

Surviving Staffing Audits & Questionable CDPH Practices: Administrative Appeals & Judicial Challenges

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Objectives

- Understanding nurse staffing audits for 3.5/2.4 and CDPH practices related thereto.
- Understanding when administrative appeals are appropriate, what issues may be raised and best practices for presentation.
- Understanding the ability to seek judicial appeals of nurse staffing audits and how to assert claims in court.



2022 QASP

As of May 3, 2022: Staffing Audit for FY 2020-2021
(7/1/20-6/30/21)

- 2567s finalized and issued: 92
- Audits pending QA review: 858
- 2567s pending release: 980



- Waivers Applicable to 2022 QASP (other than Workforce Shortage or Patient Needs Waivers)
- The “blanket waiver” associated with staffing was in effect from March 3, 2020 through July 9, 2020 (AFL 20-32) and the 5000A individual waivers (AFL 20-32.1) were in place from July 10, 2020 through February 28, 2021.
- This means that the vast majority of staffing waiver issues for the 2022 QASP associated with something less than 3.5/2.4 would largely be associated with the 5000A process.



- The waivers associated with nurse assistants were in place beginning on April 20, 2020 (AFL 20-35) and were continued on March 17, 2021 (AFL 21-11), with necessary clarification made at that time at CAHF's insistence.
- This means that many of the nurse assistant issues will fall within the 2022 QASP period but, except for the last three months of the performance period, there was no clarification that facilities were supposed to submit 5000A requests if they had forms on file stating "Hire CNAs only."



2021 QASP

As of May 3, 2022: Staffing Audit for FY 2019-2020
(7/1/20 - 6/30/21)

- 2567s finalized and issued: 1016
- Audits pending QA review: 54
- 2567s pending release: 56



Waivers Applicable to 2021 QASP (other than Workforce Shortage or Patient Needs Waivers)

- To the extent that the nurse staffing audits included days during the pandemic, they would largely be covered by the “blanket waivers” as to the numerical metrics and just a few months on the nurse assistant issues discussed above.
- However, those few months were prior to the clarification issued in March of 2021 associated with using the 5000A process for the “offending” paperwork.



Important Timelines

Color key:

Indicates waivers

Indicates other elevated topic

QASP	Staffing audit FY	Dates impacted	Source	Language
2021	July 1, 2019- June 30, 2020	July 1, 2019-June 30, 2020	FY 2019-2021 PNW and WSW	If approved by CDPH
2022	July 1, 2020- June 30, 2021	July 1, 2020-June 30, 2021	FY 2020-2021 PNW and WSW	If approved by CDPH
2021	July 1, 2019- June 30, 2020	July 1, 2019-June 30, 2020	AFL 19-16 (issued April 9, 2019)	<ul style="list-style-type: none"> Mandated use of the 530/612 CDPH specific forms. Note: One year of relief on penalties issued in AFL 20-01 Non-compliant for less than five percent of the audited days /Non-compliant audit finding not rising to the level of an administrative penalty- are not entitled to an appeal. Note: rescinded by AB 81



Important Timelines

2021	July 1, 2019- June 30, 2020	July 1, 2019-June 30, 2020	AB 81 Filed June 29, 2020 (to take effect immediately) Published June 30, 2020	CDPH issued a letter to facilities regarding appeal rights. <ul style="list-style-type: none"> Permits facilities to appeal a non-compliant audit finding not rising to the level of an administrative penalty. If CDPH determines the SNF is non-compliant for less than five percent of the audited days, the SNF will not be issued an administrative penalty but may appeal the finding of non-compliance.
2021	July 1, 2019- June 30, 2020	July 1. 2019-June 30, 2020	AFL 20-01 (issued January 6, 2020)	One year of relief on penalties regarding the mandated use of the 530/612 CDPH specific forms
2022- forward	July 1, 2020- June 30, 2021 and forward	July 1, 2020 - Forward	AFL 20-01 (issued January 6, 2020)	Penalties weaponized effective July 1, 2020 for providers not using the mandated 530/612 CDPH specific forms



