

**DEPARTMENT OF HUMAN SERVICES
AGING AND PEOPLE WITH DISABILITIES
OREGON ADMINISTRATIVE RULES**

**CHAPTER 411
DIVISION 89**

**NURSING FACILITIES/LICENSING - COMPLAINTS, INSPECTIONS,
AND SANCTIONS**

411-089-0010 Inspections and Surveys

(Amended 12/13/2021)

(1) Frequency. The Department shall, in addition to any investigations conducted pursuant to complaints, conduct a general in-person inspection of each facility to determine compliance with nursing facility laws on a schedule consistent with the survey schedule defined by the Centers for Medicare and Medicaid Services (CMS), and at such other times as the Department deems necessary.

(2) Content. The general in-person inspection includes a review of resident care practices. Results of the review shall be summarized on the survey form.

(3) Documentation: A nursing facility shall maintain all written documentation required by Oregon law. Such written documentation shall be kept on the facility premises. When documents and records are requested by the Department, the facility shall make the requested materials available to the investigator or inspector for review and copying.

Stat. Auth.: ORS 410.070, 441.055, 441.615

Stats. Implemented: ORS 441.087, 441.050, 441.615, 441.630, 441.690, 441.695, 441.710

411-089-0020 Sanctions, Generally

(Amended 06/28/2015)

(1) Information collected during a visit by any Department, local APD, or Area Agency on Aging representative, regardless of the reason for the visit, may be used as a basis for any sanction imposed by the Department.

(2) The use of any one sanction by the Department does not preclude the implementation of any other sanctions for the same deficiencies.

(3) The Department may seek appropriate administrative or injunctive relief before the completion of an investigation or inspection if it appears a resident might otherwise be deprived of rights secured by federal or state law.

(4) If after an investigation or inspection the Department believes there is substantial evidence a violation has occurred or is occurring, the Department may seek, by administrative or judicial means, to obtain such remedial relief as may be appropriate, including voluntary compliance, contested case, and injunction proceedings.

Stat. Auth.: ORS 441.055, 441.615, 441.070

Stats. Implemented: ORS 411.050, 441.615, 441.710

411-089-0030 Civil Penalties

(Amended 6/29/2018)

(1) For purposes of imposing civil penalties, facilities licensed under ORS 441.015 are considered to be long-term care facilities subject to ORS 441.705 to 441.745.

(2) For purposes of this rule:

(a) "Resident rights" means that each resident must be assured the same civil and human rights accorded to other citizens as described in OAR 411-085-0310 through 411-085-0350.

(b) "Harm" means a measurable negative impact to a resident's physical, mental, financial, or emotional well-being.

(c) "Minor harm" means harm resulting in no more than temporary physical, mental, or emotional discomfort or pain without loss of function, or in financial loss of less than \$1,000.

(d) "Moderate harm" means harm resulting in temporary loss of physical, mental, or emotional function, or in financial loss of \$1,000 or more, but less than \$5,000.

(e) "Serious harm" means harm resulting in long-term or permanent loss of physical, mental, or emotional function, or in financial loss of \$5,000 or more.

(f) "Financial loss" means loss of resident property or money as a result of financial exploitation, as defined in ORS 124.050. Financial loss does not include loss of resident property or money that results from action or inaction of an individual not employed or contracted with the facility, or that arises from the action or inaction of an individual employed or contracted with the facility if the action or inaction occurs while the individual is not performing employment or contractual duties.

(3) CIVIL PENALTIES REQUIRING REPEAT VIOLATIONS. Violation of any Department rule is subject to a civil penalty under the following circumstances:

(a) Such violation is determined to exist on two consecutive surveys, inspections, or visits; and

(b) The Department prescribed a reasonable time for elimination of the violation at the time of, or subsequent to, the first citation.

(4) The Director shall assess the severity of a violation using the following criteria:

(a) Level 1 - is a violation that results in no actual harm or in potential for only minor harm.

(b) Level 2 - is a violation that results in minor harm or potential for moderate harm.

