

Who Provides Care for Nursing Home Residents? An Update on Temporary Nurse Aides

On March 20, 2020, at the beginning of the coronavirus pandemic and as part of a long list of blanket waivers and flexibilities granted to nursing facilities,¹ the Centers for Medicare & Medicaid Services (CMS) waived the requirement that facilities not use individuals as nurse aides for more than four months unless they were trained in a state-approved nurse aide training program of at least 75 hours.² CMS did not waive the requirement for competency testing.³ As the Center for Medicare Advocacy (Center) reported in July 2020, the American Health Care Association (AHCA), a major industry trade association, immediately announced its development of a free eight-hour on-line training course for a “temporary position intended to address the current state of emergency”⁴ and many states explicitly adopted AHCA’s training program or other lesser training requirements.⁵

In this update, the Center reports that many states, following CMS’s April 2021 guidance discussed below, are moving, in a variety of ways, to convert these temporary workers into permanent aides, without receiving the training that they would ordinarily have required before the pandemic. States are most commonly counting time worked as temporary nurse aides as if it were actual training and many are requiring few, if any, hours of additional training beyond the eight hours received on-line. In essence, many temporary aides are currently being grandfathered into permanent status as certified nurse aides. The Center considers CMS’s guidance, and states’ actions, both illegal and poor public policy. Without public debate, the permanent downgrading of the nursing home workforce is underway.

CMS guidance on April 8, 2021

On April 8, 2021, CMS updated its guidance on some of the blanket waivers issued in 2020.⁶ CMS did not end the waiver of nurse aide training requirements and stated that “the four-month regulatory timeframe will be reinstated when the blanket waiver ends.” Despite its recognition that lifting of the waiver would restore existing regulations, CMS suggested “that states evaluate their NATCEP [Nurse Aide Training and Competency Evaluation Program] and consider allowing some of the time worked by the nurse aides during the PHE [public health emergency] to count toward the 75-hour training requirement.” As shown below, many states accepted CMS’s explicit invitation to create new options for temporary nurse aides to become fully certified aides, without satisfying the states’ normal training requirements.

In the Center’s view, through this suggestion, which allows states to treat time worked as if it were time in training, CMS signaled that states are free to undermine longstanding nurse aide training requirements now, in anticipation of the end of the public health emergency. As shown below, CMS’s guidance has in fact encouraged states to allow workers to continue providing care to residents now and after the pandemic, even when they have less training than the state required of all aides before the pandemic and less training than the 75 hours that the federal government has required for decades as the minimum.

CMS's gratuitous offer to states and the nursing home industry is especially troubling when CMS does not know how many people are working as temporary nurse aides and what proportion of the aide workforce they actually represent, what kind of training and how much training they received, who provided the training, where they work, which specific tasks they perform, and how well (or inadequately) they perform aide assignments. CMS has no plans to find out any of this information.

How many temporary nurse aides are there? According to the American Health Care Association's *Provider Magazine*, as reported in February 2021, 182,890 people had registered for the program and "more than 136,300 have completed and passed these courses since their launch in April [2020], numbers that continue to rise every day."⁷ An article in the trade press *Skilled Nursing News* in April 2021 reported that Genesis had hired more than 600 temporary nurse and still employed 319 of them.⁸ Estimates of temporary nurse aides working in Pennsylvania facilities range from 1,000 temporary nurse aides⁹ to 4,000.¹⁰ Iowa nursing facilities have employed 2,100 temporary nurse aides.¹¹ Michigan has more than 2,000 temporary nurse aides.¹² There could literally be tens of thousands of individuals with limited training providing care to residents as temporary nurse aides, now and into the indefinite future.

The Center believes that CMS's April 2021 guidance violates federal law and is poor public policy.

