

## 3.5/2.4: Where Are We Now?

2019 Summer Conference

Mark E. Reagan  
Hooper, Lundy & Bookman, P.C.  
575 Market Street, Suite 2300  
San Francisco, CA 94105  
Tel: 415-875-8500  
Email: [mreagan@health-law.com](mailto:mreagan@health-law.com)

Patti Owens  
CAHF Director of Regulatory Affairs  
[powens@cahf.org](mailto:powens@cahf.org)

Amy Blumberg  
CAHF Director of Legislative Affairs  
[ablumberg@cahf.org](mailto:ablumberg@cahf.org)

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### 3.5/2.4 as of July 2019

- 3.5/2.4 “weaponized” for QASP and enforcement purposes
- AFL 19-16
- Workforce Shortage and Patient Needs Waivers
- Public Records Act and “Reverse Public Records Act” litigation

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### 3.5/2.4 “weaponized” for QASP and enforcement purposes

- July 1, 2019 – “moratorium” of enforcement is lifted
- QASP – 7/1/19-6/30/20 “performance period” will utilize 3.5/2.4
- Citations – incidents on or after July 1, 2019 include 3.5/2.4

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

**AFL 19-16**

- Designation of “day” for nurse staffing audits – midnight to midnight
- Subacute unit “exemption”
- Nurse Aides/Nurse aide training programs
- Form 612 – Originally by-shift, revised to by-day

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

**2018-2019****Workforce Shortage/Patient Needs Waivers****Overview/Summary**

## Statistics:

- Workforce Shortage Waivers: 30.72% granted
- Patient Needs Waivers: 58.82% granted
- Examples of waiver results by County:

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

**2018-2019**  
**Waiver Results**

<b><u>Southern California</u></b>		
<b>County</b>	<b>WF</b>	<b>PN</b>
Los Angeles	22/109	53/114
Orange	11/25	14/25
San Diego	10/20	35/48
San Bernardino	3/16	8/16
Riverside	2/10	10/13

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### 2018-2019 Waiver Results

Northern California		
County	WF	PN
Alameda	9/19	8/21
Santa Clara	10/19	10/20
Contra Costa	5/11	6/10
San Francisco	1/6	2/2
Others		
County	WF	PN
Sacramento	2/8	11/11
San Joaquin	1/12	5/7

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### 2018-2019

#### Workforce Shortage/Patient Needs Waivers

- Anecdotal Accounts
  - ❖ Inconsistent Application
  - ❖ Contradictory Results

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### Patient Needs Waivers (PNWs) and Workforce Shortage Waivers (WSWs)

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

## Patient Needs Waivers (PNWs) and Workforce Shortage Waivers (WSWs)

§ 72329.2. Nursing Service - Staff.

(a) Each facility, except those skilled nursing facilities that are a distinct part of a general acute care facility or a state-owned hospital or developmental center, shall employ sufficient nursing staff to provide a minimum of 3.5 direct care service hours per patient day, except as set forth in Health and Safety Code section 1276.9. Skilled nursing facilities shall provide a minimum of 2.4 certified nurse assistant hours per patient day to meet the requirements of this subdivision.

(1) Facilities that are a distinct part of a general acute care facility or a state-owned hospital or developmental center shall continue to meet the standard set forth in Health and Safety Code section 1276.5.

2201 K Street, Sacramento, CA 95816

(2) Facilities which provide care for persons with mental health disorders and in which psychiatric technicians provide patient care shall meet the following standards:

(A) For patients not certified for special treatment programs, facilities shall employ sufficient staff to provide a minimum of 3.5 direct care service hours per patient day.

(B) For patients certified for special treatment programs, facilities shall employ sufficient staff to provide a minimum of 2.3 nursing hours per patient day for each patient certified to the special treatment program, exclusive of additional staff required to meet the staffing standards of the special treatment program.

2201 K Street, Sacramento, CA 95816

## PNWs

FY 2019-2020 and beyond

- Submit application and/or update and resubmit annually no later than April 1<sup>st</sup> of the proceeding fiscal year
- Waiver application must be submitted to the Department using only the Department's online application.
- The California Department of Public Health (CDPH) has implemented a new online process for SNFs requesting approval for PNWs and WSWs. CDPH Flex Waiver webpage
- The application **period is only open from January 1st to April 1st for each application year**; CDPH will not accept applications submitted outside of this timeframe.

2201 K Street, Sacramento, CA 95816

PNWs

- The application must be complete by April 1<sup>st</sup>, if there is missing information, the application is not complete and CDPH will not accept it after April 1<sup>st</sup>
- The April 1<sup>st</sup> deadline is in place so that the applications can be processed and effective July 1<sup>st</sup>.
- The department will post on their website approved waivers for fiscal year 2019-2020 and beyond no later than July 30<sup>th</sup> each year.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

To request a waiver for a facility that does not have a subacute care unit approved by the Department of Health Care Services or for portions of a facility not approved as a subacute care unit by the Department of Health Care Services:

- The average daily census at the facility, excluding any patients in a subacute care unit approved by the Department of Health Care Services.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

- A copy of the facility's Minimum Data Set Facility Level Quality Measure Report and Minimum Data Set Facility Characteristics Report, dated no earlier than 30 days prior to submission of the waiver application.
- The level of direct caregiver staffing the facility will provide if granted a waiver, including the number and type of staff.
- An analysis of the resident needs at the facility, including a description of the assessment tools used, how the tools were applied, and the outcomes used to determine resident needs.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

To request a waiver for a subacute care unit approved by the Department of Health Care Services:

- A current, valid contract with the Department of Health Care Services to provide subacute care.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

