

# Staffing Mandate Update

**LeadingAge NY HR Council Mtg. Aug, 1, 2024** *Darius Kirstein, Dir. of Financial Policy & Analysis*

# Roadmap

## AGENDA

- ▶ State Minimum Staffing Requirements
- ▶ Enforcement Status Update
- ▶ Frequency of Compliance/Non-Compliance
- ▶ Federal Requirements and Implementation Timing
- ▶ Key Differences

## Level Set

- ▶ State minimum nurse staffing mandate in effect since April 2022
- ▶ Federal minimum staffing mandate enacted in May 2024, but most requirements 2+ years away
- ▶ Litigation may thwart fed mandate
- ▶ State & Fed Requirements differ but facilities will need to comply with both

# STATE NH Minimum Staffing Requirement

Nursing homes must provide at least 3.5 hours of nursing care per resident per day (HPRD), of which:

- 1.1 HPRD must be provided by a Licensed Practical Nurse (LPN) or Registered Nurse (RN)
- 2.2 HPRD must be provided by a Certified Nurse Aide (CNA) (includes nurses in training for 2022)
- (remaining .2 hours can be any combination of RN/LPN/CNA time)

## Key considerations:

- Compliance is assessed quarterly using Payroll Based Journal (PBJ) data
- HPRD = hours reported for the quarter divided by MDS-based resident days
- Must meet all 3 threshold (3.5 overall, 1.1 licensed, 2.2 CNA)
- Unlike 5-Star Staffing Measure, hours are NOT adjusted for resident acuity
- Countable hours for state staffing levels EXCLUDE DON and admin nurse hours

# State Staffing Standard Enforcement

Enforcement began with Quarter 2 of CY 2022 (i.e., April 2022)

- Compliance is measured on a quarterly average
- Quarterly average is calculated for all 3 threshold (3.5 overall, 1.1 licensed, 2.2 CNA)
- If the quarterly average is below the threshold, a penalty is assessed for each day of the quarter that staffing is below the required threshold
- Penalties are progressive based on severity of the shortfall and recurrence

## **Current Status:**

- DOH staff has completed their review work on Q2 2022 and forwarded recommendations to the Department's Division of Legal Affairs
- Recommend reductions for the majority of homes
- No penalties assessed yet
- DOH currently working through Q4 2022 penalty reduction requests

# State Staffing Standard Penalties

Total Daily Registered Nurses, Licensed Practical Nurses, and Certified Nurse Aides* HPRD Hours (Range)	1st Quarter of Non-compliance in Year	2nd Quarter of Non-compliance in Year	3rd Quarter of Non-compliance in Year	4th Quarter of Non-compliance in Year
	Penalty/Day	Penalty/Day	Penalty/Day	Penalty/Day
3.5	\$ -	\$ -	\$ -	\$ -
2.9 to 3.49 (Deficient .01 to .6)	\$ 500.00	\$ 575.00	\$ 675.00	\$ 800.00
2.2 to 2.89 (Deficient .61 to 1.3)	\$ 650.00	\$ 750.00	\$ 875.00	\$ 1,050.00
1.5 to 2.19 (Deficient 1.31 to 2)	\$ 1,000.00	\$ 1,150.00	\$ 1,350.00	\$ 1,600.00
0 to 1.49 (Deficient 2.01 to 3.5)	\$ 2,000.00	\$ 2,000.00	\$ 2,000.00	\$ 2,000.00

