

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Medicaid

Regulation/Package Title: New Rule – Nursing Facilities (NF) Ventilator Program

Rule Number(s): 5160-3-18

Date: March 10, 2017

Rule Type:

☒ New

Amended

5-Year Review

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

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5160-3-18

This rule sets forth an alternate payment methodology designed to increase access to care for ventilator dependent Medicaid individuals. The rule includes:

- Criteria for eligible providers to receive an enhanced per Medicaid day rate to cover the high costs associated with caring for these individuals.
- Definitions of terminology used throughout the rule.
- Description of the NF provider application and the Ohio Department of Medicaid (ODM) approval process.
- Explanation of the payment methodology for reimbursement which includes a component based on improved health outcomes and description of payment for bed-hold days.
- Provision for either ODM terminating, or the NF provider voluntarily withdrawing as a provider for the program.
- Periodic reporting and review of the program.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Ohio Revised Code section 5165.157 Alternative purchasing model for nursing facility services.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

This rule does not implement any federal requirement.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable. This rule does not exceed any federal requirement.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Section 5165.157 Alternative purchasing model for nursing facility services of Amended Substitute House Bill No. 42 requires the Medicaid director to establish an alternative purchasing model for NF services provided by designated discrete units of nursing facilities to Medicaid recipients with specialized health care needs. The intent of the statute is to

adequately pay participating providers for the high cost of ventilator related services and to ensure adequate access to care.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

In order to monitor access to care, ODM monitors the number of NF participating providers. Improved outcomes is measured by the occurrences of ventilator-associated pneumonia (VAP) by NF and compares the data to a VAP threshold determined on a statewide basis

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The primary stakeholders are Ohio's three NF provider associations. The NF provider associations in Ohio are:

- Ohio Health Care Association (OHCA)
- The Academy of Senior Health Sciences, Inc.
- LeadingAge Ohio

Ohio's NF provider associations represent and advocate for small and large nursing facilities with both individual and group ownership, publicly-traded and government-owned properties, and for-profit and non-profit facilities. In addition to representing and advocating for nursing facilities, the associations are informational and educational resources to Ohio's nursing facilities, their suppliers, consultants, and the public at large.

The NF provider associations were involved in review of the draft rule on an ongoing basis. Each association received a copy of the draft rule on September 2, 8, and 23 and December 6 of 2016. Additionally, on December 2 and 6 of 2016 several nursing home administrators were also sent the draft rule for comment.

What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The rule was revised based on the feedback received by ODM. The following changes were requested:

- Clarification that that chronic ventilator dependent individuals are covered under the rule regardless of their ability to be weaned from a ventilator. This change was incorporated.
- That individuals who do not meet the program requirements be permitted to occupy a bed on the designated discrete unit of the facility. This change has been made with the provision that the NF be able to accept individuals who meet the criteria specified in the rule.
- Information on how ODM will calculate a NF's VAP rate and the statewide average VAP rate. This has been explained in the rule.
- Requirement for backup ventilators. The rule was changed to reflect that the NF should have a sufficient number of ventilators to accommodate the needs of the residents.
- If a NF is placed on the Centers for Medicare and Medicaid Services (CMS) Special Focus Facility, clarification that the current individuals receiving services in accordance with this rule will continue to receive the enhanced rate. This change has been incorporated.
- One NF was concerned that a NF ventilator provider may not be in compliance with the discharge requirements included in the CMS Requirements for Participation for NFs. This rule will have no impact on a NF's ability to meet the requirements for participation.
- One NF was concerned that participating in the NF ventilator program would impede their ability to permit individuals to refuse treatment because they would be concerned about the impact on their VAP rate. The requirements for when a plan of action is required has been modified to permit the NF to identify both avoidable and unavoidable impact on their VAP rate.
- A request that ODM permit more than 30 bed hold days for individuals participating in the program. ODM cannot permit this change as the number of bed-hold days is specified in ORC 5165.34 Payments made to reserve bed during temporary absence.

8. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

ODM has selected to measure VAP rates by facility using the formula described the Centers for Disease Control and Prevention. Each facility will submit their quarterly VAP rates and ODM will calculate a statewide VAP threshold once one full calendar year of data is available. Facilities will be measured against this rate and ODM may penalize a NF of up to five per cent of the payment by ODM.

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- 9. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

No alternative regulations were considered. The Department of Medicaid considers Administrative Code rules the most appropriate type of regulation for the provisions contained in these rules.

- 10. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

This rule incorporated performance-based methodology. A NF's rate may be decreased by ODM by up to five percent depending on maintaining a VAP rates less than the statewide average VAP rate.

What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

These rules have been reviewed by the Department of Medicaid's staff, including legal and legislative staff, to ensure there is no duplication within the Department of Medicaid's rules or any others in the OAC.

- 11. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

The final rule as adopted by the Department of Medicaid will be made available to all stakeholders and the general public on the Lawriter website. The information will also be sent to the NF provider associations.

