

REGISTRAR'S SUBMISSION PACKAGE

BOARD OF NURSING 18 VAC 90-20-10 et seq.

Regulations Governing the Practice of Nursing

Analysis of Final Amendments to Regulation

1. Basis of Regulation:

Title 54.1, Chapter 24 and Chapter 30 of the Code of Virginia provide the basis for these regulations.

Chapter 24 establishes the general powers and duties of health regulatory boards including the power to establish qualifications for licensure and responsibility to promulgate regulations.

§ 54.1-3005 establishes the powers and duties of the Board of Nursing, including the duty to *“promulgate regulations for the delegation of certain nursing tasks and procedures not involving assessment, evaluation or nursing judgment to an appropriately trained unlicensed person by and under the supervision of a registered nurse, who retains responsibility and accountability for such delegation.”*

2. Statement of Purpose:

The purpose is to amend regulations pursuant to changes in the Code of Virginia made in Chapter 458 of the 1998 Acts of the Assembly which required the Board to promulgate regulations for the delegation of certain nursing tasks and procedures to unlicensed persons. In accordance with the second enactment clause, the Board promulgated emergency regulations that became effective on January 26, 1999. These final regulations replace the emergency regulations and are intended to establish those criteria which are necessary to protect the public health and safety in the delegation of some patient care to unlicensed persons.

3. Substance of Regulations:

18 VAC 90-20-300. Disciplinary provisions.

The amendment adds a provision which includes in the list of actions constituting unprofessional conduct *“delegating nursing tasks to an unlicensed person in violation of the provisions of 18 VAC 90-20-420.”*

New Part VIII. Delegation of Nursing Tasks and Procedures.

18 VAC 90-20-420. Definitions.

Amendments provide the definitions for words and terms used in this part of the regulations as necessary for clarity and compliance. Those are “*delegation*”, “*supervision*”, and “*unlicensed person*”.

The definition of “*unlicensed person*” has been modified from the emergency regulation in response to public comment. Several persons and facilities interpreted the term to include licensed practical nurses, which was not the intent of the Board. To clarify the definition, another sentence was added to specify that, with the exception of a certified nurse aide, an “unlicensed person” does not include anyone licensed or certified by a board within the Department of Health Professions who is practicing within his recognized scope of practice.

18 VAC 90-20-430. Criteria for delegation.

The amendments establish requirements for a plan for delegation to be adopted by the entity responsible for client care; set certain criteria which must be met in order for a nurse to delegate; state that the unlicensed person may not reassign the task or procedure; and establish that delegation may occur only after an assessment has been performed.

Comments on the emergency regulations requested that the Board consider specifying in regulation the various levels of supervision that must be incorporated into the institutional plan for delegation. The Board chose to allow each health care facility to develop its own plan for supervision provided it complies with the provisions of this section. It also amended subdivision 3 in subsection A to emphasize that the supervision must be sufficient to assure safe nursing care to meet the needs of the clients in their specific settings.

In subsection C, the word "may" was changed to "shall" to clarify the imperative of the regulation.

18 VAC 90-20-440. Assessment required prior to delegation.

This section establishes the requirements for an assessment and specifies those types of tasks which may be delegated to an unlicensed persons.

18 VAC 90-20-450. Supervision of delegated tasks.

The amended regulation establishes the factors by which the nurse determines the method and frequency of supervision required; sets conditions under which another registered nurse may supervise the nursing tasks if the delegating nurse is not present; specifies what such supervision shall include; and establishes that an on-going assessment is necessary to determine if delegation continues to be appropriate.

Comment on the emergency regulation noted concern and confusion over the appropriate transfer of delegation from one registered nurse to another. To clarify the intent of the Board, the amendment states that when the delegating nurse is not available, the delegation is either terminated or the authority to delegate is transferred to another registered nurse, who then becomes the delegating nurse with responsibility for the delegation.

18 VAC 90-20-460. Nursing tasks which shall not be delegated.

The regulation establishes that nursing tasks that shall not be delegated are those which are inappropriate for a specific, unlicensed person to perform on a specific patient after an assessment is conducted; and it sets out certain nursing tasks which may not be delegated to any unlicensed person.

In response to comment on the emergency regulation, the board changed the “may” to a “shall” in subsection B to read, “Nursing tasks that shall not be delegated to any unlicensed person are”.

4. Issues of the Regulations

ISSUE 1: Responsibility for making decisions on delegation.

