

WSR 23-05-041

EMERGENCY RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Long-Term Support Administration)

[Filed February 9, 2023, 1:15 p.m., effective February 9, 2023, 1:15 p.m.]

Effective Date of Rule: Immediately upon filing.

Purpose: The department of social and health services (department) is amending the rules listed below to ensure nursing homes are not significantly impeded from admitting and caring for residents during the COVID-19 outbreak. The department is proposing adopting new sections to implement section 6 of ESHB 1120 (chapter 203, Laws of 2021). The statute directs the department to adopt rules to grant exceptions to requirements in RCW 74.42.360 (2) through (4), waive penalties, and suspend oversight activities for nursing homes. The emergency rule will be effective retroactively to October 27, 2022, the end date of the Governor's Proclamation 20-18, which had suspended RCW 74.42.360(3) and WAC 388-97-1080(3).

Citation of Rules Affected by this Order: New WAC 388-97-1081, 388-97-1082, and 388-97-1091.

Statutory Authority for Adoption: RCW 18.51.070, 74.42.360(6), and 74.42.620.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The threat of COVID-19 to our most vulnerable populations is significant, especially for those receiving long-term care services in their homes and congregate settings, such as long-term care facilities. Current nursing home rules require large nonessential community providers to have a registered nurse on duty directly supervising resident care 24 hours per day, seven days per week, and to provide a minimum of 3.4 hours of direct care for each resident every day. These rules are necessary to instruct and inform nursing homes on the process the department will use to prioritize and resume oversight of minimum staffing standards, bringing all service providers back into compliance with statutory requirements by October 27, 2023. The emergency rules are necessary to maintain the suspension of requirements related to nursing home minimum staffing standards consistent with ESHB 1120 and allow the department to adopt permanent rules to maintain the suspension for the duration required under the statute.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 3, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 3, Amended 0, Repealed 0.

Date Adopted: February 8, 2023.

Katherine I. Vasquez
Rules Coordinator

SHS-4966.5

NEW SECTION

WAC 388-97-1081 Reimplementation of 3.4 hours per resident day minimum staffing standards. (1) In response to the COVID-19 pandemic, the governor issued proclamation 20-18 suspending RCW 74.42.360(2) and WAC 388-97-1090. Pursuant to the authority granted the department in RCW 74.42.360(6), this rule section establishes requirements to gradually re-implement the staffing requirements under RCW 74.42.360(2) for facilities to provide a minimum of 3.4 hours per resident day of direct care so that nursing homes may incrementally return to compliance with the statute without being assessed a fine or receiving a citation for non-compliance.

(2) From October 27, 2022, to April 30, 2023, the department will take the following actions:

(a) Continue to suspend enforcement of RCW 74.42.360(2) and WAC 388-97-1090;

(b) Not report to the complaint resolution unit non-compliance with staffing requirements in RCW 74.42.360(2); and

(c) Report to the complaint resolution unit for investigation the nursing home's failure to report data to the center for medicare and medicaid services' payroll-based journal.

(3) From May 1, 2023, to October 27, 2023, the department will:

(a) Calculate fines for noncompliance with RCW 74.42.360(2) and WAC 388-97-1090;

(b) Notify the nursing home of what the fine would have been if it had been issued;

(i) Upon the first notice of non-compliance issued to the nursing home, the department will:

(A) Offer targeted support to the nursing home to move toward compliance;

(B) Discuss with the nursing home how it is meeting care and service needs for all residents while providing fewer than 3.4 hours per resident day of direct care;

(C) Not report to the complaint resolution unit non-compliance with staffing requirements in RCW 74.42.360(2); and

(D) Report to the complaint resolution unit for investigation the nursing home's failure to report data to the center for medicare and medicaid services' payroll-based journal.

(ii) Upon the second notice of non-compliance issued to the nursing home, the department will report to the complaint resolution unit for investigation:

(A) A nursing home's failure to report data to the center for medicare and medicaid services' payroll-based journal; and

(B) Care and services concerns related to providing fewer than 3.4 hours per resident day of direct care and offer targeted support to assist the facility to move towards compliance.

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NEW SECTION

WAC 388-97-1082 Reimplementation of 24-hour registered nurse staffing standards. (1) In response to the COVID-19 pandemic, the governor issued proclamation 20-18 suspending RCW 74.42.360(3) and WAC 388-97-1080(3). Pursuant to the authority granted the department under RCW 74.42.360(6), this rule waives the requirement for large nonessential community nursing home providers to have a registered nurse on duty directly supervising resident care 24 hours per day, seven days per week; and waives related penalties and oversight activities under RCW 74.42.360(3) and WAC 388-97-1080(3).

(2) The department must repeal this rule when staffing returns to pre-pandemic levels or by October 27, 2023, whichever occurs first.

(3) This rule supersedes WAC 388-97-1080(3). If a conflict arises, this rule prevails.

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NEW SECTION

WAC 388-97-1091 Reimplementation of registered nurse minimum staffing standards. (1) In response to the COVID-19 pandemic, the governor issued proclamation 20-18 suspending RCW 74.42.360(4) and WAC 388-97-1080(8). Pursuant to the authority granted the department under RCW 74.42.360(6), this rule waives the requirement for essential community providers and small nonessential community nursing home providers to have a registered nurse on duty directly supervising resident care a minimum of 16 hours per day, seven days per week, and a registered nurse or a licensed practical nurse on duty directly supervising resident care the remaining eight hours per day, seven days per week; and waives related penalties and oversight activities under WAC 388-97-1080(8).

(2) The department must repeal this rule when staffing returns to pre-pandemic levels or by October 27, 2023, whichever occurs first.

(3) This rule supersedes WAC 388-97-1080(8). If a conflict arises, this rule prevails.

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