Violation of federal law

Once the waiver of training requirements is lifted, the prior rules again become effective, in their entirety. Without engaging in formal notice and comment rulemaking, CMS does not have authority to rewrite the regulations. Federal law is specific and detailed about federal requirements for state approval of nurse aide training programs and about which facilities are ineligible to conduct nurse aide training.¹³ Federal law also confirms that states' review and approval of nurse aide training and competency evaluation programs (NATCEPs) must comply with the federal standards.¹⁴

The federal regulations¹⁵ set out mandatory requirements for state approval of a nurse aide training and competency evaluation program. These detailed requirements address the number of training hours,¹⁶ qualifications of instructors,¹⁷ and subject areas for training.¹⁸ The federal regulations prohibit an aide from having any contact with a resident until the aide has completed at least 16 hours of training in five specified areas: "communication and interpersonal skills; infection control; safety/emergency procedures, including the Heimlich maneuver; promoting residents' independence; and respecting residents' rights."¹⁹

Federal law also prohibits certain nursing facilities from conducting NATCEP. Facilities that have nurse staffing waivers, have had extended or partial extended surveys, or have had civil money penalties of a certain dollar amount imposed are ineligible to train aides.²⁰ Federal law also provides that if a facility conducts training, the state must determine the aide's competency and it cannot delegate the competency determination to the facility.²¹ These provisions are not waived.

Poor public policy

Aides provide most of the direct hands-on care that residents receive. Assuring that aides understand residents' rights and dementia, know how to assist residents with activities of daily living, understand and implement infection control and prevention practices, facility policies and practices, and more is essential to making good care for residents possible.

Working as an aide in a nursing home is dangerous.²² Analyzing data from the federal Bureau of Labor Statistics, PHI reports that “nursing assistants are injured more than three times more frequently than the typical American worker.”²³

A study using 2004 data from the National Nursing Assistant Survey and the National Nursing Home Survey found that 60.2% of all certified nursing assistants nationally reported a work-related injury in the year before the survey and 65.8% reported being injured more than once.²⁴ The researchers found

As for all types of injuries, CNAs who were new to the profession and to the facility, as well as those working mandatory overtime and those who rated their initial training as poor preparation for their work in the facility, were at higher odds of developing musculoskeletal injuries.²⁵

CNAs who report being generally better prepared for the job are able to handle many other challenging aspects of direct care better, resulting in fewer injuries.²⁶

It is hardly surprising that untrained or minimally trained workers are more likely to be injured than workers who have been more comprehensively trained. It appears inevitable that minimally trained TNAs will be injured.

How states are treating “temporary nurse aides”

States have taken a broad range of actions, from grandfathering in temporary aides without requiring any further training to, at the other end of the spectrum, announcing that all temporary aides will need to complete the states' full pre-pandemic training requirements. The most common response, however, is creating new state requirements that allow temporary aides to become permanent aides. Some states qualify TNAs as certified nurse aides if they pass the state examination without any additional training; others require temporary aides to complete abbreviated training, offered by the facility, regardless of the quality of care provided by the facility or, often, the qualifications of the instructors. Generally, and contrary to federal law, states allow facilities to determine and certify aides' competency.

State laws, rules, and policies are rapidly changing. The following discussion is not a comprehensive list of states' actions. It is intended to identify some of the approaches that some states have taken to date. In other states, legislation is pending. Some states have not yet addressed whether or how to convert TNAs into permanent CNAs. States that originally indicated that their TNA program would end when the public health emergency ends may alter their plans and allow the conversion of TNAs into permanent workers.

Grandfathering

Pennsylvania's Nurse Aide Resident Abuse Prevention Training Act – Certification of COVID-19 Temporary Nurse Aides²⁷ allows TNAs to be deemed to meet Pennsylvania's NATCEP requirements if the person (1) successfully completed a training program authorized during the pandemic waiver; (2) worked at least 80 hours as a TNA during the COVID-19 emergency under the supervision of a licensed or registered nurse; and (3) established competency (by successfully completing the nurse aide training examination, being certified by a site administrator, or being assessed in all areas required by 42 C.F.R. §483.152(b)). The Findings section of the law states, "(4) Individuals have served admirably and compassionately in this capacity and have demonstrated through accelerated training and experience adequate competency to transition to fully registered status as a nurse aide."

