Ohio | Common Sense Initiative

Mike DeWine, Governor
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Business Impact Analysis

Agency, Board, or Commission Name: The Ohio Department of Medicaid

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Nursing Facility Budget Bill Rules – HB110

Rule Number(s): 5160-3-58 (Rescind), 5160-3-50 (New), 5160-3-70 (New)

Date of Submission for CSI Review: 2/28/2022

Public Comment Period End Date: 3/7/2022

Rule Type/Number of Rules:

New/_2__ rules — No Change/____ rules (FYR? ___)

Amended/____ rules (FYR? ___) — Rescinded/__1__ rules (FYR? _No__)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing

regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

   Which adverse impact(s) to businesses has the agency determined the rule(s) create?

   The rule(s):

   a. ☐ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**

   b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**

   c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**

   d. ☒ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **Please briefly describe the draft regulation in plain language.**
   Please include the key provisions of the regulation as well as any proposed amendments.

   Rule 5160-3-58, entitled "Nursing facilities (NFs): quality indicators and quality payment rate" sets forth provisions specifying the nursing facility quality indicators and the methodology for determining the per Medicaid day quality payment rate. This rule is being proposed for rescission due to legislative changes that were made with the implementation of Amended Substitute House Bill 110 of the 133rd General Assembly.

   Rule 5160-3-50, entitled "Nursing facilities (NFs): use of additional dollars as a result of rebasing of rates" is being proposed for adoption. This new rule addresses the use, reporting, and reimbursement of additional dollars received as a result of rebasing of rates. It includes a definition of "cost center report" as well as provisions regarding direct care spending, submission of cost center reports, extensions for the submission of cost center reports, late reporting penalties, change of operator, new providers, reviews of cost center reports by the Department of Medicaid, and reimbursement of funds to the Department.

Rule 5160-3-70, entitled "Nursing facilities (NFs): appeals for special focus facilities (SFFs) proposed for termination from the medicaid program" is being proposed for adoption. This new rule includes provisions regarding appeals under Chapter 119. of the Revised Code for nursing facilities that are proposed for termination from the Medicaid program due to failure to improve or to graduate from the Special Focus Facility program within certain periods of time, and provisions for the hearings for those appeals.

3. **Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

4. **5160-3-58**

   Statutory Authority: 5165.02

   Amplifies: 5165.25

   5160-3-50

   Statutory Authority: 5165.02, 5165.36

   Amplifies: 5165.01, 5165.16, 5165.19, 5165.21, 5165.36

   5160-3-70

   Statutory Authority: 5165.02, 5165.771

   Amplifies: 5165.771

5. **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.

   No.

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

   5160-3-70

   This proposed rule contains provisions that address the state's appeals process for the nursing facility Special Focus Facility (SFF) Program when the Ohio Department of Medicaid proposes to terminate a facility's participation in the Medicaid program if the facility is placed on the SFF list and fails to make improvements or graduate from the SFF program within required timeframes. This rule contains provisions for an expedited appeals process for nursing facilities to dispute the length of time a facility is placed in a specific table on the SFF list. This change was made to provide an additional due process element in the state's SFF statute.

7. **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)?**

5160-3-58

Not applicable. This rule is being proposed for rescission.

5160-3-50

The public purpose of this rule is to implement provisions contained in the Ohio Revised Code regarding nursing facilities' use of any additional dollars they may receive as a result of the rebasing of nursing facility rates.

5160-3-70

The public purpose of this rule is to implement due process provisions found in the Revised Code regarding the federal Special Focus Facility program for nursing facilities.

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

5160-3-58

Not applicable. This rule is being proposed for rescission.

5160-3-50

The success of this rule will be measured by the proper use of additional rebasing funds as required by this rule.

5160-3-70

The success of this rule will be measured by the extent to which appeals are submitted according to the specifications of this rule by nursing facilities designated as Special Focus Facilities that are being proposed for termination from the Medicaid program, and by the extent to which hearings for those appeals are conducted according to the specifications of this rule.

9. **Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**
If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.
None of the proposed rules are being submitted pursuant to these specified sections of the Revised Code.

Development of the Regulation

9. **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 nursing facility provider associations. The nursing facility provider associations in Ohio are:

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

   Ohio's nursing facility provider associations represent and advocate for small and large nursing facilities and 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 nursing facility provider associations were involved in review of the draft rules when the Department of Medicaid emailed the draft rules and a summary of the rule changes to the associations on December 16, 2021.

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

    No input was provided by stakeholders on the proposed draft rules.

11. **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?**

    Scientific data was not applicable to the development of these rules.

12. **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.

13. **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.

    Performance-based regulations are not considered appropriate for these regulations.

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

The Department of Medicaid's staff reviewed the applicable ORC and OAC to ensure these rules do not duplicate any of the Department of Medicaid's rules or any other regulations in the ORC or OAC.

