

- What is the process for reviewing the performance review of nurse aides?
- How are these reviews documented and does the documentation reflect at least twelve hours of in-service training per year based on an aide's individual performance review?
- What evidence can the facility produce that demonstrates the in-service education provided addresses areas of weakness identified in performance reviews, special resident needs, and needs of residents with cognitive impairments?

## **F731**

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### **§483.35(f) Nursing facilities**

**Waiver of requirement to provide licensed nurses *and a registered nurse* on a 24-hour basis.**

**To the extent that a facility is unable to meet the requirements of paragraphs (a)(1) and (b)(1)(i) *and (c)(1)* of this section, a State may waive such requirements with respect to the facility if—**

**§483.35(f)(1) The facility demonstrates to the satisfaction of the State that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel;**

**§483.35(f)(2) The State determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility;**

**§483.35(f)(3) The State finds that, for any periods in which licensed nursing services are not available, a registered nurse or a physician is obligated to respond immediately to telephone calls from the facility;**

**§483.35(f)(4) A waiver granted under the conditions listed in paragraph (e) of this section is subject to annual State review;**

**§483.35(f)(5) In granting or renewing a waiver, a facility may be required by the State to use other qualified, licensed personnel;**

**§483.35(f)(6) The State agency granting a waiver of such requirements provides notice of the waiver to the Office of the State Long-Term Care Ombudsman (established under section 712 of the Older Americans Act of 1965) and the protection and advocacy system in the State for individuals with a mental disorder who are eligible for such services as provided by the protection and advocacy agency; and**

**§483.35(f)(7)** The nursing facility that is granted such a waiver by a State notifies residents of the facility and their resident representatives of the waiver.

**§483.35(g)** SNFs

Waiver of the requirement to provide services of a registered nurse for *at least 112* hours a week.

**§483.35(g)(1)** The Secretary may waive the requirement that a SNF provide the services of a registered nurse for more than 40 hours a week, including a director of nursing specified in paragraph (c) of this section, if the Secretary finds that—

- (i) The facility is located in a rural area and the supply of skilled nursing facility services in the area is not sufficient to meet the needs of individuals residing in the area;
- (ii) The facility has one full-time registered nurse who is regularly on duty at the facility 40 hours a week; and
- (iii) The facility either—
  - (A) Has only patients whose physicians have indicated (through physicians' orders or admission notes) that they do not require the services of a registered nurse or a physician for a 48-hours period or;
  - (B) Has made arrangements for a registered nurse or a physician to spend time at the facility, as determined necessary by the physician, to provide necessary skilled nursing services on days when the regular full-time registered nurse is not on duty;
- (iv) The Secretary provides notice of the waiver to the Office of the State Long-Term Care Ombudsman (established under section 712 of the Older Americans Act of 1965) and the protection and advocacy system in the State for individuals with developmental disabilities or mental disorders; and
- (v) The facility that is granted such a waiver notifies residents of the facility and their resident representatives of the waiver.

**§483.35(g)(2)** A waiver of the registered nurse requirement under paragraph (g)(1) of this section is subject to annual renewal by the Secretary.

**INTENT**

To give the facility flexibility, in limited circumstances, when the facility cannot meet nurse staffing requirements.

## **GUIDANCE**

If the facility is Medicaid-certified only, the State has the authority to grant a waiver of the RN requirement, and/or the 24-hour licensed nurse requirement. CMS is delegated the waiver authority for SNFs, including dually-participating facilities (SNF/NFs). The Medicare waiver authority is far more limited than is the States' authority under Medicaid since a State may waive any element of the nurse staffing requirement, whereas the Secretary (CMS) may only waive the RN requirement. The requirements that a registered nurse provide services for 8 hours a day, 7 days a week (more than 40 hours a week), and that there be an RN designated as director of nursing on a full-time basis, may be waived by the Secretary (CMS) in the following circumstances:

- The facility is located in a rural area with an inadequate supply of SNF services to meet area needs. Rural is defined as “all areas not delineated as ‘urban’” by the Bureau of Census, based on the most recent census;
- The facility has one full-time registered nurse regularly working 40 hours a week. This may be the same individual, or part-time individuals. This nurse may or may not be the DON, and may perform some DON and some clinical duties if the facility so desires; **and either**:
  - The facility has only residents whose physicians have noted, in writing, do not need RN or physician care for a 48-hour period. This does not relieve the facility from responsibility for providing for emergency availability of a physician, when necessary, nor does it relieve the facility from being responsible for meeting all needs of the residents during those 48 hours; **OR**
  - A physician or RN will spend the necessary time at the facility to provide care residents need during the days that an RN is not on duty. This requirement refers to clinical care of the residents that need skilled nursing services.
- If a waiver of this requirement has been granted, conduct a survey of nursing services during each certification survey. Dually-participating facilities must meet the waiver provisions of the SNF.

A survey of Nursing Services must be conducted if a waiver has been granted or requested.

## **PROBES**

Before granting a continuation of this waiver, or during the annual review, coordinate with the State Survey Agency, and at a minimum, determine:

- The facility's recruitment efforts and its results.
- How the facility ensures residents' needs are being met in the absence of a licensed nurse.
- How all nursing policies and procedures are followed on each shift during times when licensed services are waived?
- If there is a qualified licensed nurse to assess, evaluate, plan and implement resident care.
- If care is being carried out according to professional practice standards on each shift.
- Whether the survey team can assure the State that the absence of licensed nurses will not endanger the health or safety of residents.
- Whether there are trends in the facility, which might be indicators of decreased quality of care as a result of insufficient staffing to meet resident needs (e.g., increases in incident reports, the infection rate, hospitalizations, loss of function, etc.).
- Whether there is evidence that preventive measures (e.g., turning, ambulating) are taken to avoid poor quality of care outcomes and avoidable sudden changes in health status.
- Whether there is evidence that sudden changes in resident health status and emergency needs are being properly identified and managed by appropriate facility staff and in a timely manner.
- Whether the residents or resident representatives been notified that the facility has a waiver to provide licensed nurses on a 24-hour basis.
- Whether there is an increase in hospitalizations because licensed personnel are not available to provide appropriate services.
- Whether the facility meets all applicable requirements to continue to receive a waiver.
- Whether the staff indicates that an RN or physician is available to respond immediately to telephone calls when licensed nurses are not available.

If the SNF has a waiver of the more than 40 hours a week RN requirement:

- Is there an RN on duty 40 hours a week?