



COMMONWEALTH of VIRGINIA
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TO: KARIN CLARK
Virginia Department of Social Services

FROM: MICHELLE A. L'HOMMEDIEU
Assistant Attorney General

A handwritten signature in black ink, appearing to read "MLH", positioned to the right of the name "MICHELLE A. L'HOMMEDIEU".

DATE: March 26, 2024

SUBJECT: Emergency/NOIRA Regulations – Minimum Liability Insurance for Assisted Living Facilities, 22 VAC 40-73 et seq. (6410/10241)

I am in receipt of the attached regulations to amend the current regulations for Assisted Living Facilities (ALFs) regarding minimum liability insurance. You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate this regulation and if it comports with applicable federal and state law.

Virginia Code § 63.2-217 mandates that the State Board promulgate regulations that are necessary to carry out the provisions of Title 63.2 and Virginia Code § 63.2-1805 includes requirements for the regulations promulgated by the State Board to in the ALF regulations, including requirements for minimum liability insurance. The proposed amendments to these regulations are necessary to reflect the changes to Virginia law by the adoption of Chapter 580 of the 2023 Acts of Assembly (SB 1221), which also mandates that the regulations implementing the provisions of Chapter 580 be implemented within 280 days of the enactment of Chapter 580.

Based on my review, it is my view that the State Board has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and Executive Order 19 (2022) and has not exceeded that authority. Because these regulations are required under the Enactment Clause of Chapter 580 to be implemented within 280 days of the enactment of Chapter 580, these regulations are emergency

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regulations under Virginia Code § 2.2-4011(B). Chapter 580 requires the State Board to exercise discretion in determining the minimum liability insurance amounts; therefore, these regulations are not exempt under Virginia Code § 2.2-4006.A.4. To date, the Board has not yet acted on these regulations; and the Agency Background Document available on TownHall reflects the anticipated future date of Board action.

Under Virginia Code § 2.2-4012, these emergency regulations shall be effective upon approval by the Governor and filing with the Registrar of Regulations as no later effective date has been specified; however, amended regulation 22 VAC 40-73-45.A has a delayed date of 180 days from the effective date of the regulations for ALFs to obtain the required minimum liability insurance coverage based on the ALF's resident capacity. These regulations shall remain effective for an 18-month period. If the State Board intends to continue regulating the subject matter beyond the 18-month period from the effective date, the State Board must replace these emergency regulations with regulations duly promulgated under Article 2 of the APA. The proposed regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

If you have any questions or need additional information about this regulation, please contact me at 786-6005.

cc: Kim F. Piner, Esq.

Attachment

Project 7763 - Emergency/NOIRA

Department of Social Services

Minimum Liability Insurance for Assisted Living Facilities

22VAC40-73-45. ~~Minimum amount for liability~~ Liability insurance disclosure.

A. ~~The minimum amount of liability insurance coverage to be maintained by an assisted living facility for purposes of disclosure in the statement required by 22VAC40-73-50 and the resident agreement required by 22VAC40-73-390 is as follows:~~ As of (insert a date 180 days after the effective date of the regulation), the facility shall maintain liability insurance coverage according to the following licensed capacity tiers:

1. ~~\$500,000 per occurrence to compensate residents or other individuals for injuries and losses from the negligent acts of the facility;~~ and Tier I: A minimum of \$250,000 for facilities licensed for 25 residents or less;
2. ~~\$500,000 aggregate to compensate residents or other individuals for injuries and losses from the negligent acts of the facility.~~ Tier II: A minimum of \$400,000 for facilities licensed for 26 but no more than 75 residents;
3. Tier III: A minimum of \$500,000 for facilities licensed for 76 but no more than 150 residents; or
4. Tier IV: A minimum of \$1,000,000 for facilities licensed for 151 or more residents.

B. ~~No facility shall state that liability insurance is in place unless the insurance provides the minimum amount of coverage established in subsection A of this section.~~ The facility shall prepare and provide, upon request of the prospective resident or resident and legal representative, if any, a statement that the facility maintains liability insurance in force to compensate residents or other

individuals for injuries and losses from the negligent acts of the facility. The statement shall be made on the liability insurance statement form provided by the department.

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. k. Whether or not the facility has an onsite emergency electrical power source for the provision of electricity during an interruption of the normal electric power supply. If the facility does have an onsite 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 facility have been trained to maintain and operate the power source. For the purposes of this subdivision, an onsite 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 acknowledgment of the disclosure shall be evidenced by the signature or initials of the resident or his legal representative immediately following the onsite emergency electrical power source disclosure statement;~~

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

~~n.~~ m. 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.

22VAC40-73-390. Resident agreement with facility.