15. 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 rules as adopted by the Ohio Department of Medicaid will be posted via the Department's website at http://medicaid.ohio.gov/RESOURCES/LegalandContracts/Rules.aspx. In addition, the Department will notify stakeholders during regular Provider Association meetings when the final rules become effective.

Adverse Impact to Business

16. 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; and

These rules impact approximately 970 nursing facilities in Ohio that choose to participate in the Medicaid program. Provider participation in the Medicaid program is optional and at the provider's discretion.

b. Identify the nature of all adverse impact (e.g., 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.

5160-3-58

b.) and c.)

There is no expected adverse impact to nursing facilities to meet the quality indicators described in this rule. It is standard practice for nursing homes to provide quality care so there would be no cost to meet the criteria in the rule.

In accordance with paragraph (E)(1) of this rule, a nursing facility will not receive a point for the pressure ulcer, antipsychotic medication, and unplanned weight loss quality indicators when the Department of Medicaid determines there is insufficient data to calculate a rate for these indicators. The adverse impact to a nursing facility would be the facility's portion of the total amount of the quality funds to be paid statewide to all nursing facilities that the facility would now not receive.

In accordance with paragraph (E)(2) of this rule, a nursing facility will not receive a quality point for the employee retention quality indicator when the facility fails to complete section eight of the Department of Medicaid's nursing facility annual cost report. The adverse impact to a nursing facility would be the facility's portion of the total amount of the quality funds to be paid statewide to all nursing facilities that the facility would now not receive.

However, all the above costs are existing costs. There are no new costs as this rule is being proposed for rescission.

5160-3-50

b.) and c.)

In accordance with paragraph (C) of this rule, nursing facilities are to submit their first cost center report to the Department of Medicaid not later than 90 days after the end of calendar year 2021. Subsequent cost center reports are to be submitted not later than 90 days after the end of the applicable calendar year. Cost center reports are to be submitted on an electronic form prescribed by the Department and are to include only direct care, ancillary and support, and tax costs, as well as inpatient days. The Department of Medicaid estimates it will take a nursing facility's accountant approximately 10 hours at the rate of approximately $32.00 per hour (total estimated cost: $320.00) to prepare and submit one cost center report.

In accordance with paragraph (D) of this rule, a nursing facility may submit a cost center report within 14 days after the original due date for good cause shown if written approval for an extension request is received from the Department of Medicaid prior to the original due date of the report. The Department of Medicaid estimates it will take a nursing facility's attorney approximately 1 hours at the rate of approximately $400.00 per hour (total estimated cost: $400.00) to prepare and submit one request for an extension to the Department of Medicaid.

In accordance with paragraph (E) of this rule, if a cost center report is not received by the Department of Medicaid by the original due date or by an approved extension due date, the provider may be assessed a late reporting penalty for each day a complete and adequate report is not received. The penalty is $100.00 per calendar day for each day after the original due date or the extension due date that a facility does not submit a report. The amount of the penalty would be calculated by multiplying $100.00 by the number of calendar days after the due date or extension due date that a facility does not submit the report.

In accordance with paragraph (I) of this rule, any amounts a nursing facility spends on cost centers other than as permitted by this rule, Section 333.240 of Am Sub HB110 of the 134th General Assembly, and ORC section 5165.36 must be reimbursed to the Department of Medicaid with interest. The amount to be reimbursed by a nursing facility would be calculated by multiplying the amount improperly spent by the facility by the rate of interest to be used.

5160-3-70

b.) and c.)

In accordance with paragraph (A)(3) of this rule, if a nursing facility chooses to appeal an order terminating the facility's participation in the Medicaid program due to failure to make improvements or graduate from Special Focus Facility program within certain periods of time, the facility must submit the appeal to the Ohio Department of Medicaid within 48 hours of receipt of the order. The Department of Medicaid estimates it will take a nursing facility's attorney approximately 1.5 hours at the rate of approximately $400.00 per hour (total estimated cost: $600.00) to prepare and submit one such appeal.

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

5160-3-58

Not applicable. This rule is being proposed for rescission.

5160-3-50

The adverse impact to nursing facilities associated with this rule is justified because this rule is intended to increase direct care staffing in nursing homes, thereby helping to ensure the provision high quality, person centered care and result in better resident outcomes.

5160-3-70

The adverse impact to nursing facilities associated with this rule is justified because this rule adds an additional due process element to the state's Special Focus Facility statute. This new appeals process allows a nursing facility that has been placed on the federal Special Focus Facility (SFF) list and has received notice of termination from the Medicaid program for failure to make improvements or graduate from the SFF program within a certain period of time to file an appeal to dispute the length of time the facility has been on the SFF list.

Regulatory Flexibility

18. 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 regardless of size.

19. 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.

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

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