



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: 6170/9898
July 14, 2023

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.¹

Summary of the Proposed Amendments to Regulation

The State Board of Health (Board) proposes to amend the regulation for the licensure of nursing facilities to conform to the Code of Virginia (Code) and implement multiple recent legislative mandates. The proposed changes would also group related requirements, remove outdated language, make certain terminology more consistent throughout the regulation, and update the text to reflect current practice.

Background

The proposed changes are primarily intended to implement the following legislative mandates, which the Virginia Department of Health (VDH) reports have largely been previously implemented in practice because statutory requirements apply even if a regulation has not yet been updated to reflect a particular mandate:

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.

- Chapter 72 of the 2021 Acts of Assembly, Special Session I, which prohibits discriminating against health insurance enrollees on the basis of the enrollee being a litigant or potential litigant due to a motor vehicle accident.² This mandate is already in effect.
- Chapters 10 and 11 of the 2020 Acts of Assembly, Special Session I, which require the Board to amend regulations governing nursing homes, certified nursing facilities, and hospices to require that, during a public health emergency related to COVID-19, each entity establish a protocol to allow each patient to receive visits, consistent with guidance from the Centers for Disease Control and Prevention (CDC) and as directed by the Centers for Medicare and Medicaid Services (CMS) and the Board.³ This action would newly require nursing facilities to establish such a protocol. However, facilities that are certified by CMS have likely already done this since it was a federal requirement prior to the enactment of the 2020 legislation.
- Chapter 829 of the 2020 Acts of Assembly, which updated the language in existing requirements for nursing homes and certified nursing facilities to register with the State Police to receive notice that person living in the same zip code are on the Sex Offenders and Crimes Against Minors (SOCAM) Registry and to verify whether a potential patient is required to register with the SOCAM Registry.⁴ Although this mandate is already in effect, this action would require nursing facilities to update their written policy on this subject.
- Chapters 1080 and 1081 of the 2020 Acts of Assembly, which prohibited balance billing by out-of-network providers.⁵ This mandate is already in effect.
- Chapter 1278 of the 2020 Acts of Assembly, which redefined and replaced occurrences of THC-A oil and cannabidiol oil with cannabis oil.⁶ This action would update the regulatory language to conform to statute.
- Chapters 177 and 222 of the 2005 Acts of Assembly, which directed the Board to add minimum design and construction guidelines for hospitals and nursing facilities in the regulations for licensure.⁷ The proposed changes in this action would replace references to

² See <https://townhall.virginia.gov/l/viewmandate.cfm?mandateid=1341>.

³ See <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=ch10>.

⁴ See <https://townhall.virginia.gov/l/viewmandate.cfm?mandateid=1343>.

⁵ See <https://townhall.virginia.gov/l/viewmandate.cfm?mandateid=1349>.

⁶ See <https://townhall.virginia.gov/l/viewmandate.cfm?mandateid=1350>.

⁷ See <https://townhall.virginia.gov/l/viewmandate.cfm?mandateid=1359>. This mandate was first implemented in 2005 (<https://register.dls.virginia.gov/vol22/iss07/v22i07.pdf>) to add the 2006 *Guidelines for Design and Construction of Hospital and Health Care Facilities* issued by the American Institute of Architects as minimum

the 2018 *Guidelines for Design and Construction of Residential Health, Care, and Support Facilities* with the 2022 edition and update the documents incorporated by reference. This change will only be binding for new license applications whose facility plans are dated after this regulatory action is effective.

- Chapter 762 of the 2004 Acts of Assembly, which requires certified nursing facilities and nursing homes to provide or arrange for the optional administration of annual influenza vaccines and the pneumococcal vaccination, in accordance with the CDC's most recent recommendations.⁸ This mandate is already in effect. The proposed changes in this action would update the language of the regulation to match current terminology (pneumonia to pneumococcal) and update the documents incorporated by reference with the most recent CDC guidelines.

Accordingly, the Board proposes to make a number of changes to the regulation. The most substantive changes are summarized below. The six sections indicated with an asterisk include changes that would implement a legislative mandate.