An issue that precipitated the need for statutory authority to promulgate regulations on delegation was the question of a line of authority and who is responsible for making a decision to delegate certain tasks to unlicensed persons. Without regulations, there was no guidance for employers or for registered nurses who were occasionally asked to take responsibility for a delegation which they felt was inappropriate or dangerous to the patient. These regulations permit registered nurses, who are qualified by education and experience to supervise and coordinate the delivery of nursing care, to make decisions about the appropriate delegation of such care to others within the plan for delegation developed by the institution.

The plan for delegation must comply with provisions of the regulations and must provide for certain assessments, resources, and safeguards to be in place before delegation to unlicensed persons can occur within the institution. Therefore, the plan should include an assessment of the client population the institution serves, an analysis and identification of the nursing needs and priorities, organizational standards for sufficient supervision to ensure safe care in each specific setting, communication of the plan to staff, documentation of the training and competencies of unlicensed persons, and provisions for resources necessary to support safe delegation. Within that framework, it is also clearly stated that the delegation can only occur when, in the judgment of the registered nurse, it is appropriate and safe for the patient to do so.

In developing a plan for delegation, some institutions questioned the definition of an “unlicensed person” and had determined that it included a licensed practical nurse. In the adoption of proposed regulations to replace the emergency regulations, the Board clarified the definition .

ISSUE 2: Criteria for delegation.

The proposed regulations establish standards for the safe delegation of nursing care. The regulations describe the procedures for determining what task could be delegated and to whom and under what circumstances in order to adequately protect the public. In the concept paper by the National Council of States Boards of Nursing, the Five Rights of Delegation are described as: the right task, under the right circumstances, by the right person to the right person, with the right direction or communication, under the right supervision. Those Five Rights became the basis for the Board in establishing the criteria for delegation.

Foremost of the criteria is the responsibility and accountability of the registered nurse for the nursing care of the client. Regardless of an institutional plan, the delegating nurse must determine that

the task or procedure can be properly and safely performed by an unlicensed person and that the delegation does not jeopardize the patient. Delegation can only occur on a client specific basis with clear instructions for performance of the tasks with for expected outcomes. Delegation can also only occur when the unlicensed person has been clearly identified as such to the patient by nametag or in person by the delegating nurse.

ISSUE 3: Supervision of the unlicensed person to whom a task is delegated

Questions were raised about whether regulations should stipulate the levels of supervision as “immediate supervision”, “direct supervision”, and “indirect supervision” with specific parameters and practice settings described. The Delegation Advisory Committee reviewed regulations from other states and discussed at length the advantages and disadvantages of specifying levels of supervision. It recommended against adopting such a regulation. While it will be necessary and appropriate for an entity to include the level and degree of supervision required for delegation in each practice settings within that institution, the Board determined that it was not appropriate or necessary to so specify by regulation. Instead, the Board adopted regulations to provide those general requirements that are necessary for patient safety, and it directed the institutions to develop a plan that is suited to its patient population and their needs. An amendment was added to definitely state that the delegation plan shall provide “establishment of organizational standards to provide for sufficient supervision which assures safe nursing care to meet the needs of the clients in their specific settings.”

Criteria for supervision are clearly articulated by the proposed regulations, which state the factors that determine the method and frequency of supervision. Rather than prescribing supervision for every situation or every patient setting, the determination on the level and type of supervision is to be based on the stability and condition of the patient, the experience and competency of the unlicensed person, the nature of the tasks or procedures, and the proximity and availability of the registered nurse when the tasks in being performed. Proposed regulations also provide that delegation should either be terminated or the authority to delegate transferred to another registered nurse when the delegating nurse is no longer going to be available to supervise. Delegation then becomes the decision and responsibility of the new supervising nurse as the delegating nurse.

In addition to the factors that determine the method and frequency of supervision, the regulations also specify what constitutes appropriate supervision.

ISSUE 4: Tasks which may or may not be delegated.

As the National Council’s position paper states, nursing is a knowledge-based process and cannot be reduced to a list of tasks. Therefore, the Board did not attempt to specify what tasks or procedures may be delegated – such delegation is dependent on the factors stated in the Five Rights of Delegation and set forth in these regulations. However, the Board has specified the assessment of the patient and the unlicensed person that must be performed prior to a delegation. The delegating nurse must assess the clinical status and stability of the patient’s condition, determine the type, complexity and frequency of the nursing care needed and delegate only those tasks which meet the criteria set forth in regulation. The delegating nurse must also assess the training, skills and experience of the unlicensed person to determine which tasks are appropriate and the level of supervision that is needed.

