

**Nursing Home Staffing Standards Webinar**  
**Frequently Asked Questions (FAQ)**

July 12, 2023

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**Acute Labor Supply Shortage**

**Q. Where can I find the Commissioner's determination on an acute labor supply shortage?**

**A.** The Commissioner of Health's Determination on the Existence of an Acute Labor Supply Shortage (hereinafter, "Commissioner's Determination") will be made available on the DOH Nursing Home Minimum Staffing and Direct Resident Care Spending Public Webpage at [https://health.ny.gov/facilities/nursing/minimum\\_staffing/index.htm](https://health.ny.gov/facilities/nursing/minimum_staffing/index.htm).

**Q. Has the Commissioner's Determination been made for the applicable quarters?**

**A.** Please see the Commissioner's Determination posted to the DOH Nursing Home Minimum Staffing and Direct Resident Care Spending Public Webpage referenced above for specific applicability guidance.

**Q. How do you identify a labor shortage? If most of the SNF's can't meet the requirement does that have an impact on the commissioner's decision.**

**A.** The Commissioner's Determination will be made in consultation with the New York State Department of Labor (DOL) and will take into account job availability metrics developed and/or reviewed by DOL, which may include but is not limited to the list of job openings in New York State.

**Q. Executive Order (EO) 4.22 was in effect until June 2023. Is this EO taken in consideration?**

**A.** At this point, the Commissioner, in consultation with DOL, has issued a Determination regarding the 2nd Quarter of 2022, the 3rd Quarter of 2022, and 4th Quarter of 2022. This Determination relies upon EOs 4.7 through 4.16 and states that such EOs support the

determination that healthcare facilities, including residential health care facilities licensed by the State of New York in all Metropolitan and Nonmetropolitan Areas of New York State, were located in an area experiencing an acute labor supply shortage during the second, third and fourth quarters of 2022.

**Q. It seems contradictory to have a State of Emergency regarding labor supply shortages (under Executive Order No. 4) but still have this law (PHL 2828) go into effect; can you address this apparent inconsistency?**

**A.** The Commissioner, in consultation with the Department of Labor, has issued determinations regarding the 2nd Quarter of 2022, the 3rd Quarter of 2022, and 4th Quarter of 2022. The determinations cite Executive Orders (EOs) 4.7 through 4.16 and states that such EOs support the determination that healthcare facilities, including residential health care facilities licensed by the State of New York in all Metropolitan and Nonmetropolitan Areas of New York State, were located in an area experiencing an acute labor supply shortage during the second, third and fourth quarters of 2022. If the facility has made reasonable attempts to acquire new staff and taken appropriate steps to ensure the health and safety of residents, it may be eligible for a penalty reduction based on a shortage of labor.

### **Assessments of Compliance**

**Q. What is the expected turnaround time for DOH to make a decision on a redetermination or penalty reduction request?**

**A.** The Department will review redetermination requests and penalty reduction applications as soon as reasonably practicable after receipt of a complete application. Nevertheless, response time may vary based on the completeness of the application, how quickly the facility responds to requests for additional information, and the complexity of issues and facts involved.

**Q. What is the time lag between the Payroll Based Journal (PBJ) data submission and when DOH will review the PBJ data and issue the compliance notice?**

**A.** The Centers for Medicare & Medicaid Services (CMS) publishes the PBJ approximately four months after the close of a quarter. The Department will issue compliance notices as soon as reasonably practicable thereafter.

**Q. What is the timeline that DOH expects to have the first round of compliance assessments completed? What is the timing of subsequent rounds?**

**A.** The Department anticipates beginning assessments of compliance for the 2nd Quarter 2022 the week of July 10, 2023. We will engage in compliance activities for subsequent quarters thereafter. The compliance notices disseminated at that point will include information regarding which specific period is covered.

**Q. Will all outstanding quarters be released at the same time or just Q2 -2022?**

**A.** Please see the answer to the previous question regarding the release of compliance determinations for quarterly compliance periods.

**Q. How will DOH treat homes that do not have PBJ data for a specified quarter? (Once the deadline is missed, a facility is not able to submit and no data for them is in the database.)**

**A.** Nursing homes that do not appear in the PBJ for the quarter will be determined to be out of compliance. Facilities found to be out of compliance that do not agree with the determination will have the opportunity to request a redetermination using the Department-prescribed form covered during the July 6, 2023 webinar.