Tennessee's emergency rules allow a TNA to be deemed to satisfy the requirements of a nurse aide training and competency evaluation program if the aide (1) has worked at least 200 hundred hours in a nursing home during the public health emergency; (2) "passed a written or oral test, which can be the initial online test the TNA took to become a TNA (i.e., part of the 8-hour AHCA TNA Training Program);" and (3) established "competency to perform the duties of a nurse aide by successful completing an assessment in all areas of required nurse aide training . . . by the hiring entity."²⁸ The employer and worker complete attestation forms.²⁹ The worker's attestation asks for date of completion of the AHCA 8-hour training program; the name of the facility where the individual worked 200 or more hours as a TNA; whether the workers has ever been convicted of, or is under investigation for, abuse or neglect. The facility attestation asks if the individual worked at least 200 hours as a TNA, passed AHCA's 8-hour training worker's course, and "demonstrated competence in all skills required of a nurse aide as outlined by 42 CFR Part 483." The TNA Bridge Program is available only to individuals who became TNAs on or before October 15, 2021. Facilities can use TNAs until the federal blanket waivers issued under the public health emergency are lifted. As of now, the Emergency Rule ends January 14, 2022.

Restoration of prior training requirements when the public health emergency ends

Illinois' Temporary Nursing Assistant Program provided that the position "is only authorized for the duration of the Governor's COVID Disaster Proclamation, after which time facilities are required to transition to certified staff only (Certified Nursing Assistants)" and that "TNAs are not eligible to take the Certified Nursing Assistant competency exam and will not be employed as an aide after the pandemic emergency."³⁰ According to the Illinois Health Care Association, the TNA program expired January 18, 2021 and all temporary aides were required to register for a certified nurse assistant program within 45 days.³¹ "Once registered, TNAs can serve as a CNA in-training."

New Jersey law, A5353, has authorized TNAs during the public health emergency, counted training they received during the PHE ("and, if so required by the CMS, such additional training as may be required"), permitted the director of nursing, by certification or letter, to establish the competency of a TNA, and given TNAs three attempts to pass a state test and become CNAs. However, the law also provides that TNAs who have not become a certified nurse aide can work "no more than 90 days following the end of the public health emergency."³²

Creating new state requirements

Passing an examination without additional training

Some states allow temporary nurse aides to bypass additional training beyond the (generally eight-hour) TNA training they received if they have worked a certain number of hours in a nursing facility and pass a state certification test.

North Carolina announced “a new temporary pathway available for individuals who worked in nursing homes during the COVID-19 pandemic as temporary nurse aides to be listed on the Nurse Aide I Registry.”³³ The Press Release says that “Eligible nursing home staff [who are not defined] may use their on-the-job training and experience as an equivalency to the traditional classroom training and take the Nurse Aide I competency examination and be listed on the registry after successfully completing it.”³⁴

Oklahoma allows “those brave men and women who have served this vulnerable [long-term care] population during the COVID-19 pandemic . . . to count those hours towards their training and certification requirements.”³⁵ The Oklahoma Department of Health’s memorandum to All Long-Term Care Facilities (Aug. 24, 2021) about the nurse aide waiver provides that the waiver during the pandemic “does not exempt the minimum 75 hours of training, but does allow consideration of time worked by the nurse aide to count towards the 75-hour training requirement.”³⁶ TNAs must apply no later than 120 days after the public health emergency is lifted, submit a training exceptions request, and “sit for the competency examination.”³⁷ The application includes a Skills Performance Checklist, Affirmation of 16 Hours of Training, and 10 hours of Alzheimer’s disease training (a state law requirement).

Louisiana’s Transition from Temporary Nurse Aide (TNA) to Certified Nurse Aide (CNA), for four months after the CMS waiver expires, makes TNAs who have had at least eight hours of TNA training, at least 16 hours of “skills competency verification,” and at least 60 hours of “on the job training/work” “eligible to test for certification as a CNA.”³⁸ The facility must submit a specified form to the Louisiana Nurse Aide Registry (LA-NAR). A nurse aide evaluator may administer the competency test to a minimum of four TNAs or TNAs may take the test at a regional test site. TNAs who do not pass the test after three attempts must take an approved nurse aide training program before testing again.

Virginia deems temporary workers to be eligible by the Board of Nursing during the public health emergency “to take the National Nurse Aide Assessment Program examination upon submission of a completed application, the employer’s written verification of competency and employment as a temporary nurse aide, and provided no other grounds exist under Virginia law to deny the application.”³⁹ Virginia’s HB 7001 Budget Bill continued the authorization.