- Section 55 Plan of correction. This new section consolidates requirements currently found in other sections of the regulation, mainly sections 60 and 70. The proposed changes clearly specify the minimum elements of a plan of correction and add a 45-day timeline for submission and completion of a plan of correction. The Board's intent is to standardize the plan of correction process and make it more similar to the federal plan of correction process, so that the same requirements are applied across all facilities.⁹
- Sections 60 On-site inspections. This section would be renamed as "Inspection procedure." The proposed changes include adding language about frequency of inspections, which matches the current practice followed by VDH's Office of Licensure and Certification (OLC). The Board also proposes to add more details regarding the inspection process so that facilities know what to expect during an inspection.¹⁰

design standards. These standards are updated every four years and the regulation has been updated accordingly via exempt actions.

⁸ See <https://townhall.virginia.gov/l/viewmandate.cfm?mandateid=1351>. This mandate was first implemented in 2004 (<https://register.dls.virginia.gov/vol20/iss26/v20i26.pdf>) and incorporated the CDC's guidelines for these vaccines that were current at that time.

⁹ Agency Background Document (ABD), page 13. See https://townhall.virginia.gov/l/GetFile.cfm?File=58\6170\9898\AgencyStatement_VDH_9898_v3.pdf.

¹⁰ ABD, p. 15.

- Section 70 Complaint investigation. This section would be amended to include the factors taken into consideration by OLC in determining whether a complaint should be investigated. The proposed changes would give VDH flexibility in determining whether a complaint warrants an on-site inspection and allow them to make more effective use of agency resources.¹¹
- Section 90 Administrative sanctions.* This section would be renamed to “Disciplinary action,” and would incorporate statutory provisions about prohibited acts and disciplinary options available. Specifically, the proposed changes would implement the legislative mandates relating to prohibitions on balance billing and discriminating against health insurance enrollees on the basis of the enrollee being a litigant or potential litigant due to a motor vehicle accident.
- Section 100 Surrender of license. This section would be renamed to “Surrender of license; mid-term change of license.” This section specifies that a nursing facility must notify the OLC in writing 30 days in advance of implementing any change in the location, ownership, operator, or name of the nursing facility; change in the management contract or lease agreement to operate the nursing facility; change of services being provided, regardless of whether licensure is required for that service; and closure of the nursing facility. The current requirement only applies to a change in ownership and facility closure. The proposed changes would add that OLC shall determine if any of these changes affect the terms of the license or the continuing eligibility for a license, and that an inspector may inspect the facility during the process of evaluating a proposed change.
The proposed changes would also add stipulations that licenses cannot be transferred or assigned and that a change in the operator of the facility requires that a new license be issued. Further, if the nursing facility is closing, it shall notify resident, legal representatives, and the OLC at least seven days prior to closing where all clinical records are to be located following closure or cessation of operations.

¹¹ ABD, pp. 16-17. VDH reports that while the COVID-19 pandemic significantly altered the pattern of complaints for this facility type, they typically receive weekly complaints, some of which originate from the facilities themselves when they file self-report incidents. They also report that the timeline for resolving a complaint depends on how a complaint is triaged; it can be an immediate jeopardy complaint, a 10-day complaint, or a 180-day complaint.

- Section 110 Management and administration.* The main changes here would be to update references to the documents incorporated by reference to the most recent recommendations of the CDC’s Advisory Committee on Immunization Practices. These changes would continue to implement the 2004 legislative mandate mentioned previously.
- Section 150 Resident rights.* The proposed changes would match statutory language about registration, reregistration, and verification with the SOCAM Registry, pursuant to Chapter 829 of the 2020 Acts of Assembly.
- Section 180 Infection control.* The proposed changes would implement Chapters 10 and 11 of the 2020 Acts of Assembly, Special Session I by adding provisions about visitation during public health emergencies related to COVID-19. VDH reports that 282 of the 289 licensed nursing facilities are also certified by CMS and have therefore already been subject to these requirements.
- Section 300 Pharmaceutical services.* The proposed changes would replace “THC-A oil” and “cannabidiol oil” with “cannabis oil” thereby implementing Chapter 1278 of the 2020 Acts of Assembly.
- Section 410 Architectural drawings and solutions.* The proposed changes would update the documents incorporated by reference to the most recent (2022) *Guidelines for Design and Construction of Residential Health, Care, and Support Facilities*, adding the Errata document issued separately, thereby maintaining compliance with the 2005 legislative mandate described above.

Estimated Benefits and Costs

The primary benefit of the proposed changes would be to improve clarity for nursing facilities surrounding the requirements to maintain their license, what to expect in an inspection, how to submit and undertake a plan of correction (if necessary), and current requirements and CDC guidelines. Entities wishing to build new facilities would know to use the updated 2022 *Guidelines* for construction plans. To the extent that these changes improve the quality of service, transparency of facility policies, and patient outcomes, both patients and their families would also benefit from the proposed changes.