**Q. What if the forthcoming federal guidance on staffing standards contradicts with or is different from the State standards?**

**A.** The Department will assess the impact of any newly issued federal guidance or laws if and when they are established, and the Department will communicate any required changes to policy or procedure as soon thereafter as reasonably practicable.

**Q. Occasionally our facility's LPNs work in CNA positions, meaning they are not functioning as LPNs. Can we count them as CNAs versus LPNs?**

**A.** As required by PHL § 2895-b, the Department will determine the Hours Per Resident Day (HPRD) using the hours for each title that were reported to the CMS Payroll Based Journal and contained in the CMS Payroll Based Journal Public Use file for the review quarter. This answer therefore depends on how the LPN hours were reported to CMS.

**Q. Is there an explanation as to why Respiratory Therapy (RT), Physical Therapy, Occupational Therapy, and Speech Therapy staff are not included in the minimum staffing requirement assessment? My facility has a ventilation unit and RTs do a significant amount of hands-on clinical work. In addition, rehab staff assist with Activities of Daily Living (ADLs) and feeding. I'm curious as to why they are not counted toward the minimum staffing requirement.**

**A.** This program effectuates the standards established under PHL § 2895-b, which governs only the minimum requirements for Registered Nurses, Licensed Practical Nurses, and Certified Nurse Aides (including nurses in training for review periods in 2022) in New York State Nursing Homes.

**Q. Are there any nursing homes that are exempt from this requirement – i.e., Specialty facilities or CCRCs?**

**A.** This program effectuates the standards established under PHL § 2895-b, which governs only the minimum requirements for Registered Nurses, Licensed Practical Nurses, and Certified Nurse Aides (included nurses in training for review periods in 2022) in New York State Nursing Homes. Therefore, the answer to this question depends on the facility licensure type; all facilities licensed as “residential health care facilities” under Article 28 of the Public Health Law are included in the statutory requirements.

**Calculations of Hours Per Resident Day (HPRD)**

**Q. Is there any consideration for facilities that meet the overall hours per resident day (HPRD) but may not meet the individual job title and may use a LPN to replace a CNA due to shortage/call outs?**

**A.** Nursing homes must meet the staffing requirements for all three nursing titles specified in PHL § 2895-b to be in compliance with the statute. As required by PHL § 2895-b, the Department will determine the Hours Per Resident Day (HPRD) using the hours for each title

that were reported to the CMS Payroll Based Journal and contained in the CMS Payroll Based Journal Public Use file for the review quarter.

**Q. Who is included in the staffing hours? For example, would the reported RN hours include the DON or administrative nurses, or is it just floor nurses?**

**A.** For the purposes of determining compliance, an individual shall not be counted while performing administrative services, as defined in the CMS PBJ for long-term care facilities.

**Q. Can you please clarify the job codes that will be counted towards the staffing hours and ratios used, most notably RN/LPN areas?**

**A.** The Department calculates staffing ratios using CMS's PBJ Public Use File data for the quarter. Per statute, for the purpose of determining compliance, an individual shall not be counted while performing administrative services or when in training and not available to perform primary duties, as defined in the CMS PBJ for long-term care facilities. Please contact CMS for more information on which job codes are associated with RNs, LPNs, CNAs, and NAs.

**Q. There are three columns for the HPRD; is the Department making that determination by the regular "Reported Hours per Resident per Day", or is it the "Case-Mix HRD" or "Case-Mix Adjusted HRD"?**

**A.** The Department will calculate the Hours Per Resident Day (HPRD) using the Total Hours for each of the appropriate titles and the Resident Census from MDS contained in the CMS PBJ Public Use file for the review quarter.

**Q. Can you walk through process of calculation for quarterly submission of all 3 staffing requirements?**

**A.** Using the CMS PBJ data for the quarter:

- To determine compliance with the 3.5 requirement, the Department will calculate the total HPRD by:
  1. First Calculating the total average staff hours for the quarter - We will sum the daily hours reported for all of the applicable titles and divide this sum by the number of days reported to CMS.
  2. Then Calculating the total average census for the quarter - We will sum the daily Resident Census reported and divide this sum by the number of days reported to CMS.
  3. And finally, we will divide the calculated total average staffing hours by the calculated total average census.
- To determine compliance with each the RN and/or LPN 1.1 and CNA 2.2. requirements, the Department will calculate the HPRD for the applicable titles by:
  1. First Calculating the average staff hours for the appropriate titles for the quarter: To do this we will sum the daily hours reported for the applicable titles and divide this sum by the number of days reported to CMS.
  2. Then we will calculate the total HPRD provided by the applicable titles - We will Divide the calculated average staff hours for the applicable titles by the calculated total average census.

