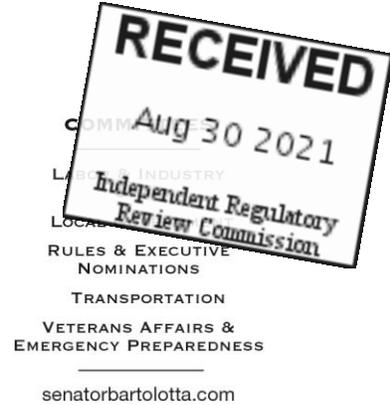


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August 30, 2021

Submitted by e-mail to: [RA-DHLTCRegs@pa.gov](mailto:RA-DHLTCRegs@pa.gov)

Lori Gutierrez  
Deputy Director  
Office of Policy  
Department of Health  
525 Forster Street, Room 814  
Health and Welfare Building  
Harrisburg, PA 17120

Dear Deputy Director Gutierrez:

As Chair of the Senate Labor and Industry Committee, I respectfully submit the following comments in response to proposed regulation #10-221: Long-Term Care Facilities submitted by the Department of Health. While the regulation is well intentioned, I believe it will have significant negative consequences for Pennsylvania nursing homes from a cost perspective and is impractical based on current and projected labor force participation.

Employers across all industries are struggling to hire sufficient employees to meet their staffing needs despite increases in pay, sign-on bonuses, enhanced benefits and other perks. While there has been a lot of churn in the labor market as the economy recovers from the COVID-19 pandemic and response, recent data from the U.S. Bureau of Labor Statistics showed 10.1 million job openings nationally in June, the highest number of job openings in the history of the data set. In the health care and social services sector there were over 1.5 million job openings, 654,000 hires and 628,000 separations reported in June nationwide.

The proposed regulation is projected to require Pennsylvania nursing homes to increase staffing by 50 percent in order to meet the increased minimum direct care staffing hours. This will be a near impossible standard for many nursing homes to meet, particularly in light of the existing labor shortages. Even if nursing homes were to meet the standard, the resulting increased costs would have to be covered through the Medical Assistance program funded by taxpayers and potential increased rates to private payers.

According to the regulatory package submitted by the Department, the proposed increase for direct care from 2.7 hours per day to 4.1 hours per day is based on a 20-year-old Centers of Medicare and Medicaid Services (CMS) study. It remains unclear as to whether the proposed increase of hours is intended to be per day or per shift; however, the regulatory package further notes that when CMS updated federal regulations in 2016 they did not impose a standard citing insufficient information and a concern that a mandated ratio could result in unintended consequences, such as staffing to the minimum, input substitution, task diversion or stifling innovation. Using a dated study that the agency that published the study declined to use as the basis for their own regulations seems misguided.

It also came to my attention in reviewing the regulation that relevant stakeholders were engaged in discussions about updated regulations in 2018 but it appears no further consultation occurred in 2019, 2020 or 2021 prior to the publishing of the regulation. Further, the Department of Health has indicated that this is the first of five proposed rulemakings it intends to publish regarding nursing homes. On the surface it would seem to make more sense to publish one comprehensive rulemaking since presumably the regulations will be interconnected in their applicability.

Lastly, I would be remiss if I did not raise a concern about adopting CMS guidelines (State Operations Manual, Chapter 7 and Appendix PP) by reference. While the regulatory process differs from the legislative process, recent court decisions, including *Protz v. WCAB (Derry Township School District)*, ruled that the Pennsylvania General Assembly could not automatically adopt future versions of guidelines without further legislative action or a deliberative process. Since it appears the CMS guidelines can be changed at any time, this could potentially be a constitutional issue.

Thank you for the opportunity to review the proposed regulation. While I certainly appreciate the intent to provide higher quality care to nursing home residents, I believe this regulation, as proposed, includes numerous deficiencies. Increasing care hours and subsequently increasing staffing, does not necessarily equate to increased quality of care. I encourage the Department of Health to reengage nursing home providers in a collaborative process to update dated regulations that are beneficial to residents, feasible to attain, and in the best interest of all Pennsylvanians. If you have any questions regarding my comments, please do not hesitate to contact my office.

Sincerely,



Senator Camera Bartolotta  
Chair  
Senate Labor and Industry Committee

cc: Independent Regulatory Review Commission (via e-mail)