\*Certified Nurse Aides includes nurses in training for review periods in 2022

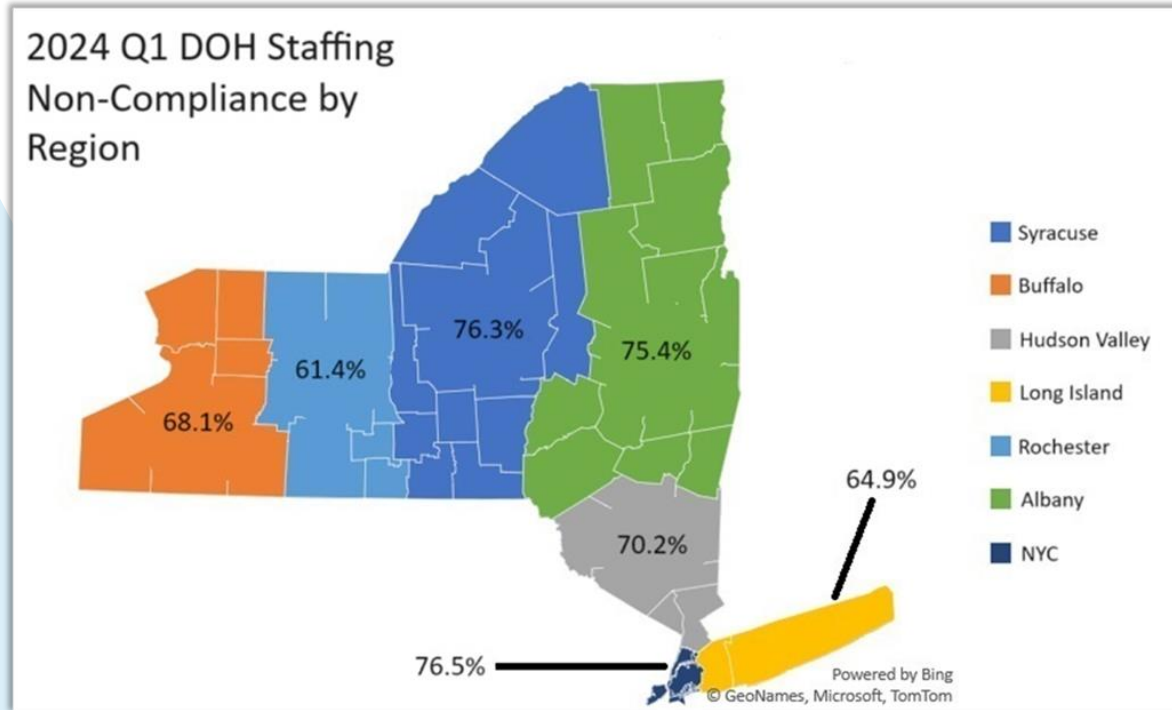
Note that homes that do provide 3.5 hours per resident day of overall nursing but do not meet the 1.1 RN/LPN or the 2.2 CNA hours per resident day thresholds are also out of compliance but current DOH materials do not specify those penalties.

# State Staffing Standards Compliance Levels

## PERCENT OF HOMES FAILING AT LEAST 1 OF THE THREE STATE STAFFING REQUIREMENTS

	ALL	PROP	VOL	PUB
Q2 2022	75%	86%	55%	35%
Q2 2023	74%	84%	61%	27%
Q4 2023	69%	79%	53%	27%
Q1 2024	72%	82%	56%	25%

# State Staffing Standards Compliance Levels



## PBJ Nurse Staffing Data

<b>MEDIAN NURSING STAFFING PER RESIDENT DAY</b>				
	<b>ALL</b>	<b>PROP</b>	<b>VOL</b>	<b>PUB</b>
<i>Q4 2019</i>	<i>3.36</i>	<i>3.24</i>	<i>3.61</i>	<i>3.87</i>
<i>Q4 2021</i>	<i>3.10</i>	<i>3.00</i>	<i>3.40</i>	<i>3.80</i>
<i>Q4 2022</i>	<i>3.18</i>	<i>3.06</i>	<i>3.52</i>	<i>3.89</i>
<i>Q2 2023</i>	<i>3.22</i>	<i>3.11</i>	<i>3.49</i>	<i>3.85</i>
<b>Q4 2023</b>	<b>3.30</b>	<b>3.20</b>	<b>3.56</b>	<b>4.12</b>

# Nursing Home Staffing Compliance Determinations

Next quarter to be checked for compliance will be Q1 of CY 2023. Custom compliance letters will be posted on the Health Commerce System.