Important Timelines

2022-forward	July 1, 2020-June 30, 2021 and forward	July 1, 2020-forward	AFL 21-11 (issued March 17, 2021)	<p>Although issued March 17, 2021- staffing audit guidance effective July 1, 2020.</p> <ul style="list-style-type: none"> Permits facilities to appeal a non-compliant audit finding not rising to the level of an administrative penalty. If CDPH determines the SNF is non-compliant for less than five percent of the audited days, the SNF will not be issued an administrative penalty but may appeal the finding of non-compliance. <u>AFL 11-20</u>, or subsequent AFLs, address the appeal process. Increases administrative penalty amounts for non-compliance of the 3.5 and or 2.4 DHPPD staffing requirements to \$25,000 and \$50,000, respectively. Defines terms commonly used and referenced in the audit process (infection preventions, etc.). Clarifies the use of form <u>CDPH 530 (Nursing Staffing Assignment and Sign-In Sheet) (PDF)</u> Clarifies the allowance of non-traditional healthcare workers and how they will be counted as part of the auditing process during the COVID-19 pandemic. CDPH granted additional waivers to specified SNFs designated as "Hire Certified Nurse Assistants Only" (HRO) to hire nurse assistants throughout the duration of the COVID emergency with an approved CDPH 5000A waiver.
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Important Timelines

2021	July 1, 2019- June 30, 2020	March 3, 2020- July 9, 2020	AFL 20-32 (issued 3/31/20)	Blanket staffing waiver <ul style="list-style-type: none"> Did not specifies facilities need to be in compliance with 3.2- but that they needed to notify the Department if staffing levels were unsafe.
2022	July 1, 2020- June 30, 2021			
2021	July 1, 2019- June 30, 2020	April 20, 2020- March 17, 2021	From the release of AFL 20-35 until the release of AFL 21- 11	<p>AFL 20-35 issued April 20, 2020</p> <ul style="list-style-type: none"> As a result of this temporary waiver, facilities do not need to submit individual program flexibility requests to employ nurse assistants or CNAs using the waivers specified above. Requests for waivers not specified in this AFL shall be submitted using the <u>CDPH 5000A</u> (PDF). Note: There was nothing in this waiver that specified ONLY facilities with NATP approvals <p>AFL 21-11 issued March 17, 2021</p> <ul style="list-style-type: none"> CDPH granted additional waivers to specified SNFs designated as "Hire Certified Nurse Assistants Only" (HRO) to hire nurse assistants throughout the duration of the COVID emergency with an approved CDPH 5000A waiver. Note: Almost one year later CDPH adds this to clarify AFL 20-35. Note: There is an additional CAHF timeline for this on the NA issue <p style="text-align: right;">2022 CAHF SUMMER CONFERENCE</p>



Important Timelines

2022	July 1, 2020- June 30, 2021	July 10, 2020- February 28, 2021	AFL 20-32.1 (issued 6/26/20)	<p>SNFs shall bring staffing levels into state ratio compliance within two weeks of this AFL issue date.</p> <ul style="list-style-type: none">• SNFs directly impacted by COVID-19 may request a staffing waiver.• Temporary staffing waivers will only be approved for a maximum of 90-days. Note-potential for gaps from 7/10 until CDPH approved and CDPH issued waiver effective date Note: does not specifies facilities need to be in compliance with 3.2, in fact it states: On page 2 of 4 , under Staffing it states “SNFS with staffing waiver must maintain sufficient staffing levels for safety and must have a plan in place to resume mandatory staffing levels as soon as feasible”.
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Important Timelines

2022	July 1, 2020- June 30, 2021	March 1, 2021- Current	AFL 20-32.2 (issued 3/1/2021)	Effective March 1, 2021 facility temporary staffing waivers have expired. <ul style="list-style-type: none"> • SNFs must maintain required staffing levels at all-time. • All prior issued Temporary staffing waivers rescinded by CDPH.
2022	July 1, 2020- June 30, 2021	March 1, 2021- August 15, 2021	Potential for a facility to have a Temporary staffing waiver approved by CDPH.	Although the temporary staffing waivers receded by CDPH in AFL 20-32.2-CDPH stated to CAHF they will only approve new ones if very compelling reasons and facilities demonstrate they exhausted all entities to obtain staffing.
2023	July 1, 2021 - June 30, 2022			
2023	July 1, 2021 - June 30, 2022	August 16, 2021 (issued)	EO N-12-21	Removed the states authority to waive staffing except what's allowable by law.



