



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

22 VAC 40-73 Standards for Licensed Assisted Living Facilities
Department of Social Services
Town Hall Action/Stage: 6132/9853
January 23, 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 these economic impacts.¹

Summary of the Proposed Amendments to Regulation

As a result of a 2022 legislative mandate, the State Board of Social Services (Board) is proposing to update the regulation governing assisted living facilities (ALFs) to add requirements that address the involuntary discharge of a resident, including an appeals process.²

Background

ALFs are non-medical residential settings that provide or coordinate personal and health care services, 24-hour supervision, and assistance for the care of four or more adults who are aged, infirm or disabled.³ Chapter 706 of the 2022 *Acts of Assembly* created specific requirements for the regulation governing ALFs with respect to the circumstances in which residents may be involuntarily discharged, the opportunity to appeal an involuntary discharge,

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 See <https://townhall.virginia.gov/L/viewmandate.cfm?mandateid=1299>.

³ See <https://www.dss.virginia.gov/facility/alf.cgi>. The website further specifies that, “Assisted living facilities are not nursing homes. A nursing home is a facility in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more non-related individuals. Nursing homes are regulated by the Virginia Department of Health.”

and the process for such an appeal.⁴ The legislation specifies that residents may only be involuntarily discharged in accordance with Board regulations, provided that the ALF has met the regulatory requirements and has made reasonable efforts to meet the needs of the resident. Further, an involuntary discharge may only occur for one of the following reasons: (i) nonpayment of contracted charges, provided that the resident has been given at least thirty days to cure the delinquency after notice was provided to the resident and the resident's legal representative or designated contact person; (ii) for the resident's failure to substantially comply with the terms and conditions of the resident agreement between the resident and the ALF; (iii) if the ALF closes in accordance with the regulations;⁵ or (iv) when the resident develops a condition or care need that the Code or regulation indicate ALFs are not licensed to handle.⁶

Chapter 706 also requires ALFs to “make reasonable efforts, as appropriate, to resolve any issues with the resident upon which the decision to discharge is based and document such efforts in the resident's file” except when “an emergency discharge is necessary due to an immediate and serious risk to the health, safety, or welfare of the resident or others.” Further, the legislation requires an ALF to provide a written discharge notice to the resident and the resident’s legal representative/designated contact person, as well as a copy of that notice to DSS and the State Long-Term Care Ombudsman at least thirty days prior to the involuntary discharge.⁷ This notice is required to include the ALF’s decision to discharge the resident, the reasons for the discharge, the date on which the discharge will occur, and information regarding the resident's right to appeal within the thirty-day notice period.⁸ Additionally, the legislation provides that the ALF shall provide relocation assistance to the resident prior to the involuntary

⁴ See <https://leg1.state.va.us/cgi-bin/legp504.exe?221+ful+CHAP0706>.

⁵ The legislation states that a resident may appeal any of the discharge decisions based on the other factors, but that an involuntary discharged based on a facility’s closure is not appealable.

⁶ Some of these include ventilator dependency, certain types of ulcers, intravenous therapy or injections, airborne infectious disease, and individuals who present an imminent physical threat or danger to self or others. The list of these conditions appears in Virginia Code § 63.2-1805 D. See <https://law.lis.virginia.gov/vacode/title63.2/chapter18/section63.2-1805/>.

⁷ The legislation provides an exception for emergency discharges and requires that notice be “provided as soon as possible but not later than five days” after the emergency discharge. According to the legislation, these residents retain the right to appeal even if they no longer reside in the facility.

⁸ DSS is required to furnish a discharge notice form which includes information regarding the process for initiating an appeal, the number for a toll-free information line, a hearing request form, the facility's obligation to assist the resident in filing an appeal and provide, upon request, a postage prepaid envelope addressed to the agency, and a statement of the resident's right to continue to reside in the facility, free from retaliation, until the appeal has a final Department case decision, subject to an emergency discharge or development of a certain type of condition or care need.

discharge.⁹ Lastly, the legislation directs the Board to “adopt regulations that establish a process for appeals filed pursuant to this [legislation].”