Adverse Impact to Business

- 12. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

- a. Identify the scope of the impacted business community;**

Provider participation in the Medicaid program is optional and at the provider's discretion. This rule impacts between 50 to 100 nursing facilities depending on the number who submit a request to participate. Participation in this program is also options.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

Compliance with Medicaid program requirements is mandatory for providers who choose to participate in the program, and may result in administrative costs as detailed below.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

ODM estimates it will require:

- Approximately two hours of administrator time at a rate of approximately \$60 per hour (total of \$120) to submit a request to become a NF ventilator program provider and to submit sufficient information to demonstrate the NF meets all of the requirements included in the rule.
- Approximately fifteen minutes of administrator time at a rate of approximately \$60 per hours (total \$15) to sign and return the ODM 1098 Addendum to ODM Provider Agreement for Ventilator Services in NFs. This cost is incurred once every five years during a provider’s revalidation process and with a change of ownership.
- Approximately thirty minutes per week of an admissions coordinator at a rate of approximately \$26 per hours (annual cost of \$480) to maintain the information required for quarterly reporting.
- Approximately two hours of administrator time at a rate of approximately \$60 per hour (total of \$120) to submit each quarterly report (annual cost of \$480)
- Approximately four hours of administrator time at a rate of approximately \$60 per hour (total of \$240) in the case they are required to write a plan of action and send to ODM. Any modifications to the plan of action and the follow up report may take up to an additional four hours (total of \$240).
- Approximately fifteen minutes of administrator time at a rate of approximately \$60 per hour (15) to notify ODM if they choose to no longer participate in the program. Approximately two hours of nurse time at a rate of approximately \$26 per hour per resident for discharge planning in the event the NF chooses to no longer participate in the program and elects to discharge their ventilator dependent individuals. ODM is unable to estimate a total cost because it is dependent on the number of individuals participating in the program.

Possible adverse impacts listed below were identified after the initial CSIO review of the Ohio Administrative Code contained in Electronic Rule Filing (ERF) package 170398: Rule 5160-3-18. Per the approval of Sarah JanTausch on March 7, 2017, this section of the Business Impact Analysis is updated as follows:

- Information was inadvertently omitted from the response to question 12(C) of the Business Impact analysis for ERF 170398 (Rule 5160-3-18). The omitted information involves minor costs of compliance, existing requirements not unique to this rule, or requirements that will only be applicable if a nursing facility has to file an action plan or is placed on the CMS special focus facility list as a result of deficiencies. The following is the omitted information:
 - In accordance with paragraph (C)(5) of this rule, if a NF changes the size or location of the designated discrete unit or the number of beds in the discrete unit, the facility shall notify ODM of the change via email to nfpolicy@medicaid.ohio.gov within five business days of the change. ODM estimates it will take a NF staff person approximately 15 minutes at the rate of approximately \$16.00 per hour (total estimated cost: \$4.00) to comply with this requirement.
 - In accordance with paragraph (C)(4) of this rule, NFs must cooperate with ODM or its designee during all provider oversight and monitoring activities. ODM is unable to estimate the cost of compliance with this provision because ODM does not know how many facilities will be audited, nor the extent of cooperation that will be necessary. It will vary by facility and issue.
 - In accordance with (E)(4), ODM estimates it will take approximately fifteen minutes of administrator time at a rate of approximately \$60.00 per hour (total cost \$15.00) to notify ODM that an action plan has been completed.
 - In accordance with paragraph (C)(7)(a), a NF that becomes a Special Focus Facility (SFF) under the Centers for Medicare and Medicaid Services (CMS) SFF program must notify ODM of the SFF status within one business day of receipt of the CMS SFF letter via email at Nfpolicy@medicaid.ohio.gov and attach a copy of the letter. ODM estimates it will take a NF staff person approximately 15 minutes at the rate of approximately \$16.00 per hour (total estimated cost: \$4.00) to notify ODM of the SFF status and attach a copy of the SFF letter.
 - In accordance with paragraph (C)(7)(b), when a NF has been graduated from the SFF program for a period of six consecutive months, the facility may submit a new request to provide ventilator services in accordance with paragraph (D) of this rule in order to begin admitting new individuals to the ventilator program again. ODM estimates it will take a NF administrator approximately two hours of administrator time

at a rate of approximately \$60.00 per hour (total of \$120.00) to submit a request to become a NF ventilator program provider and to submit sufficient information to demonstrate that the NF meets all of the requirements included in the rule.

13. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

There is no adverse impact on the business community. This rule will have a positive financial impact for all participating providers.

Regulatory Flexibility

14. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The provisions in these rules are the same for all nursing facilities.

How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

ORC section 119.14 is not applicable to these regulations because these regulations do not impose any fines or penalties for paperwork violations as defined in ORC section 119.14.

15. What resources are available to assist small businesses with compliance of the regulation?

Providers in need of assistance may contact the Department of Medicaid, Bureau of Long Term Services and Supports at (614) 466-6742.