



Emergency Personal/Compassionate Caregiving Regulations Issued by DOH

The Department of Health (DOH) issued regulations on an emergency basis this week to implement the legislation establishing Personal Caregiving and Compassionate Caregiving Visitors in Nursing Homes and Adult Care Facilities (ACFs), 2801-h of the Public Health Law (PHL) and section 461-u of the Social Services Law (SSL), as enacted by Chapter 108 of the Laws of 2021. **The regulations are effective as of June 1, 2021.**

We recognize that these regulations raise a number of questions. To date, we have not seen any *Dear Administrator* Letter or additional official guidance from DOH regarding the implementation of regulations. We have submitted some questions to the Department and received a partial answer to one question via email, which is set forth below. We welcome any additional member questions, which we will pursue with DOH.

The legislation, signed by the Governor last month, allows residents of ACFs and nursing homes to identify “personal caregiving visitors” to assist with personal caregiving or compassionate caregiving for the resident during a public health emergency. Personal caregiving is defined as care and support of a resident to benefit such resident’s mental, physical, or social well-being, and compassionate caregiving is defined as personal caregiving provided in anticipation of the end of the resident’s life or in the instance of significant mental, physical, or social decline or crisis.

The regulations relating to personal caregiving visitation, contained in the new 10 NYCRR 415.3(d)(3) and 18 NYCRR 485.18(c), provide that such visitation shall be permitted in a nursing home and ACF during a public health emergency. The new 10 NYCRR 415.3(d)(4) and 18 NYCRR 485.18(d) establish additional provisions for compassionate caregiving provided by personal caregiving visitors.

Below is a summary of the regulatory changes, which are essentially the same for nursing homes and ACFs, with minor nuances. Notable requirements are bolded for your convenience. Members are encouraged to review the regulations carefully, as policies and procedures must be developed. The regulations also set a timeframe of *fourteen days from the date of implementation of the regulation, which was June 1st, 2021*, for checking in with existing residents regarding their desire to have such caregivers designated. Moving forward, this should be a discussion with new residents.

Summary

Nursing home and ACF regulations are amended to indicate that during a public health emergency, ACFs and nursing homes must allow residents to designate up to two personal caregivers and to access their designated personal caregiving visitors, notwithstanding any

restrictions or prohibitions relating to visitation resulting from the declared public health emergency. Some restrictions are noted:

- If a facility has cause to think that a resident would not benefit from having the personal caregiving visit, and **that concern/reason is documented**, they may require a statement from an appropriate professional (not necessarily affiliated with the facility) that indicates such visitation would be beneficial.
- A facility may temporarily suspend or limit personal caregiving visitors to protect the health, safety, and welfare of residents if:
 - the declared public health emergency is related to a communicable disease, and the Department determines that local infection rates are at a level that presents a serious risk of transmission of such communicable disease within local facilities;
 - the facility is experiencing temporary inadequate staffing **and has reported such staffing shortage to the Department of Health and any other State or federal agencies as required by law, regulation, or other directive**;
 - or an acute emergency situation or loss of essential service exists at the facility.
- If personal caregiving visitation is suspended or limited for the aforementioned reasons, the facility shall notify residents, all designated personal caregiving visitors, and the applicable Department regional office of the suspension/limitation and the duration within twenty-four hours of implementing the visitation suspension or limitation.
 - For each day of the suspension or limitation, the facility shall document the specific reason for the suspension or limitation in their administrative records.
 - The facility shall further provide a means for all residents to engage in remote visitation with their designated personal caregiving visitor(s), until the suspension or limitation on personal caregiving visitation has ended.

The ACF or nursing home shall develop **written policies and procedures to ask residents, or their designated representatives in the event the resident lacks capacity, at time of admission or readmission, or for existing residents within fourteen days of the effective date of this paragraph (June 1st), which individuals the resident elects to serve as their personal caregiving visitor during declared public health emergencies. A resident shall be entitled to designate at least two personal caregiving visitors at one time.**

- **The facility shall maintain a written record of the resident's designated personal caregiving visitors, and when personal caregiving and compassionate caregiving is provided.**
- **As part of its ongoing review of a resident's care, the facility shall regularly inquire of all current residents, or their designated representative if the resident lacks capacity, whether the facility's current record of designated personal caregiving visitors remains accurate, or whether the resident, or their designated representative if the resident lacks capacity, wishes to make any changes to their personal caregiving visitor designations. For nursing homes, this inquiry should occur at least quarterly, and upon change in condition, and should be updated in the resident's individualized comprehensive plan of care. In an ACF, such inquiries should be made at least every six months and upon change in condition and documented in case management records.**

Upon review of a facility's visitation policies and procedures, the Department may also require the facility inquire of any resident whether the facility's current record of designated personal caregiving visitors remains accurate.