Accordingly, the proposed changes include adding a definition in section 10 for “involuntary discharge” as “when a facility requires a resident to move out of the [ALF] and not be allowed to return.” Section 430 (Discharge of residents) would be revised significantly to reorder current requirements and incorporate the changes required by Chapter 706. These changes are summarized as follows:

- The current requirement that the ALF adopt and conform to a written policy that provides for a general notice of an intent to move within a certain timeframe would be replaced with the more specific requirement that the ALF provide written notice 30 days prior to discharge. The written notice must include the decision to discharge, the reason for discharge, discharge date, and the place the resident will be discharged to.
- Reasons for involuntary discharge would be added, identical to those listed in statute, as well as the requirement that the written notice inform residents and their legal representatives of their right to file an appeal within the 30-day notice period.
- Language stating that “the responsibility of moving the resident’s belongings would rest with the resident or his legal representative” would be removed since the regulation does not otherwise address residents’ responsibilities.¹⁰
- Emergency discharge requirements would be updated to conform to the changes to Code § 63.2-1805 pursuant to Chapter 706, including that the ALF shall provide a copy of the department's discharge notice form to the regional licensing office and the State Long-Term Ombudsman within five days after the emergency discharge. The emergency discharge notice would also have to include information regarding the resident’s right to appeal within 30 days from the emergency discharge date, plus the additional five days granted to the ALF to provide the discharge notice following an emergency.
- References to “eligibility worker” would be changed to “assigned staff at the local department of social services” to reflect current terminology. A current requirement that

⁹ DSS reports that this requirement appears in the current regulation at 22 VAC 40-73-430, and that it does not mean the ALF has to find the resident another placement. Rather, the requirement applies to situational assistance such as packing belongings, providing a list of possible alternative accommodations, working with the family to help the person transition to another level of care, and preparing copies of records.

¹⁰ See Agency Background Document (ABD), page 7:

https://townhall.virginia.gov/l/GetFile.cfm?File=73\6132\9853\AgencyStatement_DSS_9853_v4.pdf.

such staff be informed at least 14 days prior to the discharge date, as well as current exemptions from this requirement for emergencies, would be preserved as is.

Lastly, section 435 would be added to incorporate requirements promulgated by Chapter 706 relating to appeals of emergency or involuntary discharge. This section contains the following requirements for ALFs:

- (i) ALFs shall “assist the resident and the resident’s legal representative, if any, when the resident is filing an appeal.”¹¹
- (ii) ALFs shall allow the resident to continue to reside in the facility, free from retaliation, until the appeal has reached its final department case decision, except in the case of emergency discharges or if the resident has developed a condition or care need prohibited by § 63.2-1805 D.
- (iii) The ALF must inform the resident of their continued right to reside in accordance with this requirement.
- (iv) The ALF shall provide a postage prepaid envelope addressed to the department to use if the appeal is mailed, if requested by the resident.

This section would also state that residents who have been removed pursuant to an emergency discharge can still file an appeal, and note that appeals are considered filed upon receipt by the agency’s Division of Appeals and Fair Hearings.

Estimated Benefits and Costs

The proposed changes would primarily benefit residents of ALF by clarifying the grounds for involuntary discharge, providing them with 30-day written notice of an involuntary discharge (or within five days after an emergency discharge), establishing a process to appeal the involuntary discharge with DSS during the 30-day advance notice period (or following an emergency discharge), as well as the right to remain in the ALF until the DSS Commissioner has made a final case decision (unless an emergency discharge has already occurred).¹² These changes broadly serve to help residents and their families better plan for the residents’

¹¹ DSS does not believe that this requirement is a conflict of interest, since residents “commonly need at least minimal support for instrumental activities of daily living,” and that this assistance could include contacting family members or connecting the resident with an advocate.

¹² This decision may be further appealed in court, and it is unclear if the resident’s right to remain in the ALF would extend through any subsequent court proceedings.

accommodation and care needs post-discharge. However, these changes would create new costs for DSS as well as for ALFs.