1. If notice indicates compliance, congratulations- no further action needed.
2. If notice indicates non-compliance:
  1. Review your own data to verify accuracy of DOH quarterly calculations
  2. Review the list of non-compliant days provided on the notice for accuracy
  3. Verify that the daily MDS Census shown on the CMS PBJ Data release matches your own records

If you observe **errors** in the DOH calculations or identify reporting issues that misrepresent the facility's staffing levels, complete the on-line **Request for Redetermination**

If the data is **accurate** but the facility is out of compliance, apply for penalty mitigation by completing the on-line **Penalty Reduction Application** (Schedules A, B and C)

## Facility CY2023 Q4 PBJ Staffing Compared to NY State Minimum Staffing Requirements

updated April 2024

Select Facility by Medicare Cert # Below:

DON hours as well as hours of RNs/LPNs with Administrative Duties are not included in staffing level calculations.

included

included

included

NO LONGER INCLUDED IN 2023

1.1

2.2

3.5

A. DAILY HPR STAFFING

B. DAILY PER RESIDENT SHORTFALL

C. DAILY OVERALL SHORTFALL (BASED ON DAILY CENSUS)

Name	Work Date	Census	RN HRS	LPN HRS	Aide HRS	Aide Trainee HRS	RN/LPN	AIDE	TOTAL	RN/LPN NEED	AIDE NEED	ADDITIONAL NEED (any combination RN/LPN/Aide)	RN/LPN NEED	AIDE NEED	ADDITIONAL NEED (any combination RN/LPN/Aide)
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231224	79	37.8	49.3	123.3	0.0	1.10	1.56	2.66	-	0.64	0.20	-	50.6	15.7
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231225	80	29.8	56.3	126.8	0.0	1.08	1.58	2.66	0.03	0.62	0.20	2.0	49.3	16.0
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231226	81	36.0	57.3	132.0	0.0	1.15	1.63	2.78	-	0.57	0.15	-	46.2	12.1
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231227	81	24.8	66.3	145.0	0.0	1.12	1.79	2.91	-	0.41	0.18	-	33.2	14.3
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231228	81	28.0	67.0	139.0	0.0	1.17	1.72	2.89	-	0.48	0.13	-	39.2	10.3
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231229	79	41.0	52.8	116.5	0.0	1.19	1.47	2.66	-	0.73	0.11	-	57.3	8.9
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231230	79	53.3	33.0	121.5	0.0	1.09	1.54	2.63	0.01	0.66	0.20	0.7	52.3	15.8
THE EMERALD PEEK REHABILITATION AND NURSING CENTER	20231231	81	31.5	61.3	121.0	0.0	1.15	1.49	2.64	-	0.71	0.15	-	57.2	12.6

<b>QUARTERLY TOTALS:</b>	<b>7,858</b>	<b>3,856</b>	<b>6,085</b>	<b>14,114</b>	<b>-</b>
<b>335003</b>					

<b>Additional Hours Needed to Ensure Daily Compliance:</b>	<b>RN/LPN</b>	<b>AIDE</b>	<b>"Either"</b>
Additional Hours needed for Quarter:	56.8	3,173.9	551.5

Source: CMS. Raw data available at the link below:

<https://data.cms.gov/quality-of-care/payroll-based-journal-daily-non-nurse-staffing>

Regulations can be accessed at the link below:

<https://regs.health.ny.gov/content/section-41513-nursing-services>

PBJ Manual is available here :

<https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Downloads/PBJ-Policy-Manual-Final-V25-11-19-2018.pdf>

Notes: Figures in yellow box at right show the facility's average staffing levels for the quarter. If a facility does not meet all three requirements (3.5 overall, 1.1 RN/LPN, 2.2 CNA) on a quarterly average basis, penalties are assessed for each non-compliant day.

DOH has indicated that the Department will round to one decimal place when calculating quarterly average hours to determine compliance.

