

MINIMUM STAFFING IN ARKANSAS

Presented by: Frank GoBell, OLTC

I. Minimum Staffing

The Arkansas Minimum Staffing requirements actually encompass two distinct, but related, areas. The first is minimum staffing. The second is documenting, which we'll address as completing the forms.

As the current ratios for staffing have been in effect for almost a decade, we'll address common issues with staffing rather than numbers. If you need the ratios, please see Section 520 of the state regulations, or download the Minimum Staffing Calculator located on the Office of Long Term Care (OLTC) website at <http://humanservices.arkansas.gov/dms/Pages/StaffingCalculator.aspx>. Just remember, the minimum staffing requirements are just that – the *minimum* number of staff. The law and the regulations require that facilities have more than the minimum if residents' needs require additional staff.

- a. **What's an "other"????** If you've never really taken a look at the regulations or the forms, you might be surprised to learn that there is no minimum requirement for CNAs. Instead, what you see is the word "other". Why is that? Because minimum staffing requirements are for total direct care staff and nurses. In other words, to be in compliance with minimum staffing requirements, a facility must meet two standards – the total number of direct-care staff per shift, and the total number of nurses per shift. There is no specific requirement for the total number of CNAs. For example, assume that a facility has to have 10 total direct-care staff for a shift, and of that 10, at least two must be nurses. The facility can "fill" the remaining 8 slots using any mix of direct care staff – it does not have to be 8 CNAs. It could be 7 CNAs and another nurse. It could be 7 nurses and a single CNA. So long as facilities have sufficient total staff – and meet the minimum nursing requirements – it doesn't matter whether the remaining staff is CNAs or nurses.

But there's a catch, of course. When a nurse is "slotted" into a CNA position, the nurse can still perform nursing duties. *But the nurse can do so only in addition to performing the necessary CNA duties that residents need.* The long and the short of it is that residents' needs must be met, and that includes both nursing and CNA tasks. If a nurse is in an "other" slot, that means that nurse must perform the duties that a CNA would perform to meet resident needs.

- b. **Out of sight, out of mind.** At one time, the only way direct-care staff could be counted toward minimum staffing was when that direct-care staff was actually present in the facility. Now, facilities can count direct-care staff

toward minimum staffing when direct-care staff is providing transportation services. This makes sense; it allows a facility to meet the needs of residents being transported without having to have additional direct-care staff while that person is gone. In other words, if the facility employs non-direct care staff to provide transportation services, but also sends a CNA or nurse with residents to, say, doctor's visits, the direct care staff (but NOT the transportation aide, since the aide is non-direct care) would count toward the minimum staffing ratios while accompanying the resident or residents to the doctor's visit.

- c. **Being flexible.** Under the law, facilities may vary the starting time and ending time of shifts for up to 25% of the direct care staff for the day or evening shifts. To do so, the facility must:
1. Inform OLTC in writing of the purpose of the flex staffing – how will resident needs be met or improved with the change.
 2. Inform OLTC in writing the number of direct care staff for whom flex staffing will apply.
 3. Inform OLTC in writing of the starting and ending times of the shift in which flex staffing will apply.
 4. Inform OLTC in writing the length of time that the facility will use flex staffing if the facility intends to use it only for a limited period.
 5. Receive written approval from OLTC.

There are several “gotchas” here:

- Flex staffing does not apply to the night shift.
- A facility cannot “flex” more than 2 hours from the standard start or end times of the shift. As an example, assume your day shift begins at 7:00 a.m. Your flex shift cannot begin earlier than 5:00 a.m. This is because the “regular” shift cannot have any period of more than two hours in which the shift has less than the required total number of direct care staff under the ratios.
- You can't flex every staff on a shift – that's not flexing; that's changing the start time of a shift. No more than 25% of a shift can be on the flex schedule.
- *The intent of flex staffing is to grant facilities the flexibility to create solutions for specific resident needs.* For example, the creation of “feeding” or “bathing” teams. It is not uncommon for facilities to provide breakfast before 7:00 a.m. However, when it does, the facility

is under the minimum staffing requirement for the night shift, which has far fewer staff. By allowing facilities to “flex” some of the day shift, facilities can have additional staff to provide meals to residents. *It is not the intent to benefit staff preferences.*

- d. **In or out, in or out.** When a facility reaches one of the staffing shortages for the imposition of a denial of new admissions, the law requires that the denial be imposed for a *minimum* of two weeks beginning the next day after notification of the denial by OLTC.

Facilities can have that restriction lifted after the two week period when it submits a report to OLTC showing that the facility was not in a pattern of failure for the time the facility was under a denial of new admissions.