The proposed changes would require nursing facilities to update their policies with respect to visitation during public health emergencies and with respect to verification of potential

patients with the SOCAM Registry. Other new costs may arise if a facility meets one of the newly added criteria for reporting a mid-term change of license, or if the facility is closing and must comply with new requirements with respect to informing patients and legal representatives about where medical records will be located and surrendering its license. VDH also reports that as a result of the mandate to comply with the 2022 edition of the applicable design and construction guidelines, there may be a quantifiable indirect cost equal to 0.2 percent increase in construction costs for a 180-bed nursing facility that has more than one story of non-combustible construction, and a 0.4 percent increase in construction costs for a 180-bed nursing facility that has a single story of combustible construction.¹²

VDH reports that economic impact for most proposed changes have already been incurred either as a result of the legislative mandates and changes to statutory requirements, or as a result of changes to federal CMS guidelines. This includes the one-time cost to update policies and procedures regarding visitation during public health emergencies for 282 of the 289 licensed facilities that are also federally certified by CMS. However, although VDH reports that the agency's policy regarding visitation has been consistent with the 2020 legislative mandate, the seven licensed facilities that are not federally certified by CMS may have to update their visitation policies to reflect the new regulatory requirements if they have not already done so. In addition, VDH reports that for some nursing homes (if they were unaware of the statutory amendments), the one-time cost to update policies and procedures regarding the SOCAM Registry may not have yet been incurred. VDH estimates that each nursing facility is likely to spend about \$1,250 in staff time to update each of these policies.¹³

Businesses and Other Entities Affected

VDH reports that there are 289 licensed nursing facilities, and all of them will be required to comply with the regulatory changes. As mentioned previously, many of these facilities have already complied with the new requirements since most of the changes result from legislative mandates, which often reflect federal guidelines and requirements. Two of these licensed nursing facilities are operated by the Virginia Department of Veterans Services and one is operated by

¹² See ORM Economic Review Form, page 3:

https://townhall.virginia.gov/l/GetFile.cfm?File=58\6170\9898\ORM_EconomicImpact_VDH_9898_v2.pdf

¹³ ABD, p. 8.

the County of Bedford. The remaining facilities are privately owned and operated. VDH could not ascertain how many entities own and operate multiple facilities but reported that “a majority [of facilities] are owned by companies with a portfolio of nursing facilities.”¹⁴

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.¹⁵ 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 proposed changes would create new costs for licensed nursing facilities, even if some of those changes are required by federal and state law and have already been borne by nursing facilities. Thus, an adverse impact is indicated.

Small Businesses¹⁶ Affected:¹⁷

VDH reports that they do not have sufficient information to determine which nursing facilities have fewer than 500 full-time employees.¹⁸ In addition, as mentioned previously, even if some small independent nursing homes meet the criteria for a small business, a majority of them are owned by larger business entities.

¹⁴ VDH shared that the ownership and corporate structure of nursing facilities has become a significant policy issue and has started to draw the attention of the federal government. See for example: <https://www.gao.gov/products/gao-23-104813>, <https://www.cms.gov/newsroom/fact-sheets/disclosures-ownership-and-additional-disclosable-parties-information-skilled-nursing-facilities-and>, and <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-makes-more-medicare-nursing-home-ownership-data-publicly-available>.

¹⁵ 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.

¹⁶ 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.”

¹⁷ 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.

¹⁸ ABD, p. 7.

Localities¹⁹ Affected²⁰

The proposed amendments do not introduce costs for local governments. The County of Bedford owns and operates a licensed nursing facility and is the only locality to do so. Consequently, an adverse economic impact²¹ is indicated for Bedford.

Projected Impact on Employment

The proposed amendments are unlikely to impact the number of nursing facilities that obtain and remain licensed and the staffing in those facilities. Thus, the proposed amendments are not projected to significantly impact employment.

Effects on the Use and Value of Private Property

The proposed amendments raise costs for nursing facilities, which would reduce their value. The proposed amendments do not affect real estate development costs in general but would result in a small increase in construction costs for new nursing facilities based on changes contained in the updated 2022 *Guidelines*.

¹⁹ “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.

²⁰ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

²¹ 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.