



# COMMONWEALTH of VIRGINIA

*Office of the Attorney General*

202 North 9th Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120

Mark R. Herring  
Attorney General

**TO:** **KARIN CLARK**  
Virginia Department of Social Services

**FROM:** **MICHELLE A. L'HOMMEDIEU**   
Assistant Attorney General

**DATE:** **August 6, 2019**

**SUBJECT:** **Exempt Final Regulation – Amend ALF Standards to reflect legislative changes, 22 VAC 40-73 et seq. (5311/8659)**

I am in receipt of the attached regulations to amend the assisted living facilities (ALF) regulations 22 VAC 40-73 *et seq.* You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (the “State Board”) has the statutory authority to promulgate the proposed regulations and if the proposed regulations comport with applicable state law.

Virginia Code §§ 63.2-217 and 63.2-217.1 mandate that the State Board adopt and amend regulations that are necessary to carry out the provisions of the laws of the Commonwealth administered by the Virginia Department of Social Services. The current regulations for the administration of ALFs are set forth at 22 VAC 40-73 *et seq.* The proposed amendments to these regulations are necessary to reflect the changes to Virginia Code by the adoption of Chapters 91, 97, 294, 448, and 602 of the 2019 Acts of the Assembly.

Based on my review, it is my view that the State Board has the authority to promulgate the final regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and Executive Order 14 (Revised)(2018), and has not exceeded that authority. To date, the State Board has not yet acted on this regulation; and the Agency Background Document available on Town Hall reflects the anticipated future date of State Board action.

Based on the foregoing, it is my view that the amendments to these regulations are exempt from the procedures of Article 2 of the APA under Virginia Code §§ 2.2-4006(A)(3) and

Karin Clark  
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(4)(a). If you have any questions or need additional information about this regulation, please contact me at 786-6005.

cc: Kim F. Piner, Esq.  
Attachment

**DEPARTMENT OF SOCIAL SERVICES**  
**Amend ALF Standards to Comply with Code Requirements**

**22VAC40-73-50. Disclosure.**

A. The assisted living facility shall prepare and provide a statement to the prospective resident and his legal representative, if any, that discloses information about the facility. The statement shall be on a form developed by the department and shall:

1. Disclose information fully and accurately in plain language;
2. Be provided in advance of admission and prior to signing an admission agreement or contract;
3. Be provided upon request; and
4. Disclose the following information, which shall be kept current:
  - a. Name of the facility;
  - b. Name of the licensee;
  - c. Ownership structure of the facility (e.g., individual, partnership, corporation, limited liability company, unincorporated association, or public agency);
  - d. Description of all accommodations, services, and care that the facility offers;
  - e. Fees charged for accommodations, services, and care, including clear information about what is included in the base fee and all fees for additional accommodations, services, and care;
  - f. Criteria for admission to the facility and restrictions on admission;
  - g. Criteria for transfer to a different living area within the same facility, including transfer to another level or type of care within the same facility or complex;
  - h. Criteria for discharge;
  - i. Categories, frequency, and number of activities provided for residents;
  - j. General number, position types, and qualifications of staff on each shift;
  - k. Whether or not the facility maintains liability insurance that provides at least the minimum amount of coverage established by the board for disclosure purposes set forth in 22VAC40-73-45 to compensate residents or other individuals for injuries and losses from negligent acts of the facility. The facility shall state in the disclosure statement the minimum amount of coverage established by the board in 22VAC40-73-45;
  - l. Whether or not the facility has an on-site emergency electrical power source for the provision of electricity during an interruption of the normal electric power supply. If the facility does have an on-site emergency electrical power source, the statement must include: (i) the items for which the source will supply power and (ii) whether or not staff of the the facility have been trained to maintain and operate the power source. For the purposes of this subdivision, an on-site emergency electrical power supply shall include both permanent emergency electrical power sources and portable emergency electrical power sources, provided that such temporary electrical power supply source remains on the premises of the facility at all times. Written acknowledgement of the disclosure shall be evidenced by the signature or initials of the resident or his legal representative immediately following the on-site emergency electrical power source disclosure statement.

~~l.~~ m. Notation that additional information about the facility that is included in the resident agreement is available upon request; and

~~m.~~ n. The department's website address, with a note that additional information about the facility may be obtained from the website.

B. Written acknowledgment of the receipt of the disclosure by the resident or his legal representative shall be retained in the resident's record.