### Quarterly Averages: HPRD

Quarterly Avg. RN/LPN (1.1)	1.27
Quarterly Avg. CNA (2.2)	1.80
Quarterly Avg. Overall (3.5)	3.06

**COUNT OF NON-COMPLIANT DAYS: 92**

Note: Daily penalties for non-compliant days are assessed if the facility fails to reach one or more of the three

# State Staffing Standards- Resources

## [DOH Dedicated NH Staffing Levels Web Page](https://www.health.ny.gov/facilities/nursing/minimum_staffing/)

[https://www.health.ny.gov/facilities/nursing/minimum\\_staffing/](https://www.health.ny.gov/facilities/nursing/minimum_staffing/)

## [DOH Staffing Levels Enforcement Webinar Recording \(July 6, 2023\)](https://meetny-events.webex.com/webappng/sites/meetny-events/recording/3763c456fe4d103bbe7fbea550c11895/playback)

<https://meetny-events.webex.com/webappng/sites/meetny-events/recording/3763c456fe4d103bbe7fbea550c11895/playback>

## [DOH Staffing Levels Enforcement Webinar Slides](https://health.ny.gov/facilities/nursing/minimum_staffing/docs/2023-07-06_nursing_home_staffing_standards.pdf)

[https://health.ny.gov/facilities/nursing/minimum\\_staffing/docs/2023-07-06\\_nursing\\_home\\_staffing\\_standards.pdf](https://health.ny.gov/facilities/nursing/minimum_staffing/docs/2023-07-06_nursing_home_staffing_standards.pdf)

## [Staffing Levels Enforcement FAQs](https://www.health.ny.gov/facilities/nursing/minimum_staffing/docs/faq.pdf)

[https://www.health.ny.gov/facilities/nursing/minimum\\_staffing/docs/faq.pdf](https://www.health.ny.gov/facilities/nursing/minimum_staffing/docs/faq.pdf)

## [Commissioner's Acute Labor Shortage Determination](https://www.health.ny.gov/facilities/nursing/minimum_staffing/docs/commissioners_determination.pdf) (covering Q2-Q4 of 2022)

[https://www.health.ny.gov/facilities/nursing/minimum\\_staffing/docs/commissioners\\_determination.pdf](https://www.health.ny.gov/facilities/nursing/minimum_staffing/docs/commissioners_determination.pdf)

## [Commissioner's Acute Labor Shortage Determination](https://www.health.ny.gov/facilities/nursing/minimum_staffing/docs/commissioners_determination_2024-01.pdf) (covering Q1-Q2 of 2023)

[https://www.health.ny.gov/facilities/nursing/minimum\\_staffing/docs/commissioners\\_determination\\_2024-01.pdf](https://www.health.ny.gov/facilities/nursing/minimum_staffing/docs/commissioners_determination_2024-01.pdf)

[nhsafestaffing@health.ny.gov](mailto:nhsafestaffing@health.ny.gov) (dedicated DOH e-mail address for questions)

*Statute:* [Public Health Law §2895-b](#)      *Regulations:* [10-NYCRR-§415.13](#)

# FEDERAL Nursing Home Staffing Standards

On May 10<sup>th</sup>, 2024, CMS finalized federal staffing standards:

- A minimum RN/LPN/Aide staffing requirement of 3.48 hours per resident day (HPRD);
- Of this, at least .55 hours would need to be RN hours, at least 2.45 Aide hours;
- Requirement for an RN to be on site 24 hours a day, seven days a week; and,
- Enhancements to facility assessment requirements pertaining to staffing needs.

