https://regs.health.ny.gov/content/section-942-supervision-and-scope-duties>,

Code of West Virginia 33-57-1(a)(6),  
Code of Kentucky 201-005-055,  
Code of Tennessee 56-7-1002.

<sup>12</sup> "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.

<sup>13</sup> § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.