C. The disclosure statement shall also be available to the general public, upon request.

**22VAC40-73-150. Administrator provisions and responsibilities.**

A. Each facility shall have an administrator of record.

B. If an administrator dies, resigns, is discharged, or becomes unable to perform his duties, the facility shall immediately employ a new administrator or appoint a qualified acting administrator so that no lapse in administrator coverage occurs.

1. The facility shall notify the department's regional licensing office in writing within 14 days of a change in a facility's administrator, including the resignation of an administrator, appointment of an acting administrator, and appointment of a new administrator, except that the time period for notification may differ as specified in subdivision 2 of this subsection.

2. For a facility licensed for both residential and assisted living care, the facility shall immediately notify the Virginia Board of Long-Term Care Administrators and the department's regional licensing office that the licensed administrator died, resigned, was discharged, or became unable to perform his duties and that a new licensed administrator has been employed or that the facility is operating without an administrator licensed by the Virginia Board of Long-Term Administrators, whichever is the case, and provide the last date of employment of the previous licensed administrator.

3. For a facility licensed for both residential and assisted living care, when an acting administrator is named, he shall notify the department's regional licensing office of his employment, and if he is intending to assume the position permanently, submit a completed application for an approved administrator-in-training program to the Virginia Board of Long-Term Care Administrators within 10 days of employment.

4. For a facility licensed for both residential and assisted living care, the acting administrator shall be qualified by education for an approved administrator-in-training program and have a minimum of one year of administrative or supervisory experience in a health care or long-term care facility or have completed such a program and be awaiting licensure.

5. A facility licensed only for residential living care may be operated by an acting administrator for no more than 90 days from the last date of employment of the administrator.

6. A facility licensed for both residential and assisted living care may be operated by an acting administrator for no more than 150 days, or not more than 90 days if the acting administrator has not applied for licensure, from the last date of employment of the licensed administrator.

~~Exception:~~ 7. An acting administrator may be granted one extension of up to 30 days in addition to the 150 days, as specified in this subdivision 6 of this subsection, upon written request to the department's regional licensing office. An extension may only be granted if the acting administrator (i) has applied for licensure as a long-term care administrator pursuant to Chapter 31 (§ 54.1-3100 et seq.) of Title 54.1 of the Code of Virginia, (ii) has completed the administrator-in-training program, and (iii) is awaiting the results of the national examination. If a 30-day extension is granted, the acting

administrator shall immediately submit written notice of such to the Virginia Board of Long-Term Care Administrators.

~~7.~~ 8. A person may not become an acting administrator at any assisted living facility if the Virginia Board of Long-Term Care Administrators has refused to issue or renew, suspended, or revoked his assisted living facility or nursing home administrator license.

~~8.~~ 9. No assisted living facility shall operate under the supervision of an acting administrator pursuant to §§ 54.1-3103.1 and 63.2-1803 of the Code of Virginia more than ~~one time~~ two times during any two-year period unless authorized to do so by the department.

C. The administrator shall be responsible for the general administration and management of the facility and shall oversee the day-to-day operation of the facility. This shall include responsibility for:

1. Ensuring that care is provided to residents in a manner that protects their health, safety, and well-being;
2. Maintaining compliance with applicable laws and regulations;
3. Developing and implementing all policies, procedures, and services as required by this chapter;
4. Ensuring staff and volunteers comply with residents' rights;
5. Maintaining buildings and grounds;
6. Recruiting, hiring, training, and supervising staff; and
7. Ensuring the development, implementation, and monitoring of an individualized service plan for each resident, except that a plan is not required for a resident with independent living status.

D. The administrator shall report to the Director of the Department of Health Professions information required by and in accordance with § 54.1-2400.6 of the Code of Virginia regarding any person (i) licensed, certified, or registered by a health regulatory board or (ii) holding a multistate licensure privilege to practice nursing or an applicant for licensure, certification, or registration. Information required to be reported, under specified circumstances includes substance abuse and unethical or fraudulent conduct.

E. For a facility licensed only for residential living care, either the administrator or a designated assistant who meets the qualifications of the administrator shall be awake and on duty on the premises at least 40 hours per week with no fewer than 24 of those hours being during the day shift on weekdays; , unless at least one of the following applies:

Exceptions:

1. 22VAC40-73-170 allows a shared administrator for smaller facilities.
2. If the administrator is licensed as an assisted living facility administrator or nursing home administrator by the Virginia Board of Long-Term Care Administrators, the provisions regarding the administrator in subsection F of this section apply. When such is the case, there is no requirement for a designated assistant.