*CMS continues to stress the Agency's expectation that these HPRD levels that would be established would serve as a minimum floor. Providers would be expected to staff above the minimum levels to address the specific needs of their unique resident population based on the enhanced facility assessment and resident acuity levels.*

# FEDERAL Nursing Home Staffing Standards

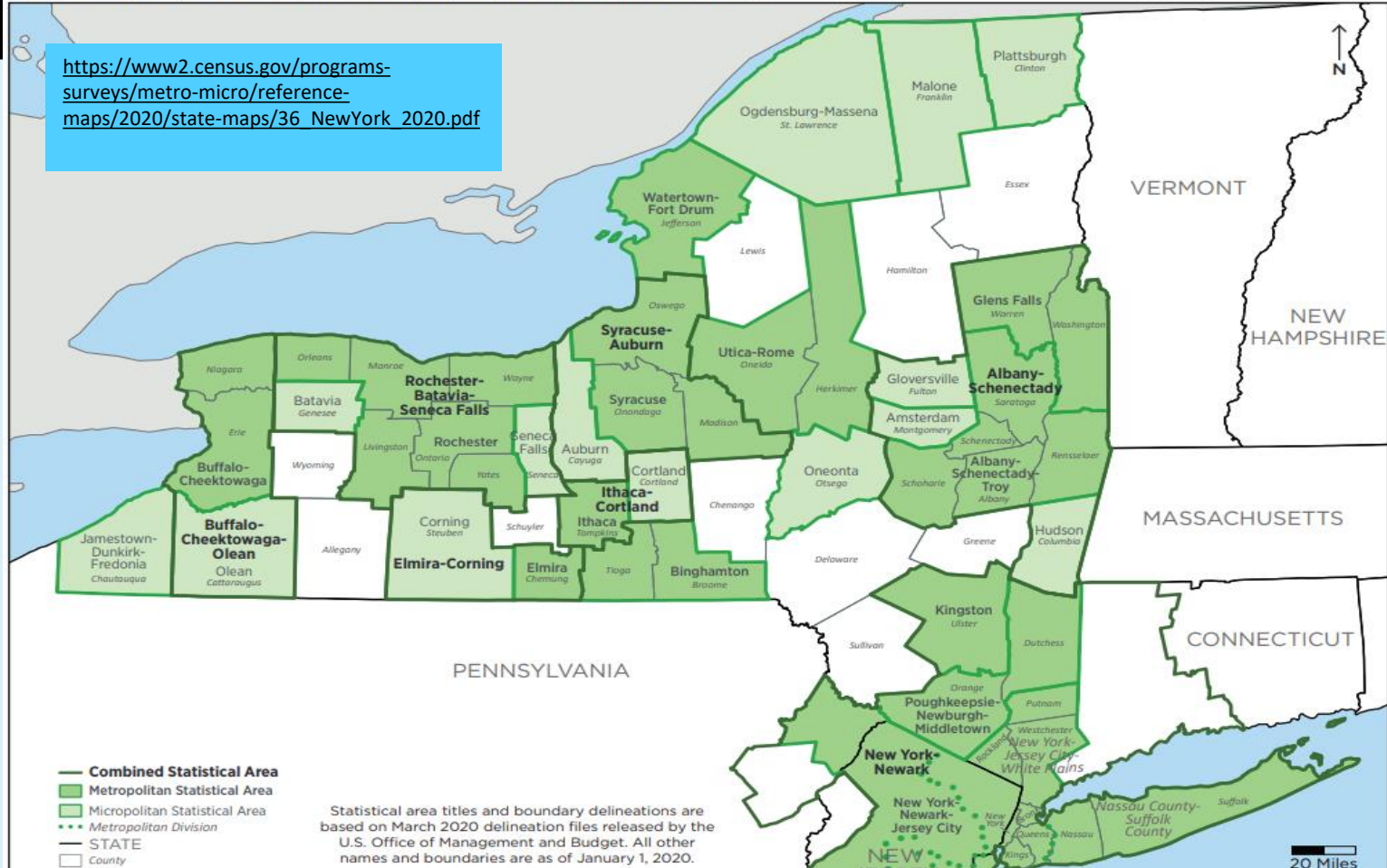
## Implementation Timeline

- Compliance with 24/7 RN requirement & 3.48 overall HPRD
  - ✓ 2 years after adoption (3 years if in non-urban area)
- Compliance with 0.55 RN hours and 2.45 Aide hour requirement
  - ✓ 3 years after adoption (5 years if in non-urban area)
- Compliance with facility assessment changes
  - ✓ 90 days after adoption (all facilities)