PLEASE NOTE: There is a “gotcha” with this, however. If a facility sends in an erroneous report and OLTC subsequently learns that the period in which the facility was claiming was not in a pattern of failure was, in fact, below minimum staffing, OLTC *must* impose another period of denial of new admissions that lasts for *at least 2* weeks. So, while facilities can be allowed to admit new residents more quickly than in the past, facilities should take great care that the information they report to OLTC is correct – or face an additional period of denial of new admissions.

- e. **The last to be picked.** We know that minimum staffing means direct care staff, and direct care staff means nurses and CNAs. But it also means that those nurses and CNAs must be performing direct care services. So, who is *not* part of minimum staffing?
1. Directors of Nursing. DONs are *in addition* to minimum direct care staff. And there’s more. Under the law, the DON “shall be a full-time employee and shall be employed for no less than forty (40) hours per week” and an “additional registered nurse shall be employed for a minimum of sixteen (16) hours per week to ensure coverage seven (7) days a week.” Again, these requirements are in addition to the minimum direct care staff.
 2. Therapy personnel or personnel listed in § 20-10-1404 (which refers to the DON – see immediately preceding).
 3. Medication assistive persons as defined in § 17-87-701.
 4. The MDS nurse. This one is kind of tricky. Yes, the MDS nurse is, well, a nurse. And nurses count as direct care staff. But, again, only while performing direct care services. When the MDS nurse is performing MDS duties, he or she is not performing direct care services, and therefore cannot be counted as direct care staff – and thus cannot be counted for minimum staffing purposes.

II. Forms

There are two forms that have to be completed for minimum staffing. They are the DMS-718 Minimum Staffing Reporting Form and the DMS-7780 Daily Staffing Log. Both – along with all other OLTC forms – can be found on the OLTC website at <http://humanservices.arkansas.gov/dms/Pages/oltcForms.aspx>. For convenience, let's call them the Reporting Form and the Staffing Log.

The Reporting Form is filled out at the end of each month, and lists the census, total number of direct care staff, total number of licensed staff, and the total number of “other” staff, for each shift for each day of the month. This is the form you send to OLTC each month.

The Staffing Log is the “sign in” sheet, where direct care staff sign in for each shift. This form is not sent to OLTC; it's posted (more on that later) and kept by the facility. As the Reporting Form is pretty straightforward, let's look at the requirements for the Staffing Log.

- a. Must be posted within twenty (20) feet of the main entrance to the facility – you no longer have to post a copy on every hall, wing and corridor. The location and method of posting must make the daily staffing log readily accessible and visible to residents and visitors.
- b. In addition to posting the sign-in form, the facility must post a diagram of the facility – showing the location of each hall, wing, or corridor – immediately below the sign-in sheet.
- c. The daily staffing log must be posted at the beginning of each shift.
- d. Staff must sign in and sign out on the posted form every time they arrive for work or leave work.
- e. The sign-in sheet must show every hall, wing, or corridor worked by each employee. As an example, assume Jane Doe arrives on time for her shift that begins at 7:00 a.m., and leaves at 3:00 p.m. Let's say that during the day, Jane Doe works both A and C halls. While Jane would only sign the time in and the time out once (at 7:00 a.m. and 3:00 p.m.), she would have to list both A and C halls – she would **not** have to list the times she worked each; just that she worked both.
- f. The form is retained for eighteen (18) months or until the next survey, whichever time period is longer.

III. Common Mistakes when Completing the Forms

Rather than try and describe how to complete the Staffing Log or the Reporting Form, it may be more beneficial to describe the most common mistakes that occur with each.

a. Reporting Form

1. $8 + 2 = 12$. Yes, believe it or not, the most common mistake in completing the staffing form is basic arithmetic. I cannot begin to tell you how often we see forms that list total direct care staff at 12, licensed nurses at 2, and “Other” at...8. Folks, $8 + 2 = 10$, not 12. Please check your arithmetic. When we get these kinds of errors, we have no choice but to flag the report. We contact the facility to get it corrected, but as you can imagine, we have to question whether the facility actually knows what it’s doing when we see this kind of report.
2. Not understanding what kind of positions can be counted. This error takes two forms. The first is when a facility only has to have two nurses for a shift, but actually has three present. Some facilities don’t list the third nurse. The third nurse can and should be counted – if the nurse worked as a nurse, list him or her in the Licensed column; if the nurse worked CNA duties, list them in the Other category. If a nurse works both, you can handle this by just picking which column you want to put them in. The thing to remember is that the Licensed column and the Other column must equal the Total Direct Care Staff column. The second way this problem arises is with therapy staff. Therapy staff counts as direct-care staff – so long as they are performing direct care duties. If they are, count ‘em. If not, don’t.
3. Counting staff that isn’t performing direct care duties. If you have a person who is normally counted as direct care staff, but whose duties don’t include actually providing direct care, don’t count them. As noted above, when a person is performing MDS duties, they are not performing direct care duties. You can’t count them when they are performing MDS duties. Make sure that the person is not only direct care staff, but are actually performing direct care duties.