F. For a facility licensed for both residential and assisted living care, the administrator shall serve on a full-time basis as the on-site agent of the licensee and shall be responsible for the day-to-day administration and management of the facility, except as provided in 22VAC40-73-170.

G. The administrator, acting administrator, or as allowed in subsection E of this section, designated assistant administrator, shall not be a resident of the facility.

Part IX  
Emergency Preparedness

**22VAC40-73-950. Emergency preparedness and response plan.**

A. The facility shall develop a written emergency preparedness and response plan that shall address:

1. Documentation of initial and annual contact with the local emergency coordinator to determine (i) local disaster risks, (ii) communitywide plans to address different disasters and emergency situations, and (iii) assistance, if any, that the local emergency management office will provide to the facility in an emergency.
2. Analysis of the facility's potential hazards, including severe weather, biohazard events, fire, loss of utilities, flooding, work place violence or terrorism, severe injuries, or other emergencies that would disrupt normal operation of the facility.
3. Written emergency management policies and procedures for provision of:
  - a. Administrative direction and management of response activities;
  - b. Coordination of logistics during the emergency;
  - c. Communications;
  - d. Life safety of residents, staff, volunteers, and visitors;
  - e. Property protection;
  - f. Continued services to residents;
  - g. Community resource accessibility; and
  - h. Recovery and restoration.
4. Written emergency response procedures for assessing the situation; protecting residents, staff, volunteers, visitors, equipment, medications, and vital records; and restoring services. Emergency procedures shall address:
  - a. Alerting emergency personnel and facility staff;
  - b. Warning and notification of residents, including sounding of alarms when appropriate;
  - c. Providing emergency access to secure areas and opening locked doors;
  - d. Conducting evacuations and sheltering in place, as appropriate, and accounting for all residents;
  - e. Locating and shutting off utilities when necessary;
  - f. Maintaining and operating emergency equipment effectively and safely;
  - g. Communicating with staff and community emergency responders during the emergency; and
  - h. Conducting relocations to emergency shelters or alternative sites when necessary and accounting for all residents.
5. Supporting documents that would be needed in an emergency, including emergency call lists, building and site maps necessary to shut off utilities, memoranda of understanding with relocation sites, and list of major resources such as suppliers of emergency equipment.

B. By December 1, 2020, an assisted living facility that is equipped with an on-site emergency generator shall include in its emergency preparedness and response plan a description of the generator's capacity to provide sufficient power for the operation of lighting, ventilation, temperature control, supplied oxygen, and refrigeration.

C. By December 1, 2020, an assisted living facility that is not equipped with an on-site emergency generator shall:

1. Enter into an agreement with a vendor capable of providing the facility with an emergency generator for the provision of electricity during an interruption of the normal electric power supply; and
2. Enter into at least one agreement with a separate vendor capable of providing an emergency generator in the event that the primary vendor is unable to comply with its agreement with the facility during an emergency.

~~B.~~ D. Staff and volunteers shall be knowledgeable in and prepared to implement the emergency preparedness plan in the event of an emergency.

~~C.~~ E. The facility shall develop and implement an orientation and semi-annual review on the emergency preparedness and response plan for all staff, residents, and volunteers, with emphasis placed on an individual's respective responsibilities. The review shall be documented by signing and dating. The orientation and review shall cover responsibilities for:

1. Alerting emergency personnel and sounding alarms;
2. Implementing evacuation, shelter in place, and relocation procedures;
3. Using, maintaining, and operating emergency equipment;
4. Accessing emergency medical information, equipment, and medications for residents;
5. Locating and shutting off utilities; and
6. Utilizing community support services.

~~D.~~ F. The facility shall review the emergency preparedness plan annually or more often as needed, document the review by signing and dating the plan, and make necessary plan revisions. Such revisions shall be communicated to staff, residents, and volunteers and incorporated into the orientation and semi-annual review for staff, residents, and volunteers.

~~E.~~ G. In the event of a disaster, fire, emergency, or any other condition that may jeopardize the health, safety, and welfare of residents, the facility shall take appropriate action to protect the health, safety, and welfare of the residents and take appropriate actions to remedy the conditions as soon as possible.

~~F.~~ H. After the disaster or emergency is stabilized, the facility shall:

1. Notify family members and legal representatives; and
2. Report the disaster or emergency to the regional licensing office by the next day as specified in 22VAC40-73-70.