*Note: final rule defines “rural” in accordance with the Office of Management and Budget (OMB) definition. Any county not in a metropolitan statistical areas is considered rural. A Metro area contains a core urban area of 50,000 or more population.*

## New York: 2020 Core Based Statistical Areas and Counties

[https://www2.census.gov/programs-surveys/metro-micro/reference-maps/2020/state-maps/36\\_NewYork\\_2020.pdf](https://www2.census.gov/programs-surveys/metro-micro/reference-maps/2020/state-maps/36_NewYork_2020.pdf)



# FEDERAL Nursing Home Staffing Ratios

## Facility Assessment Changes – COMPLIANCE DATE: AUG. 8, 2024

Enhancements to the [current facility assessment requirements](#):

- clarify that facilities must use evidence-based methods when care planning, including consideration of those residents with behavioral health needs;
- require the use of the facility assessment to assess the specific needs of each resident in the facility and to adjust as necessary based on any significant changes in the resident population;
- require that facilities include the input of facility staff, representatives of direct care staff, staff who provide other services, as well as residents and families; and,
- Require it to be used to inform decisions about staffing across all shifts, weekends, and holidays, [planning for recruitment and retention](#), and contingency planning.

Recorded LeadingAge Educational Session available on the LearningHub:

<https://learninghub.leadingage.org/courses/federal-staffing-mandate-preparing-for-the-facility-assessment-expansion-recorded>

# FEDERAL Nursing Home Staffing Ratios

## Comparing State and Federal Requirements

(Nursing homes will be expected to meet both)

- Federal HPRD requirements differ from NY State standards:
  - ✓ Federal Rule requires overall 3.48 HPRD; NY requires 3.5
  - ✓ Fed requires .55 RN hours. NY requires 1.1 hours of combined RN and LPN time. Statewide, RNs represent approximately one-third of licensed nursing hours, so many homes do not meet 0.55 hours of RN time even as they meet the state standard of combined RN/LPN hours.
  - ✓ Federal requirement does include the hours of the Director of Nursing (DON) and seems to include RNs with administrative duties while the state calculation does not.
  - ✓ State requirement is 2.2 hours of Certified Nurse Aide (CNA) time vs. fed standard of 2.45 hours (which includes aide trainee and med. tech hours).

*Same as NY requirements, federal HPRD requirements are not case mix adjusted but CMS reiterates that it expects facility staffing to reflect resident acuity. NOTE THAT 5-ATAR STAFFING MEASURES ARE CASE MIX ADJUSTED.*

## Contract Staff & NH Minimum Spending Requirement (“40/70”)

1. Requires NH to spend at least 70 percent of operating revenue on direct resident care, of which at least 40 percent must be spent on resident-facing staffing.
2. Caps profits at 5 percent.
3. Spending shortfalls/“excess” profit remitted to the state.
4. Excludes CCRCs and specialty FACILITIES.

### *For those at risk of penalty, decreasing or having low contract nursing utilization is critical*

- Starting with spending year 2023, penalties are reduced for low contract staff utilization, year-over-year reductions
- 50% reduction in penalty if year-over-year contract staff utilization drops by 30% or more
- 25% penalty reduction if contract staff utilization drops 20%-30%
- For 2023, only Medicaid Revenue used in minimum spending calculation if facility uses less than 10% contract staff in 2023 (9% in 2024, 8% in 2025/6)
- Contract staff test done on resident facing RN/LPN/Aides

## Wrap-up

### Key takeaways:

- ▶ Be aware of state requirements (e.g., which positions count, 3 criteria) and where you stand
- ▶ Track quarterly staffing and make concerted effort to hit standards, esp. if close
- ▶ Document recruitment/retention and other staffing efforts and initiatives as they happen
- ▶ Evaluate once penalties are actually issued
- ▶ Monitor potential implications of contract staff utilization
- ▶ Keep an eye on but don't sweat Federal requirements (yet)

THANK YOU



***Please reach out if you have questions:***

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