

**WAC 388-97-1090 Direct care hours.** (1) Each nursing home must provide a minimum of 3.4 hours of direct care per resident day (HRD). Direct care means the staffing domain identified and defined in the Centers for Medicare and Medicaid Services' five star quality rating system and as reported through the Centers for Medicare and Medicaid Services' payroll-based journal. Compliance with the minimum staffing standard must be measured using the Centers for Medicare and Medicaid Services' payroll based journal and nursing home census and payroll data.

(2) On a quarterly basis the department will use the Centers for Medicare and Medicaid Services' payroll based journal to determine compliance with the minimum staffing standard.

(3) Payroll based journal data must be submitted after the end of each calendar quarter and filed electronically.

(4) The department will presume that all hours worked by direct care employees at the nursing home have been spent providing direct care.

(5) The department may use census and payroll data from facilities to perform enforcement audits.

(6) The department must periodically review the nursing home's census information, reported staff hours, and payroll data to determine whether HRD figures are relatively constant throughout a quarter or are being increased at the end of the quarter through unusual spending on direct care.

(7) A nursing home may use the hours of geriatric behavioral health workers as defined under RCW 74.42.010 to meet this section's direct care minimum staffing requirements.

(8) A nursing home that fails to meet the minimum staffing requirement of 3.4 hours and of direct care per resident day for any quarter is subject to a fine. The department will determine the amount of the fine as follows:

(a) The fine must be based on the total cost the nursing home would have incurred had it complied with the 3.4 HRD requirement;

(b) The department will use a formula that calculates a fine based on the cost of certified nurse aid wages and benefits for the missing staff hours;

(c) If the nursing home believes that the department's application of the standard in subsection (8)(b) of this section is inequitable, it may explain its position to the department and request consideration of an alternative method of calculating the fine; and

(d) The fine will be one and a half times the additional amount it would have cost the nursing home to provide direct care at the 3.4 HRD standard for a nursing home's first violation and two times the additional amount for each subsequent violation by the nursing home. After a nursing home has not violated the 3.4 HRD requirement for three years the department will reset the nursing home's status and treat any subsequent violation as an initial violation.

(9) If a noncompliant nursing home believes that it made a good-faith effort to meet the minimum staffing requirement and asks that the penalty not be imposed, the department may in its sole discretion waive the penalty.

(10) If the department waives a nursing home's fine under subsection (9) of this section, its noncompliance with the 3.4 HRD requirement must not count as a violation for determining whether a future violation is a first violation or a subsequent violation under subsection (8)(d) of this section and must not count as a violation for the purposes of resetting a nursing home's status under section (8)(d).

(11) The amount of money the nursing home would have been required to spend to reach 3.4 HRD must be treated as a direct care cost for the year in which the staffing was deficient for settlement purposes. The portion of the fine representing the additional one-half or one times that amount is a penalty, and will not be added to the actual costs of the nursing home in the settlement process.

(12) The department will monitor compliance with the 3.4 HRD minimum staffing requirement for the quarter beginning July 1, 2016, but will not impose any penalties on nursing homes that do not comply during that quarter. The department instead will notify noncomplying nursing homes what their penalty would otherwise have been, and will require those nursing homes to submit a written plan for correcting the deficiency. The department will begin imposing fines for the quarter beginning October 1, 2016. Noncompliance with the 3.4 HRD requirement during the quarter beginning July 1, 2016 must not count as a first violation for fine calculation purposes under subsection (8)(d) of this section.

(13) The nursing home must pay penalties under WAC 388-97-1090(8) by check. The department will deposit penalty checks into the nursing home quality enhancement account in the custody of the state treasurer. The department's secretary, or the secretary's designee, may authorize expenditures from the nursing home quality enhancement account. Such expenditures may only be for: Technical assistance to nursing homes, specialized training for nursing homes, or an increase to the quality enhancement component of the daily medicaid rate provided by RCW 74.46.581.

(14) The department may grant a limited exception to the 3.4 HRD staffing requirements for nursing homes demonstrating a good faith effort to hire and retain staff.

(15) To determine initial eligibility for exception consideration, the department must send surveys to facilities anticipated to be below, at, or slightly above the 3.4 HRD requirement.

(16) These surveys report the staffing of a nursing home from October through December 2015, January through March 2016, and April through June 2016. These surveys must measure the HRD in a manner as similar as possible to the Centers for Medicare and Medicaid Services' payroll-based journal.

(17) In the event the Centers for Medicare and Medicaid Services' payroll-based journal is not available, the department may use any data source that is reasonably consistent with data metrics used by the payroll-based journal to measure direct care being provided by a nursing home. To gather data similar to the data gathered by the payroll-based journal, the department may provide a written survey to nursing homes. The metrics will be used to determine whether the nursing home has complied with the 3.4 HRD requirement.

[Statutory Authority: Chapters 18.51, 74.42, 74.34, 74.46 RCW, 2015 2nd sp.s. c 2, 2015 c 268, and 2016 c 131. WSR 16-23-094, § 388-97-1090, filed 11/16/16, effective 12/17/16.]