**Q. Are CNA trainees counted in the HPRD assessment?**

**A.** For review periods in the calendar year 2022, the HPRD hours for a CNA will included hours of care provided by nurse aides in training.

**Q. Will the department be using the MDS census information that is used by CMS, or will you be getting the daily census from another source?**

**A.** When initially determining whether a facility is compliant or non-compliant with minimum nursing staff requirements, the Department will calculate the Hours Per Resident Day (HPRD) using the Resident Census from MDS contained in the CMS Payroll Based Journal Public Use file for the review quarter.

**Q. We have a respite program at our NH. Are those days included in census?**

**A.** Please see the answer to the previous question regarding the census used in our calculations.

### **Health Commerce System**

**Q. How can I update my roles in the HCS?**

**A.** The Commerce Accounts Management Unit (CAMU) at [camu@its.ny.gov](mailto:camu@its.ny.gov) or 1-866-529-1890 option 1, and your HCS Administrator, can assist you with making necessary updates.

### **Mitigating Factors**

**Q. Does the Declaration of a Statewide Disaster Emergency Due to Healthcare Staffing Shortages in the State of New York count as an extraordinary circumstance per 10 NYCRR § 415.13, providing that “a State or municipal emergency affecting the facility has been declared pursuant to Article 2-B of the Executive Law”?**

**A.** If the facility applies for a penalty reduction on the basis of a healthcare staffing shortage, and the Commissioner of Health has determined, in consultation with the Department of Labor, that there was an Acute Labor Supply Shortage in the area the facility is located in, the facility must complete the application Schedule B for an Acute Labor Supply Shortage.

A facility may also consider whether any “extraordinary circumstance” may also apply, separate from the acute labor supply shortage, to warrant mitigation; in this case, the facility must also submit Schedule A. In the event that a facility cites the Governor’s declaration/Acute Labor Shortage as a mitigating factor, the Department will first assess Schedule B to determine whether an Acute Labor Supply Shortage exists and the facility has, to the satisfaction of the department, demonstrated sufficient reasonable attempts to recruit staff and actions to ensure the health and safety of residents, before determining whether any other mitigating factors in Schedule A are implicated.

**Q. Can a facility qualify for mitigation in the context of an acute labor supply shortage if it has reduced admissions, but has not taken the extraordinary steps of suspending them entirely or transferring residents to another facility?**

- **If a facility is required to transfer residents in order to qualify for mitigation, but the residents do not initiate the transfer, how does the facility comply with federal regulations at 42 CFR §483.15(c)(1)(i)?**
- **If a facility is required to transfer residents to qualify for mitigation, it will be difficult to find transfer destinations, given the existence of an acute labor supply**

**shortage in the area. Will the Department assist with identifying other facilities to accept the residents?**

- A. When evaluating the steps taken to ensure the health and safety of residents during a period of insufficient staffing and an acute labor supply shortage, as declared by the Commissioner of Health, in the area the facility is located in, the Department will consider all actions taken by the facility over the course of the quarter, including but not limited to transferring residents when allowable by law and appropriate.

**Notices of Compliance/Noncompliance**

**Q. When can facilities expect initial notices, and will each quarter be given calculated/separately?**

- A. The Department anticipates disseminating initial notices the week of July 15, 2023, barring any technical or other operational issues. Individual notices will be provided for each review period when the corresponding assessment cycle is completed. The compliance notices disseminated at that point will include information on what period is being covered

**Q. When will we begin seeing the notices on HCS?**

- A. Please see previous answer regarding the dissemination of notices.

**Penalties**

**Q. If the facility meets 2 of the 3 requirements, will they be considered out of compliance and have to pay fines?**

- A. Nursing homes must meet the staffing requirements for all three nursing titles to be in compliance with the statute. Therefore, nursing homes that do not meet the requirement set forth for each nursing title will be subject to penalties. Nursing homes that believe they can demonstrate the mitigating factors set forth in regulation may apply for a penalty reduction using the form prescribed by the Department.