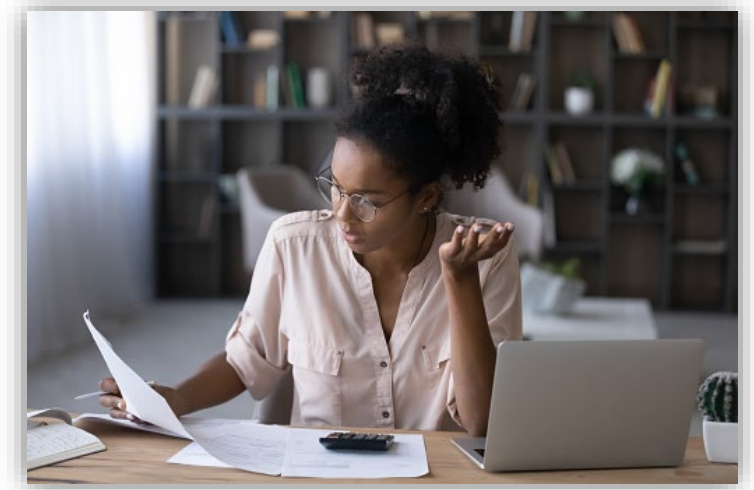
Significant Issues

“Hire CNA only”:

- CDPH has disqualified nurse assistant hours recorded by facilities between April 20, 2020 and March 17, 2021, despite the fact that the department issued a waiver (AFL 20-35) for the use of these caregivers, but never informed the facilities that they had to replace the paperwork on file with the department (stating that they “hire CNAs only”) or seek a specific waiver to “correct” these filings.



Significant Issues



“Hire CNA only” continued:

- Only after CAHF raised the issue did the department articulate its position through the issuance of AFL 20-35.1 on March 17, 2021.
- Nevertheless, CDPH has caused (and will continue to cause) SNFs to “fail” staffing audits and lose access to QASP on this basis of hours recorded before March 17th.



Significant Issues

Nurse assistants “not trained in the facility-based program”:

- CDPH has disqualified nurse assistant hours recorded by facilities in the circumstance where the nurse assistant were not trained in the facility-based program--but there is no legal requirement dictating the location of the program for the hours to be counted. Again, this has caused facilities to “fail” their nurse staffing audits and lose access to QASP.



Significant Issues

“Failing to meet 3.2 NHPPD” when the waiver didn’t require it:

- CDPH has determined that SNFs “failed” their nurse staffing audits during the time that the 3.5./2.4 NHPPD staffing waivers were in effect for allegedly not meeting 3.2 NHPPD.
- These determinations covered the timeframes associated with the “blanket” waiver contained in AFL 20-32, as well as during the period where specific waivers were approved under AFL 20-32.1.



Significant Issues

“Failing to meet 3.2 NHPPD” when the waiver didn’t require it:

- However, the department has made determinations of non-compliance for the alleged failure to meet 3.2 NHPPD when the “conditions” of the “blanket” waiver as well as specific waivers did not require such compliance.



Significant Issues

- In fact, these materials made no mention of the 3.2 NHPPD requirement whatsoever but only that “SNFs shall continue to provide necessary care in accordance with resident needs and make all reasonable efforts to act in the best interests of residents.” (AFL 20-32 at p. 3).
- This situation has inappropriately caused (and continues to cause) facilities to lose access to QASP, and, like the first two issues, we have outlined this problem to the department, in writing and verbally, since October 2021.



Significant Issues

Taking Advantage of Misused 530 Forms

- Hours being removed from the DHPPD on the staffing audit for direct care staff captured in payroll that did not sign in on the “assignment sheet”.



Significant Issues

Taking Advantage of Misused 530 Forms

- CDPH mandated 530 form may be considered an "assignment sheet" although the form is ONLY to:
 - record daily staffing assignments to document nursing hours worked by direct care givers not captured in payroll records;
- or
 - direct caregivers primarily engaged in duties other than nursing services, including employees who perform nursing services beyond the hours required to carry out their job duties-the CDPH required form has very specific requirements and has to be signed by the employee and DON.



Significant Issues

- The facility “assignment sheet” is a separate and distinct requirement from the CDPH 530 form with no requirement for the employees to sign it.
- It is a facility created document - it is solely for the direct care assignments for that shift.