#### **22VAC40-73-980. Emergency equipment and supplies.**

A. A complete first aid kit shall be on hand in each building at the facility, located in a designated place that is easily accessible to staff but not to residents. Items with expiration dates must not have dates that have already passed. The kit shall include the following items:

1. Adhesive tape;
2. Antiseptic wipes or ointment;
3. Band-aids, in assorted sizes;
4. Blankets, either disposable or other;
5. Disposable single-use breathing barriers or shields for use with rescue breathing or CPR (e.g., CPR mask or other type);
6. Cold pack;
7. Disposable single-use waterproof gloves;
8. Gauze pads and roller gauze, in assorted sizes;

9. Hand cleaner (e.g., waterless hand sanitizer or antiseptic towelettes);
10. Plastic bags;
11. Scissors;
12. Small flashlight and extra batteries;
13. Thermometer;
14. Triangular bandages;
15. Tweezers; and
16. The first aid instructional manual.

B. In facilities that have a motor vehicle that is used to transport residents and in a motor vehicle used for a field trip, there shall be a first aid kit on the vehicle, located in a designated place that is accessible to staff but not residents that includes items as specified in subsection A of this section.

C. First aid kits shall be checked at least monthly to ensure that all items are present and items with expiration dates are not past their expiration date.

D. Each facility with six or more residents shall be equipped with a permanent connection able to connect to a temporary emergency electrical power source for the provision of electricity during an interruption of the normal electric power supply. The connection shall be of the size that is capable of providing power to required circuits when connected and that is sufficient to implement the emergency preparedness and response plan. The installation of a connection for temporary electric power shall be in compliance with the Virginia Uniform Statewide Building Code (13VAC5-63) and approved by the local building official. Permanent installations of emergency power systems shall be acceptable when installed in accordance with the Uniform Statewide Building Code and approved by the local building official.

E. By December 1, 2020, the following provisions shall be met:

1. A facility that is equipped with an on-site emergency generator shall test the generator monthly and maintain records of the tests.

2. A facility that is not equipped with an on-site emergency generator shall have a temporary emergency electrical power source connection, which is tested at the time of installation and every two years thereafter by a contracted vendor, and maintain records of the tests.

~~E.~~ F. The following emergency lighting shall be available:

1. Flashlights or battery lanterns for general use.
2. One flashlight or battery lantern for each employee directly responsible for resident care who is on duty between 5 p.m. and 7 a.m.
3. One flashlight or battery lantern for each bedroom used by residents and for the living and dining area unless there is a provision for emergency lighting in the adjoining hallways.
4. The use of open flame lighting is prohibited.

~~F.~~ G. There shall be two forms of communication for use in an emergency.

~~G.~~ H. The facility shall ensure the availability of a 96-hour supply of emergency food and drinking water. At least 48 hours of the supply must be on site at any given time, of which the facility's rotating stock may be used.

**22VAC40-73-1130. Staffing.**

A. ~~When~~ Except during night hours, when 20 or fewer residents are present, at least two direct care staff members shall be awake and on duty at all times in each special care unit who shall be responsible for the care and supervision of the residents, ~~except as noted in subsection~~



~~B of this section.~~ For every additional 10 residents, or portion thereof, at least one more direct care staff member shall be awake and on duty in the unit.

B. ~~Only~~ Except during night hours, only one direct care staff member has to be awake and on duty in the unit if sufficient to meet the needs of the residents, if (i) there are no more than five residents present in the unit and (ii) there are at least two other direct care staff members in the building, one of whom is readily available to assist with emergencies in the special care unit, provided that supervision necessary to ensure the health, safety, and welfare of residents throughout the building is not compromised.

C. During night hours, the following number of direct care staff members shall be awake and on duty at all times in each special care unit and shall be responsible for the care and supervision of the residents:

1. When 22 or fewer residents are present, at least two direct care staff members;
2. When 23 to 32 residents are present, at least three direct care staff members;
3. When 33 to 40 residents are present, at least four direct care staff members; and
4. When more than 40 residents are present, at least four direct care staff members plus at least one more direct care staff member for every additional 10 residents, or portion thereof.

The requirements in subsections A<sub>1</sub> and B and C of this section are independent of 22VAC40-73-280 D and 22VAC40-73-1020 A and B.

~~C.~~ D. During trips away from the facility, there shall be sufficient direct care staff to provide sight and sound supervision to residents.