**Q. Could you please provide a chart or schedule of the progressive penalties to be imposed?**

- A. Prior to considering Mitigating Factors, the Department will establish a penalty of up to two thousand (2,000) dollars per day for each day in a quarter that a facility fails to comply with the minimum nursing staffing level requirements. Based on the chart below:

Total Daily Registered Nurses, Licensed Practical Nurses, and Certified Nurse Aides* HPRD Hours (Range)	1st Quarter of Non-compliance in Year	2nd Quarter of Non-compliance in Year	3rd Quarter of Non-compliance in Year	4th Quarter of Non-compliance in Year
	Penalty/Day	Penalty/Day	Penalty/Day	Penalty/Day
3.5	\$ -	\$ -	\$ -	\$ -

2.9 to 3.49 (Deficient .01 to .6)	\$ 500.00	\$ 575.00	\$ 675.00	\$ 875.00
2.2 to 2.89 (Deficient .61 to 1.3)	\$ 650.00	\$ 750.00	\$ 875.00	\$ 1,100.00
1.5 to 2.19 (Deficient 1.31 to 2)	\$ 1,000.00	\$ 1,100.00	\$ 1,250.00	\$ 1,500.00
0 to 1.49 (Deficient 2.01 to 3.5)	\$ 2,000.00	\$ 2,000.00	\$ 2,000.00	\$ 2,000.00

\* Certified Nurse Aides includes nurses in training for review periods in 2022

If the Department accepts that mitigating factors impacted the facility's ability to provide sufficient staff, the penalty is eligible for a partial or full reduction during the period covered by the mitigating factor.

**Q. The regulations call for “progressive penalties assessed based upon the number of days per quarter in which the daily staffing hours provided per resident fell below the minimum hourly requirements”. What formula, if any, will the Department use to establish “progressive” penalties based on number of days out of compliance?**

**A.** Penalties of up to \$2000 per day will be based on the levels of noncompliance in the quarter and frequency of noncompliance. Penalties are assessed for each day out of compliance, based on the actual HPRD within set ranges and can increase based on the number of quarters the facility is out of compliance in the year. If the Department accepts a mitigating factor presented by the facility, the penalty is eligible for partial or full penalty reduction. See chart above.

**Q. The civil penalty for non-compliance is “up to” \$2,000. Are there levels of non-compliance that would result in a penalty of less than \$2,000?**

**A.** Please see answer to previous questions regarding penalty amounts.

**Q. Is there a minimum penalty per day? Can you direct me to the statute indicating any minimums?**

**A.** When determined appropriate, under the authority established by the Public Health Law § 2895-b, the Department can reduce the penalty to any amount between \$0 and \$2000. Public Health Law § 2895-b can be found at: <https://www.nysenate.gov/legislation/laws/PBH/2895-B> and the regulations at 10 NYCRR § 415.13 can be found at <https://regs.health.ny.gov/>.

### **Redeterminations**

**Q. If a facility determines that the job title code was submitted in error to the PBJ system, can they correct the title through the Department’s request for redetermination process?**

**A.** If the nursing home believes the initial determination of noncompliance was due to an error in the CMS PBJ Public Use file, you will have the opportunity to request a redetermination using the forms prescribed by the Department.

### **Request Forms**

**Q. Where can we find the forms to request a reconsideration of an erroneous determination and to request mitigation of penalties?**

**A.** The electronic Request for Redetermination form and application for Penalty Reduction due to mitigating factors will be available through a link in the Notice of Noncompliance that will be sent to Nursing Home Administrators and Operators. The additionally required Request for Redetermination - Employee Detail Attachment is available on the DOH Nursing Home Minimum Staffing and Direct Resident Care Spending webpage at [https://health.ny.gov/facilities/nursing/minimum\\_staffing/index.htm](https://health.ny.gov/facilities/nursing/minimum_staffing/index.htm).

**Supplemental Staffing Funding**

**Q. When will the federal share of the \$187M in staffing funds be distributed?**

**A.** The federal share of the \$187 Million in staffing funds will be distributed when the Department receives authority from CMS.

**Webinar Materials**

**Q. Please advise where the PowerPoint presentation slides and recording of the Nursing Home Minimum Staffing Standards Webinar can be found.**

**A.** Presentation slides for the July 6, 2023, webinar, as well as a recording, were shared with nursing home Operators, Administrators, Directors of Nursing, HPN Coordinators and industry associations. They are also available in the Health Commerce System landing page in the sections entitled Important Health Notifications and New Items.

**Webpage**

**Q. Please provide the URL that was mentioned during the webinar.**

**A.** The Department of Health (DOH) Nursing Home Minimum Staffing and Direct Resident Care Spending webpage can be found at [https://health.ny.gov/facilities/nursing/minimum\\_staffing/index.htm](https://health.ny.gov/facilities/nursing/minimum_staffing/index.htm).

This page can also be reached from the DOH Nursing Homes in New York State webpage at <https://health.ny.gov/facilities/nursing/>.