Texas adopted emergency rules, Nurse Aide Transition from Temporary Status, on May 19, 2021 to “provide a path for certification of temporary nurse aides who have been working in nursing facilities under a waiver of training requirements during the COVID-19 pandemic.”⁴⁰ The emergency rule allows “time trained and time worked in a nursing facility during the pandemic to be counted as classroom and clinical hours required as part of a NATCEP.” Training by nursing facilities that are not ordinarily able to conduct a NATCEP nevertheless counts, so long as the facility documents the name of the instructor (who must meet state requirements), “a list of the training requirements with an attestation that the individual was

trained in each,” and an attestation that the work training and experience equaled at least 100 hours. The worker is then eligible to take the state’s written and oral examination. Workers must be certified within four months of the end of the PHE.

Abbreviated training

Many states give credit to TNAs for hours worked as TNAs and mandate some additional number of hours of training, usually to reach the 75 hours that federal regulations consider the minimum permissible number.

Georgia’s COVID-19 Temporary Nurse Aide Training Program, which became effective March 20, 2020, provided that “Once the state of emergency has been lifted, the Department will allow a period of time for emergency nurse aides to complete any additional training necessary for them to pass the required Georgia Certified Nurse Aide Competency Test administered by Pearson VUE and to enroll in the Georgia Nurse Aide Registry.”⁴¹

Mississippi’s Bridge Project gives TNAs credit for their 8-hour on-line course and for the 16 clinical hours. TNAs must complete a Nurse Aide Training Program (NATP) of 59 classroom hours. In a unique provision, the Bridge Project states that facilities cannot qualify to conduct NATP if they have had an immediate jeopardy deficiency or were assessed a civil money penalty of \$11,160 or more in the past two years.⁴²

Wisconsin’s Emergency Nurse Aide Training Program qualifies individuals for inclusion on the nurse aide registry list if they complete 16 hours of initial essential training (as required by state and federal law), have at least 59 additional hours (including 16 clinical hours), and take the nurse aide competency examination. The Program allows facilities to train individuals a total of 75 hours (with 16 clinical hours) instead of the usual 120 hours (with 32 clinical hours). Wisconsin also authorized a temporary nurse aide training program that required an initial 16 hours of essential training. This program exists for the duration of the PHE, but aides may not continue working after the emergency is over.⁴³

New York’s Dear Administrator Letter (Aug. 23, 2021), DAL-NH-21-18, describes a TNA to CNA Training Program, which requires 24 hours of classroom and 16 hours of lab instruction (totaling 40 hours) and gives 35 hours of “credit” for each TNA “in recognition of their ‘on the job training’ and employment providing resident care between March 1, 2020 through the end of the federal PHE.”⁴⁴ TNAs are eligible for the TNA to CNA Training Program if they worked at least 30 days or 150 hours as a TNA. TNAs not meeting those work requirements must complete an approved full nurse aide training program of at least 100 hours. Facilities that want to train TNA staff must complete a form letter that identifies the program instructor.

Other modifications of state law

Connecticut created a Temporary Nurse Aide Bridge to Certified Nurse Aide (CNA) Program.⁴⁵ TNAs can work after July 20, 2021 only if they are “enrolled in an approved training program” or if they “have completed an approved nurse aide training program and be working within *the allowed* 120 days after hire prior to successfully completing the Nurse Aide exam [italics in original].” Facilities wanting to offer a bridge training program for currently employed TNAs must provide the Department of Public Health Nurse Aide Registry with a curriculum and course

overview and the resumes of the primary training instructor and other proposed instructors. The Department must approve the training program prior to its implementation. Currently-employed TNAs must complete training, which includes AHCA's 8-hour on-line training program, classroom training, skills lab/clinical training, and on the job training provided by a nursing facility and totaling at least 100 hours. The program provides that "Any training that has occurred during the employment of the temporary nurse aide may count towards the minimum 100 hours of required training for certification as a CNA," but also states "the facility-based instructors must ensure that all training modules outlined in Connecticut model nurse's aide training curriculum are incorporated into each trainee's learning experience" so that some TNAs may be required to complete more than 100 hours of training. Trainees with a signed certificate or letter on facility letterhead documenting that they have completed the training are then eligible to take the Connecticut Nurse's Aide Examination.

