

October 14, 2024

Nursing Home Minimum Staffing Rule – Full Reprieve Near Term Unlikely, Potential for Smaller Relief

Key Takeaways: Nursing homes and their post-acute care REIT landlords have legal and legislative reasons to be hopeful about efforts to kill CMS’ minimum staffing rule, but we are skeptical they will secure a full reprieve in the near term. Nursing homes will likely still need to plan and invest for their nurse labor needs, especially since it is dubious CMS will yield on the staffing rule. That said, later this year/early next year, we see a path for *slight* legislative relief, though the odds are still below 50%. Longer term, we think nursing homes could score a legal win by at least one of the courts as early as next spring, even if that victory is appealed and put on hold.

We note that if Vice President Kamala Harris (D) wins in November, this outlook is unlikely to change whereas if former President Donald Trump (R) wins in November, the odds improve immeasurably for a perhaps quicker reversal of CMS’s nursing home mandate.

Recall that in April, CMS finalized its imposition of minimum staffing levels for nursing homes. Specifically, the rule mandated these facilities provide a minimum of 3.48 hours of care per-resident per-day (HPRD), with 0.55 HPRD required for registered nurses, 2.45 HPRD required for nurse aides, and the rest fulfilled at the facilities’ discretion. CMS also called for the onsite presence of a registered nurse 24 hours a day, seven days a week. Depending on the location, facilities will have 3-5 years to implement. Culminating a multiyear inquiry to address the subpar care quality at nursing homes derived from insufficient staffing, the rulemaking then spurred opponents to introduce legislation curbing CMS’s authority and invited lawsuits alleging the CMS rule was arbitrary, capricious, expensive, and flawed.

What is happening in Congress?

Legislation with the greatest legs is Protecting America’s Seniors’ Access to Health Care Act by Reps. Michelle Fischbach (R-MN) and Greg Pence (R-IN), which passed out of the House Energy and Commerce Committee along party lines in September. This bill would overturn the CMS rule and establish an advisory panel on the nursing workforce. A similar bill was scored as saving the federal government \$22B/10 years.

Either version seems to garner enough support to pass the House, but would likely fall short in the Senate, despite concerns raised by some rural Senate Democrats. Overall, we think too many Senate Democrats would oppose the legislation due to union backing and agreement with the Administration that these mandates will help improve the quality of care at nursing homes.

That said, we still see a potential path for a slimmer type of relief. With legislative healthcare savings needed to offset the costs related to extending the expiring healthcare extenders at year’s end and avoiding certain healthcare cuts next year, we

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The Ensign Group Inc (ENSG)

Price:	\$147.08
52-Week High:	\$154.93
52-Week Low:	\$92.69

PACS Group, Inc. (PACS)

Price:	\$39.93
52-Week High:	\$42.25
52-Week Low:	\$22.61

Omega Healthcare Investors Inc (OHI)

Price:	\$39.94
52-Week High:	\$41.53
52-Week Low:	\$27.53

Sabra Healthcare REIT Inc (SBRA)

Price:	\$18.22
52-Week High:	\$19.32
52-Week Low:	\$12.83

CareTrust REIT Inc. (CTRE)

Price:	\$30.22
52-Week High:	\$31.51
52-Week Low:	\$20.10

Providence Group

think Congress may consider modifying the rule's implementation timing as a part of its list of pay-fors, especially since a delay would not upend the status quo, afford the administration consistency on its policy goals, and provides time to rebuild the nurse labor pool (a concern raised by opponents) while logging federal savings.

What is happening in the courts?

Last week, 20 Republican Attorneys General, some nursing home industry organizations, and a few facilities filed a federal lawsuit in Iowa against HHS stating that the government lacked authority to promulgate its minimum staffing rule. The plaintiffs allege that HHS violated the "major questions" doctrine in imposing the minimum staffing requirements that goes beyond what is laid out in statute. They claim that the rule hikes spending on private / state actors and impacts a sizable part of the economy such that CMS needed specific statutory direction from Congress to promulgate such a regulation.

This case is distinct from – though reminiscent of – arguments in two separate federal lawsuits filed in a federal district court in northern Texas. Those legal challenges – one by the nursing home industry organization American Health Care Association and the other by the state of Texas – were recently consolidated into a single case and is being heard by Trump appointee Judge Matthew Kacsmaryk, the federal judge who initially struck down the FDA approvals of the abortion pills in a nationwide injunction. The consolidated case is still in the briefing stages, which we think is likely to conclude this quarter/early Q1 and suggest a schedule for a potential hearing during Q1/Q2 and a district court decision next spring at the earliest.

While Kacsmaryk has not opined about nursing homes or staffing mandates, he has shown willingness to void federal rules when he believes they violate the statute or the Constitution. We think he also may be sympathetic to arguments opposing the nursing home minimum staffing mandates in the wake of Supreme Court decisions about: 1) the deference given to federal agencies in their regulation of industries, when the law is unclear; and 2) the regulatory ability to promulgate rules that would impose sizable costs on industry and impact a large part of the economy, without specific direction from Congress.

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