b. Staffing Log

1. Far and away, the most common error is staff simply not signing in. Yes, it is true that the posting form is not determinative as to whether the facility is meeting minimum staffing requirements – but it is something we look at. Save yourself time and trouble by making sure staff signs the thing. The audit you save may be your own.
2. The second most common error we see with the Staffing Log is that facilities simply don’t post it. It isn’t necessarily that facilities don’t fill it

out – it’s that they don’t post it where visitors can see it. Sometimes it’s kept at the nurses’ station – but you’d need a Sherpa guide and a telescope to find and read it. Sometimes it’s kept in a binder.

Remember that the posting form is the General Assembly’s answer to families that want to know not just that facilities are meeting minimum staffing, but also want to know *who* is working, and where. When they don’t see the posting form, or they have to ask permission to see it, they tend to get a tad peeved. When that happens, they file a complaint. Complaints lead to surveys. Surveys can lead to deficiencies. Save yourself the grief; post the posting form.

IV. Three Month Surveys – What the heck are they, and what causes them?

When OLTC looks at staffing, there are two kinds of examinations – the so-called “two week” examination, and the “three-month” examination. Both are pretty self-explanatory; the former looks at staffing patterns over the two week period immediately preceding the date OLTC enters the facility. The latter looks at a full three months of staffing. The difference is when and why they occur.

The “two-week” examination is conducted in all standard state licensure surveys. It is a routine part of the examination of the facility that is conducted approximately once a year – not to be confused with the federally-based surveys which occur every 9 to 15 months.

The “three month” examination is triggered by one of three things – a facility’s staffing form that shows either poor compliance with minimum staffing; or contains errors that facilities cannot easily explain; or a complaint that the facility is not adequately staffed. Because of this, “three month” examinations may cover time periods that are not immediately preceding the date of entry. Three month examinations also tend to be far more in-depth.

V. “I got a deficiency, and I was under 20%!”

This issue is probably one of the most misunderstood – both by facilities and the public. There’s a reason the law is called the “minimum” staffing law – it’s the absolute minimum number of staff that must be present at all times. As the law states, the ratios “shall be the minimum number of direct-care staff required by nursing facilities and shall be adjusted upward to meet the care needs of residents.” This means that a facility can be cited for violation of the minimum staffing law even if they have only one shift in the entire month that is short.

However, what the law also does is require OLTC to impose elevated or increased penalties to facilities when the facilities show twenty percent (20%) or higher of shifts in a month that do not meet minimum staffing requirements.

Put another way – *any* time a facility is short staffed it is subject to a deficiency. The “20% rule” is the point of short staffing in which OLTC has to, by law, impose heightened enforcement.

VI. CMPs and Staffing

This addresses the imposition of Civil Money Penalties under patterns of failure. Therefore, we need to be sure we know that patterns of failure means...

“Pattern of failure” means that a facility did not meet the minimum staffing requirements for more than twenty percent (20%) of the total number of shifts for any one (1) month. When a pattern of failure occurs, the following penalties are imposed:

- a. When the pattern of failure is more than twenty percent (20%) but less than twenty-five percent (25%) of the total number of shifts for any one (1) month, the facility shall be assessed a fine of two thousand five hundred dollars (\$2,500);
- b. When the pattern of failure is twenty-five percent (25%) or higher but less than thirty percent (30%) of the total number of shifts for any one (1) month, the facility:
 1. Shall be assessed a fine of five thousand dollars (\$5,000); and
 2. Shall be prohibited from admitting new residents for a period of at least two (2) weeks.
- c. When the pattern of failure is thirty percent (30%) or higher of the total number of shifts for any one (1) month in a three-month reporting period, the facility:
 1. Shall be assessed a fine of seven thousand five hundred dollars (\$7,500); and
 2. Shall be prohibited from admitting new residents for a period of at least two (2) weeks.

NOTE: If after five (5) days' notice from the office of the imposition of a denial of new admissions a facility admits new residents during a period in which the facility is prohibited from admitting new residents, the facility shall be assessed a fine of twenty-five thousand dollars (\$25,000) per new resident admitted.

If you have any questions relating to Minimum Staffing, please contact Shay Eccles in the OLTC at (501) 320-6189.