Significant Issues

- Some providers have used the CDPH 530 form to cover both requirements - and they have all their staff assignments captured on the CDPH 530 form.
- However just because they choose to do that, it does not mean that if any direct care employee that does not sign the form (that is captured in payroll and payroll reflects that and was given to the auditor) that those hours will not count in that days DHPPD audit.
- Only those direct care employees that are not otherwise captured in payroll records are the ones required to sign in on the 530 form and if their signature is missing then those hours would be removed.



AFL 21-11

- Mandated Use of CDPH 530 and CDPH 612
- Facilities must use CDPH 612 ([PDF](#)) to record daily census
- Facilities are required to use the CDPH 530 ([PDF](#)) to record daily staffing assignments to document nursing hours worked by direct care givers not captured in payroll records; or direct caregivers primarily engaged in duties other than nursing services, including employees who perform nursing services beyond the hours required to carry out their job duties.



AFL 21-11

- Failure to use these CDPH-required forms will result in a finding of non-compliance for each audited day the forms are not available. The facility is responsible for ensuring all entries are accurate and legible.



- In AFL 21-11 there is an attachment link at the bottom of the AFL. CDPH 530 with Instructions ([PDF](#)).
- On page two of the instructions - see the first two paragraphs as well as #7 in the instructions.

Also notable in this AFL:

- The facility assignment sheet is a separate and distinct requirement from the 530 form. No requirement for the employees to sign in and out on it. It is a facility created document solely for the direct care assignments for that shift



Other Notable Concerns

- License Psychiatric Technician use
- CDPH-approved 5000A for NA use.
- LVN/RN use as CNAs



Required Documentation

The facility shall have the documentation listed below, readily available:

1. CDPH 612 (Census and DHPPD) (PDF);
2. Facility Assignment Sheet;
3. CDPH 530 (PDF);
4. Timecards, payroll records and reports for the audited period.



Issues that CDPH alleges cannot be raised at administrative appeals

- The audit dates and number of days CDPH audited
- The procedures contained in the CDPH-issued AFL 21-11 Guidelines for 3.5 DHPPD Staffing Audits that govern the audit process
- The appeal process contained in this AFL
- CDPH's process for establishing and granting waivers from nurse staffing standards



Issues that CDPH alleges cannot be raised at administrative appeals

- Any information the facility reported to the auditor
- Issues of law, such as laches, estoppel, res judicata, or due process
- CDPH's and/or DHCS' failure to meet statutory deadlines
- CDPH's databases maintained in the ordinary course of business, including the database maintained for these audits and any system used to verify nursing certification status or training status



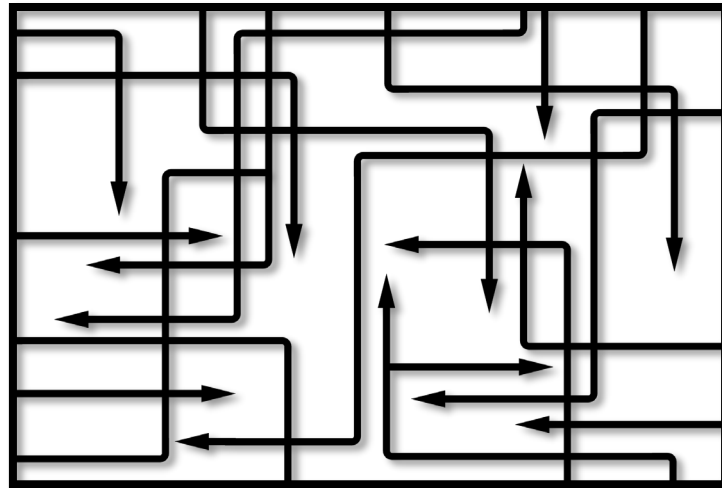
Constructing & Prosecuting Judicial Actions Based Upon 3.5/2.4

Two Different Types of Relief – Both should be utilized

- Administrative Mandamus (Code of Civil Procedure 1094.5)
- Original Mandate (Code of Civil Procedure 1085)



- Requirement of “exhausting” the administrative process
- Issues not permitted to be raised in the administrative process can be raised in court



Thank you!

For questions:

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