- **The facility must ensure that all visitors** follow infection control measures established by the facility, consistent with DOH guidance, and for nursing homes, CMS guidance. In the absence of DOH guidance, measures should be consistent with CDC guidance. This may include testing (on site or individual can provide evidence of testing), screening for symptoms, temperature, and **requiring the wearing of all necessary PPE which must be provided by the facility, enforcing social distancing between persons during visitation, including personal caregiving visitation, except as necessary to provide personal caregiving by the personal caregiving visitor for the resident.**
- **The facility shall establish policies and procedures regarding the frequency and duration of personal caregiving visits and limitations on the total number of personal caregiving visitors allowed to visit the resident and the facility at any one time.** Such policies shall not be construed to limit access by other visitors that would otherwise be permitted under state or federal law or regulation. **The facility shall ensure its policies and procedures respect resident privacy and take into account visitation protocols in the event a resident occupies a shared room. In establishing frequency and duration limits, the facility policy shall ensure that residents are able to receive their designated personal caregiving visitors for the resident's desired frequency and length of time, and any restrictions on that desired frequency and duration must be:**
 - **attributable to the resident's clinical or personal care needs;**
 - **necessary to ensure the resident's roommate has adequate privacy and space to receive their own designated personal caregiving visitors; or**
 - **because the desired visitation frequency or duration would impair the effective implementation of applicable infection control measures, including social distancing of at least six feet between the visitors and others in the facility, having sufficient staff to effectively screen all personal caregiving visitors and monitor visits to ensure infection control protocols are being followed throughout, and having a sufficient supply of necessary personal protective equipment for all personal caregiving visitors.**

Both the ACF and nursing home regulations are also amended to include a section on compassionate caregiving. In the event a resident experiences a long-term or acute physical, mental, or psychosocial health condition for which, in the opinion of the resident, their representative, or a health care professional, a compassionate caregiving visitor would improve the resident's quality of life, the resident or their representative shall designate at least two compassionate caregiving visitors at one time, and the facility shall record such designation in the resident's individualized comprehensive plan of care/case management record. A resident's designated personal caregiving visitors may also provide compassionate caregiving.

Situations in which a resident is eligible for a compassionate caregiving visitor include but are not limited to the following:

- end of life;

- the resident is struggling with the transition to living in the facility;
- the resident is grieving after a friend or family member recently passed away;
- the resident needs cueing and encouragement with eating or drinking, and such cueing was previously provided by family and/or caregiver(s), and the resident is now experiencing weight loss or dehydration; and
- the resident, who used to talk and interact with others, is experiencing emotional distress, seldom speaking, or crying more frequently (when the resident had rarely cried in the past).

Compassionate caregiving visitation shall be permitted at all times, regardless of any general visitation restrictions or personal caregiving visitation restrictions in effect in the facility. The ACF or nursing home shall require compassionate caregiving visitors to be screened for communicable diseases prior to entering the facility, and **visits must be conducted using appropriate social distancing between the resident and visitor if applicable based on guidance from the Department or the CDC; if, however, personal contact would be beneficial for the resident’s mental or psychosocial well-being, the facility shall establish policies and procedures to ensure that such necessary physical contact follows appropriate infection prevention guidelines, including the visitor’s use of personal protective equipment and adhering to hand hygiene protocols before and after resident contact, and that the physical contact is limited in duration.**

The Department can review and require modifications to a facility’s personal caregiving visitation and compassionate caregiving visitation policies and procedures to ensure conformity with requirements and any applicable visitation guidelines issued by the Department or CMS.

Personal Caregiving in a Nursing Home Outbreak: Question and Answer from DOH

It is unclear how the requirements related to personal caregiving visitors would apply in the context of an outbreak in a nursing home, when visitation is suspended in a unit or the facility. LeadingAge NY asked DOH whether nursing homes in outbreak status should admit personal caregiving visitors into the affected unit(s) even though CMS guidance would prohibit visitation. We received the following answer from DOH counsel’s office:

Consistent with current CMS and NYSDOH visitation guidance, the emergency visitation regulations would not permit a personal caregiving visitor to visit a resident who is on Transmission Based Precautions until such time a resident is removed from such precautions; however, if the personal caregiving visitor is providing compassionate caregiving, as defined in the new 10 NYCRR 415.3(d)(4), such visitor must be permitted into the facility provided they meet the screening standards set forth in section 415.3(d)(4)(iii).

We recognize that this response does not fully address the question, and we have followed up with additional questions.

Again, members are reminded that the regulations are effective as of June 1, 2021 and that steps should be taken to ensure compliance, including discussing this option with existing residents by June 15th. Please let us know what questions and concerns you have.