- The most recent audit findings from the Department of Health Care Services related to determining compliance with the staffing requirements set forth in title 22, California Code of Regulations, division 3, section 51215.5.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs**Reminders**

- A facility may request a waiver to address individual patient needs as long as the facility continues to meet the minimum 3.5 direct care service hour requirement.
- When evaluating waiver requests, the Department shall consider:
  - The substantiating information submitted by the facility.
  - Resident quality of care at the facility.
  - The facility's compliance history.
  - The needs and acuity levels of residents at the facility.
- If there is a change in the information submitted, the facility shall notify the Department within 15 days of the change.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

- The Department may revoke approval of a patient needs waiver at any time if the facility does not comply with the terms and conditions of the waiver and the Department determines that the non-compliance poses a significant risk to the health, safety, or welfare of patients.
- If the Department denies a waiver application, cannot appeal the decision- must wait until the subsequent fiscal year to reapply.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

The facility shall post the letter of acknowledgement from the Department confirming receipt of a waiver request, as a notice of a pending waiver application. The notice shall be posted immediately adjacent to the facility's license.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

PNWs

A facility with an approved waiver must post the waiver immediately adjacent to the facility's license.

Facilities shall provide written notice of approved or pending waivers to all residents prior to execution of an admission agreement. The notice shall be either a true copy of the approval letter or a letter from the Department acknowledging receipt of a waiver request.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### Workforce Shortage Waivers (WSWs)

FY 2018-2019

Approved waivers are posted

- They retro back to July 1, 2018
- They expire June 30, 2019
- Reapply and/or annually by April 1<sup>st</sup> of the preceding FY

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### WSWs

FY 2019-2020 and beyond

- Submit application no later than April 1<sup>st</sup> of the proceeding fiscal year
- The facility can submit a written request for a waiver with substantiating information to the Department via email [RNUnit@cdph.ca.gov](mailto:RNUnit@cdph.ca.gov) or by mail to California Department of Public Health, Center for Health Care Quality. Attn: RN Unit. P.O. Box 997377 MS 3201 Sacramento, CA 95899-7377, or...
- The California Department of Public Health (CDPH) has implemented a new online process for SNFs requesting approval for PNWs and WSWs. CDPH Flex Waiver webpage

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### WSWs

- The application period is only open from January 1<sup>st</sup> to April 1<sup>st</sup> for each application year; CDPH will not accept applications submitted outside of this timeframe.
- The application must be complete by April 1<sup>st</sup>, if there is missing information, the application is not complete and CDPH will not accept it after April 1<sup>st</sup>
- The April 1<sup>st</sup> deadline is in place so that the applications can be processed and effective July 1<sup>st</sup>.
- The department will post on their website approved waivers for fiscal year 2019-2020 and beyond no later than July 30<sup>th</sup> each year.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---



WSWs

## Reminders:

- Waiver of the 3.5 direct care hours or the 2.4 CNA hours per day. To address shortage of available and appropriate health care professionals and direct caregivers-as long as the facility continues to meet the 3.2 nursing hours per patient day requirement.
- Department will not grant more than two consecutive waiver renewals.
- Post a notice of a pending waiver application in a public location.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

WSWs

- Notify potential residents of a pending waiver application prior to admission. Department will send facility an acknowledgement letter.
- Approved waiver must be posted in a public location within the facility and provide written notice to potential residents prior to admission.
- If the Department denies a waiver application, cannot appeal the decision- must wait until the subsequent fiscal year to reapply.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

WSWs

## Not eligible if in the preceding 3 years:

- Issuance of two or more A citations if operated by the same owner at the time of waiver application; or
- Issuance of one or more AA citations if operated by the same owner at the time of waiver application; or
- License suspended or revoked if operated by the same owner at the time of waiver application.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### WSWs

Waiver can be revoked for one of the following:

- The Department may terminate the waiver if it determines the facility does not meet the terms of the waiver.
- Substantiated findings of substandard quality of care related to insufficient staffing;
- Issuance of an A or AA citation; or
- Quality of care violations with a scope and severity of G or higher.

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### CDPH online process for SNFs requesting approval for PNWs and WSWs

- The application **period is only open from January 1st to April 1st for each application year**; CDPH will not accept applications submitted outside of this timeframe. If there is missing information, the application is not complete and CDPH will not accept it after April 1<sup>st</sup>

**Process:**

1. Review the instruction on how to navigate the website, see the **AEM – Flex Waiver Application User Guide for Providers (PDF)**.
2. Go to the CDPH Flex Waiver webpage, create an account and sign in:

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

3. Once signed in, proceed to the Licensing Waiver Application page.
4. After successfully submitting an online waiver application, the system sends a confirmation e-mail with an identification number (Tracking ID number) to the provider's designated point of contact.
5. Use the Tracking ID number when contacting CDPH Licensing and Certification, Registered Nurse Unit about their application at **RNUnit-Waiver@cdph.ca.gov**

To assist facilities in preparing to answer the online application questions, we have provided screenshots of the online applications. See our Staff Ratio Toolkit: **<https://www.cahf.org/Programs/Staff-Ratio-Toolkit>**

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### Public Records Act and “Reverse Public Records Act” litigation

- Advocacy with DPH over trade secrets and the “workforce shortage waiver” applications
- May 21<sup>st</sup> DPH letter
- Litigation by June 21<sup>st</sup>
- Results of litigation

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---

### Any Questions?

*Thank you!*

Mark Reagan: mreagan@health-law.com

Amy Blumberg: ablumberg@cahf.org

Patti Owens: powens@cahf.org

2201 K Street, Sacramento, CA 95816

---

---

---

---

---

---

---

---