A. At or prior to the time of admission, there shall be a written agreement/acknowledgment of notification dated and signed by the resident or applicant for admission or the appropriate legal representative, and by the licensee or administrator. This document shall include the following:

1. Financial arrangement for accommodations, services, and care that specifies:
 - a. Listing of specific charges for accommodations, services, and care to be made to the individual resident signing the agreement, the frequency of payment, and any rules relating to nonpayment;
 - b. Description of all accommodations, services, and care that the facility offers and any related charges;
 - c. For an auxiliary grant recipient, a list of services included under the auxiliary grant rate;
 - d. The amount and purpose of an advance payment or deposit payment and the refund policy for such payment, except that recipients of auxiliary grants may not be charged an advance payment or deposit payment;
 - e. The policy with respect to increases in charges and length of time for advance notice of intent to increase charges;

- f. If the ownership of any personal property, real estate, money or financial investments is to be transferred to the facility at the time of admission or at some future date, it shall be stipulated in the agreement; and
 - g. The refund policy to apply when transfer of ownership, closing of facility, or resident transfer or discharge occurs.
- 2. Requirements or rules to be imposed regarding resident conduct and other restrictions or special conditions.
- 3. Those actions, circumstances, or conditions that would result or might result in the resident's discharge from the facility.
- 4. Specific acknowledgments that:
 - a. Requirements or rules regarding resident conduct, other restrictions, or special conditions have been reviewed by the resident or his legal representative;
 - b. The resident or his legal representative has been informed of the policy regarding the amount of notice required when a resident wishes to move from the facility;
 - c. The resident has been informed of the policy required by 22VAC40-73-840 regarding pets living in the facility;
 - d. The resident has been informed of the policy required by 22VAC40-73-860 K regarding weapons;
 - e. The resident or his resident's legal representative or responsible individual, as stipulated in 22VAC40-73-550 H₁, has reviewed § 63.2-1808 of the Code of Virginia, Rights and Responsibilities of Residents of Assisted Living Facilities, and that the provisions of this statute have been explained to him;

f. The resident or his resident's legal representative or responsible individual, as stipulated in 22VAC40-73-550 H, has reviewed and ~~had explained to him~~ the facility's policies and procedures for implementing § 63.2-1808 of the Code of Virginia;

g. The resident has been informed ~~and had explained to him that he~~ that the resident may refuse release of information regarding his the resident's personal affairs and records to any individual outside the facility, except as otherwise provided in law and except in case of his the resident's transfer to another caregiving facility, notwithstanding any requirements of this chapter;

h. The resident has been informed that interested residents may establish and maintain a resident council, that the facility is responsible for providing assistance with the formation and maintenance of the council, whether or not such a council currently exists in the facility, and the general purpose of a resident council (See 22VAC40-73-830);

i. The resident has been informed of the bed hold policy in case of temporary transfer or movement from the facility, if the facility has such a policy (See 22VAC40-73-420 B);

j. The resident has been informed of the policy or guidelines regarding visiting in the facility, if the facility has such a policy or guidelines (See 22VAC40-73-540 C);

k. The resident has been informed of the rules and restrictions regarding smoking on the premises of the facility, including that which is required by 22VAC40-73-820;

l. The resident has been informed of the policy regarding the administration and storage of medications and dietary supplements;

m. The resident, upon request, has been notified in writing ~~whether or not~~ that 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 notification the minimum amount of coverage established by the board in 22VAC40-73-45.~~ The written notification must be on a form developed by the department; and

n. The resident has received written assurance that the facility has the appropriate license to meet his the resident's care needs at the time of admission, as required by 22VAC40-73-310 D.

B. Copies of the signed agreement/acknowledgment and any updates as noted in subsection C of this section shall be provided to the resident and, as appropriate, his resident's legal representative and shall be retained in the resident's record.

C. The original agreement/acknowledgment shall be updated whenever there are changes to any of the policies or information referenced or identified in the agreement/acknowledgment and dated and signed by the licensee or administrator and the resident or his resident's legal representative.

FORMS (22VAC40-73)

~~Report of Tuberculosis Screening (eff. 10/2011)~~

~~Virginia Department of Health Report of Tuberculosis Screening Form (undated)~~

~~Virginia Department of Health TB Control Program Risk Assessment Form, TB 512 (eff. 9/2016)~~

ALF Liability Insurance Statement, xxx-xx-xxxx-xx-eng (eff. xx/xx)

**Assisted Living Facility Liability Insurance Statement
Required by the Virginia Department of Social Services**

Name of Facility: _____

Name of Licensee: _____

Facility Address: _____

Telephone Number: (____) _____

This facility maintains at least (Select amount) in liability insurance coverage to compensate residents or other individuals for injuries or losses from negligent acts of the facility in accordance with this facility's licensed capacity as required under Virginia Code § 63.2-1805 and 22VAC40-73-45.

Tiers Per Licensed Capacity	Minimum Amount of Liability Insurance
Tier I (1-25 residents):	\$250,000
Tier II (26-75 residents):	\$400,000
Tier III (76-150 residents):	\$500,000
Tier IV (151 or more residents):	\$1,000,000