Federal legislation

The Nurses CARE Act of 2021⁴⁶ essentially grandfathers in temporary nurse aides. Introduced by a bipartisan group of six Pennsylvania Representatives (five Republicans, one Democrat), H.R. 331 looks like the recently-passed Pennsylvania law. It provides that temporary workers who worked at least 80 hours on the job and pass the state's competency examination (defined as successfully completing the state's nursing aide examination, certification by "a site administrator of a nursing aide apprenticeship program approved by the State," or "an assessment by the facility in each of the areas and skills described in [42 C.F.R. §583.152(b)]) are included on their states' registry as certified nurse assistants.

Conclusion

One of the most significant changes to federal law made by the Nursing Home Reform Law of 1987 was the requirement that aides be trained and competent before they provide care to residents. At the time the Reform Law was passed, about half the states had no training requirement for aides. The coronavirus pandemic should not be the excuse to diminish aide training rules, reducing the quality of care that residents receive.

When the public health emergency is lifted, the prior federal regulations governing nurse aide training again become effective. CMS cannot unilaterally change the rules to allow workers to continue providing care to residents when their "training" fails to comply fully with longstanding federal and state nurse aide training requirements.

Workers with limited training and skills have been providing care to nursing home residents during the pandemic. They should not lose their jobs when the public health emergency ends. Instead, the Center believes they should be given four months to complete their state's comprehensive nurse aide training requirements and to pass their state's competency evaluation. Both residents and workers need and deserve these protections.

September 15, 2021 - T. Edelman, M. Edelman

¹ CMS, COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers (Mar. 28, 2020, most recent update, May 24, 2021), <https://www.cms.gov/files/document/covid-19-emergency-declaration-waivers.pdf>. The waivers for skilled nursing and nursing facilities are currently on pages 16-21.

² 42 U.S.C. §§1395i-3(b)(5), 1396r(b)(5), Medicare and Medicaid, respectively; 42 C.F.R. §§483.35(d)(1)(i), (ii), 483.35(c).

³ 42 C.F.R. §483.35(c), Proficiency of nurse aides, was not waived. That section states, in full, “The facility must ensure that nurse aides are able to demonstrate competency in skills and techniques necessary to care for residents’ needs, as identified through resident assessments, and described in the plan of care.”

⁴ AHCA, Temporary Nurse Aide Training & Competency Checklist, <https://educate.ahcanal.org/products/temporary-nurse-aide>

⁵ “Who’s Providing Care for Nursing Home Residents? Nurse Aide Training Requirements during the Coronavirus Pandemic” (CMA Alert, Jul. 23, 2020), <https://medicareadvocacy.org/wp-content/uploads/2020/07/Report-Nurse-Aide-Training.pdf>

⁶ CMS, “Updates to Long-Term Care (LTC) Emergency Regulatory Waivers issued in response to COVID-19,” QSO-21-17-NH (Apr. 8, 2021), <https://www.cms.gov/files/document/qso-21-17-nh.pdf>

⁷ Danielle Levitan, “Temporary Nurse Aide Training a Huge Boon During Pandemic,” *Provider* (Feb. 10, 2021), <https://www.providermagazine.com/Topics/Guest-Columns/Pages/2021/Temporary-Nurse-Aide-Training-a-Huge-Boon-During-Pandemic.aspx>

⁸ Maggie Flynn, “Lawmakers, Providers Call for Temporary Nurse Aide Extension – as ProMedica Tries to Fill 1,500 Jobs in One State Alone,” *Skilled Nursing News* (Apr. 15, 2021), <https://skillednursingnews.com/2021/04/lawmakers-providers-call-for-temporary-nurse-aide-extension-as-promedica-tries-to-fill-1500-jobs-in-one-state-alone/>

⁹ Kimberly Marselas, “Even with PHE extension, providers worry about early demise of nurse aide waiver,” *McKnight’s Long-Term Care News* (Jul. 21, 2021), <https://www.mcknights.com/news/even-with-phe-extension-providers-worry-about-early-demise-of-nurse-aide-waiver/>