DSS reports that their Division of Appeals and Fair Hearings would need two staff, a Senior Hearing Officer and an Administrative Technician, to process ALF involuntary discharge appeals. The reported cost for the staff is \$198,034 for FY23 and \$187,708 each year thereafter; DSS reports that appropriations for these positions have been provided in the state budget.¹³ In addition, DSS Licensing would need to upgrade the licensing information system to track and monitor ALF discharges and appeals. The estimated one-time cost is \$500,000 for FY23; this amount has also been appropriated in the state budget.

ALFs would incur initial costs relating to updating their documentation procedures for involuntary and emergency discharges to comply with the written notice and recordkeeping requirements. Costs relating to the appeals may arise from helping the resident or resident's legal representative compile the appeal and send it to DSS. Most of these costs would depend on the number of involuntary and emergency discharges, and the number of such decisions that are appealed.¹⁴ An ALF could be particularly impacted if a resident appealed an involuntary discharge that was based on nonpayment and remained in the facility until DSS made a final case determination, while continuing not to pay.¹⁵ However, the likelihood of this happening is unknown; thus, while it does not directly create a cost for ALFs, it increases the financial risk that they are subject to.

More generally, ALFs would face reduced flexibility and increased oversight in determining whether residents need to be discharged. Currently, ALF decisions to discharge individuals can only be appealed with the facility, if they have an appeals process. The proposed changes may reduce the number of discharges if ALFs were discharging individuals on grounds that would not meet the new criteria for involuntary or emergency discharges or would be likely to face an appeal. Essentially, ALFs' ability to turnover residents that were expensive to

¹³ ABD, page 4.

¹⁴ DSS reports that they do not have data on the number of involuntary decisions in recent years, or how many may be appealed going forward.

¹⁵ DSS reports that the Division of Appeals and Fair Hearings has a procedure to hold hearings within 90 days of the appeal. Involuntary discharge based on nonpayment requires that residents and their representatives be given 30-days' notice of nonpayment. Thus, it is possible that a resident may stay for up to five months without the ALF receiving payment.

accommodate or care for would be reduced. To this extent this occurs it could affect the composition of payors in the ALF's resident pool, or the mix of residents' care needs, such that the ALFs revenues are decreased and/or operating costs (mainly staffing needs) are increased. However, these costs are unavoidable and can be attributed to the legislation requiring these changes.

Businesses and Other Entities Affected

DSS reports that there are currently 564 licensed ALFs. Most are considered small businesses. As of March 2022, four ALFs were operated by community services boards and one ALF is operated by a locality health center commission.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.¹⁶ 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 new requirements would create new costs for DSS and for ALFs. Thus, an adverse impact is indicated.

Small Businesses¹⁷ Affected:¹⁸

The proposed amendments do appear to adversely affect small businesses.

¹⁶ 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.

¹⁷ 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."

¹⁸ 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.

Types and Estimated Number of Small Businesses Affected

As indicated above, DSS reports that most of the 564 licensed ALFs would be considered small businesses. DSS does not collect information on whether individual licensees meet the criteria for small businesses.

Costs and Other Effects

The proposed amendments create direct costs in terms of required documentation and procedural changes. ALFs may incur costs depending on the number of involuntary or emergency discharges they make and the number of such discharges that are appealed, as well as face additional financial risk since the number and nature of appeals may be difficult to predict. ALFs may also incur other indirect economic impacts by being restricted in their ability to discharge residents. Thus, an adverse economic impact is indicated for ALFs.

Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and implement the requirements of Chapter 706 or the *2022 Acts of Assembly*.

Localities¹⁹ Affected²⁰

As mentioned previously, four ALFs are operated by community services boards and one ALF is operated by a locality health center commission. These local governments would be affected to the extent that any higher costs incurred by the ALF are passed on to them.

Projected Impact on Employment

The proposed amendments are unlikely to impact total employment.

Effects on the Use and Value of Private Property

The proposed amendments would increase costs and financial risks for ALFs, thereby making them less profitable and reducing the value of these businesses. The proposed amendment would not affect real estate development costs.

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.