In addition, there are types of nursing tasks which are always inappropriate and unsafe to be delegated, and those are prohibited by these regulations to be delegated to any unlicensed person.

Advantages or disadvantages

For the clients or patients in Virginia, there are clear advantages to a plan and criteria for delegation that establishes institutional standards and responsibility for delegation of unlicensed persons. In a changing health care system, there is a need for competent, appropriately supervised, unlicensed assistive personnel to enable institutions to deliver affordable, quality health care. Consumers are benefited by regulations which empower registered nurses to delegate certain tasks that are appropriate to a patient at a given time in a given setting and that are within the abilities of the unlicensed person and within the scope of the nurse's practice.

For the entities that need to employ such persons, these regulations provide requirements for a delegation plan which are sufficiently prescriptive to provide the necessary framework but flexible enough to allow the institution to craft a plan which meets the particular needs of its clients in the settings in which they receive nursing care.

For registered nurses and unlicensed persons, provisions for a delegation provide some assurance that the appropriate assessments have been made at the institutional level, the organization has provided for sufficient supervision, the necessary training and competencies have been identified and addressed, and the resources are available for appropriate delegation. With a plan and certain criteria in place, there is some structure and guideline for delegation for both the delegating nurse and the person to whom the task has been delegated.

For the agency, there are no advantages or disadvantages to the proposal other than the clarity that the regulations provide on the issue of appropriate delegation to unlicensed persons.

5. Estimated Fiscal Impact of the Regulations

I. Fiscal Impact Prepared by the Agency:

Number of entities affected by this regulation:

These regulations could potentially affect the 77,116 registered nurses licensed in Virginia. In addition, every facility, institution, agency, school system or any other entity that employs registered nurses and unlicensed persons could be affected by these regulations. The number of unlicensed persons to whom registered nurses would delegate certain tasks is unknown.

Projected cost to the agency:

The agency will incur some costs (less than \$5000) for mailings to the 1000 people on the Board's Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final regulations. Every effort will be made to incorporate these into anticipated mailings and board meetings already scheduled.

It is also expected that a small number of licensees will be investigated for a reported violation, and some of those will result in a disciplinary case being opened. In those cases, costs would be charged back to the Board from the Investigative and Administrative Proceedings Division (APD) of the Department. Costs for cases that do result in an informal conference committee proceeding (estimated to be less than 10 per year)

would include travel expenses and per diem for board members as well as costs for the services of APD and Investigations. Informal conference committees typically hear several cases in a day, so the costs per case would be minimized.

Cost estimates for disciplinary cases related to the failure to comply with these regulations range from \$100 to cases resulting in pre-hearing consent orders to \$500 per case for those that result in an informal conference committee or a formal hearing. All expenses relating to enforcement of these regulations can be absorbed in the projected budget and existing employment level of the Board of Nursing and the Department of Health Professions.

Projected costs to the affected entities:

There would be no additional costs for compliance with these regulations for nurses or entities in the Commonwealth. The regulations provide guidance for an activity which is commonly practiced in various settings, that is the delegation of nursing tasks to unlicensed persons.

Citizen input in development of regulation:

In the development of the emergency regulations, a Delegation Advisory Committee was formed to solicit input from a number of individuals in addition to the members of the Board. The Committee met on three occasions and considered comment received on the draft regulations, which were put on the Board's web site and distributed to interested parties. With various parts of the Commonwealth, diverse nursing practices, and affected constituencies represented, the Committee brought an informed, balanced approach to rule-making and was able to achieve consensus on the regulations it recommended to the Board. The Board also held a public hearing on the draft emergency regulations and accepted and considered written comment prior to adoption.

A Notice of Intended Regulatory Action was published on 2/15/99 and was sent to persons on the board's public participation guidelines mailing list. Resulting comments were distributed to Board members and were considered in the adoption of proposed amendments to regulation. Public comment was also received at each meeting of the Board.

Localities affected:

There are no localities in the Commonwealth affected by these regulations.

II. Fiscal Impact Prepared by the Department of Planning and Budget:

(Attached to proposed regulation)

III. Agency Response: The agency concurred with the analysis of the Department.