¹⁰ Kimberly Bonvissuto, “Law creates permanent pathway to employment for temporary nurse aides,” *McKnight’s Senior Living* (Dec. 1, 2020), <https://www.mcknightsseniorliving.com/home/news/law-creates-permanent-pathway-to-employment-for-temporary-nurse-aides/> (describing TNAs in nursing homes and assisted living facilities)

¹¹ Clark Kauffman, “State waives training requirements for nursing home staff,” *Iowa Capital Dispatch* (Sep. 1, 2021), <https://iowacapitaldispatch.com/2021/09/01/state-waives-training-requirements-for-nursing-home-staff/>

¹² “Rep. Bollin spearheads plan to help frontline workers advance their careers” (News Release, Jun. 24, 2021), <https://gophouse.org/posts/rep-bollin-spearheads-plan-to-help-frontline-workers-advance-their-careers>

¹³ 42 U.S.C. §§1395i-3(f)(2)(A)(i)-(iv), 1396r(f)(2)(A)(i)-(iv), Medicare and Medicaid, respectively

¹⁴ 42 U.S.C. §§1395i-3(e)(a), 1396r(e)(1), Medicare and Medicaid, respectively

¹⁵ 42 C.F.R. §483.152

¹⁶ 42 C.F.R. §483.152(a)(1) (at least “75 clock hours of training”)

¹⁷ 42 C.F.R. §§483.152(a)(5)(i) (by or under the general supervision of a registered nurse with at least two years’ nursing experience (including at least one year in a long-term care facility), 483.152(a)(5)(ii) (instruction by persons who “have completed a course in teaching adults or have experience in teaching adults or supervising nurse aides”); 483.152(a)(5)(iii) (supervision of training by the director of nursing for the facility)

¹⁸ 42 C.F.R. §§483.152(b)(1) (at least 16 hours of training in specified areas (communication and interpersonal skills, infection control, safety/emergency procedures, promoting residents’ independence, and respecting residents’ rights) before the worker has any contact with a resident; 483.152(b)(2)(i)-(v) (basic nursing skills); 483.152(b)(3)(i)-(viii) (personal care skills); 483.152(b)(4)(i)(v) (mental health and social service needs); 483.152(b)(5)(i)-(v) (care of cognitively impaired residents); 483.152(b)(6)(i)-(vi) (basic restorative services); 483.152(b)(7)(i)-(vii) (residents’ rights)

¹⁹ 42 C.F.R. §483.152(b)(1)(i)-(v). The areas are communication and interpersonal skills; infection control; safety/emergency procedures, including the Heimlich maneuver; promoting residents’ independence; and respecting residents’ rights.

²⁰ 42 U.S.C. §§1395i-3(f)(2)(B)(iii)(I)(a)-(c), 1396r(f)(2)(B)(iii)(I)(a)-(c)

²¹ 42 U.S.C. §§1395i-3(f)(2)(B)(iii)(II), 1396r(f)(2)(B)(iii)(II)

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- ²⁵ *Id.* 10.
- ²⁶ *Id.* 11.
- ²⁷ Act of Nov. 25, 2020, P.L. 1301, No. 138 (Session of 2020, No. 2020-138), SB 1268, <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2020&sessInd=0&act=138>
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- ²⁹ Attestation Form for Temporary Nurse Aides to Be Placed on the Tennessee Nurse Aide Registry, <https://www.tn.gov/content/dam/tn/health/program-areas/hcf/TNA-Attestation-Form.pdf>
- ³⁰ Illinois Department of Public Health, Temporary Nursing Assistant (TNA) Training Program, <https://www.ihca.com/Files/COMM-COVID-19/TNA%20Training%20Program%20Instructions.pdf>
- ³¹ Illinois Health Care Association, Temporary Nursing Assistant Program, <https://www.ihca.com/tna>
- ³² Assembly, No. 5353, https://www.njleg.state.nj.us/2020/Bills/A9999/5353_R1.PDF
- ³³ North Carolina Department of Health and Human Services, “NCDHHS Creates Pathway for Temporary Nursing Home Staff to Receive Higher Credentialing” (Press Release, Apr. 29, 2021), <https://www.ncdhhs.gov/news/press-releases/2021/04/29/ncdhhs-creates-pathway-temporary-nursing-home-staff-receive-higher-credentialing>
- ³⁴ *Id.*
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