(c) Level 3 - is a violation that results in moderate harm or potential for serious harm.

(d) Level 4 - is a violation that results in serious harm or death.

(5) The Director shall assess the scope of a violation using the following criteria:

(a) An isolated violation occurs when one or a very limited number of residents or employees are affected or a very limited area or number of locations within a facility are affected.

(b) A pattern violation occurs when more than a very limited number of residents or employees are affected, or the situation has occurred in more than a limited number of locations but the locations are not dispersed throughout the facility.

(c) A widespread violation occurs when the problems causing the deficiency are pervasive and affect many locations throughout the facility or represent a systemic failure that affected, or has the potential to affect, a large portion or all of the residents or employees.

(6) Determining Civil Penalties.

(a) When the Director is considering imposition of a civil penalty under ORS 443.455(2)(a), ORS 441.710, or Or Laws 2017, ch 679, § 4 on a nursing facility the Director shall comply with the requirements of this section.

(b) When imposing a civil penalty on a facility pursuant to this section, the Director shall consider:

(A) Any prior violations of laws or rules pertaining to the facility and, as a mitigating factor, whether violations were incurred under prior ownership or management of the facility.

(B) The financial benefits, if any, realized by the facility as a result of the violation.

(C) The facility's past history of correcting violations and preventing the reoccurrence of violations.

(D) The severity and scope of the violation.

(7) Civil penalty amounts.

(a) The Director may impose civil penalties as follows:

(A) For a Level 1 violation, the Director may not impose a civil penalty.

(B) For a Level 2 violation, the Director may impose a penalty in an amount no less than \$250 per violation, not to exceed \$500 per violation.

(C) For a Level 3 violation, the Director may impose a civil penalty in an amount no less than \$500 per violation, not to exceed \$1,500 per violation.

(D) For a Level 4 violation, the Director may impose a civil penalty in an amount no less than \$1,500 per violation, not to exceed \$2,500 per violation.

(E) For a failure to report abuse of a resident to DHS as required by state law, the Director may impose a civil penalty in an amount of no more than \$1,000 per violation.

(b) The penalties imposed under paragraph (a)(A) to (D) of this section may not exceed \$20,000 in the aggregate for violations occurring in a single facility within any 90-day period.

(c) In imposing civil penalties under this section, the Director may take into account the scope of the violation.

(8) Additional Civil Penalties. The Department shall impose a civil penalty of not less than \$2,500 and not more than \$15,000 for each occurrence of substantiated abuse that resulted in the death, serious injury, rape, or sexual abuse of a resident. The civil penalty may not exceed \$40,000 for all violations occurring in a single facility within any 90-day period.

(a) To impose this civil penalty, the Department must establish all of the following:

(A) The abuse arose from deliberate, or other than accidental action or inaction;

(B) The conduct resulting in the abuse was likely to cause a negative outcome by a person with a duty of care toward a resident of a facility; and

(C) The abuse resulted in the serious injury, rape, sexual abuse, or death of a resident.

(b) For purposes of this civil penalty, the following definitions apply:

(A) "Negative Outcome" includes serious injury, rape, sexual abuse, or death.

(B) "Serious injury" means a physical injury that creates a substantial risk of death or that causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.

(C) "Rape" means rape in the first degree as defined in ORS 163.375, rape in the second degree as defined in ORS 163.365, and rape in the third degree as defined in ORS 163.355.

(D) "Sexual Abuse" means any form of sexual contact between an employee of a residential care facility or a person providing services in the facility and a resident of that facility, including, but not limited to:

(i) Sodomy.

(ii) Sexual coercion.

(iii) Taking sexually explicit photographs.

(iv) Sexual harassment.

(9) ADMINISTRATOR SANCTIONS - NURSING FACILITY CLOSURES.

Any individual who is or was the administrator of a facility and fails or failed to comply with the requirements at OAR 411-085-0025(2)(d)(e)(f)(h), OAR 411-085-0025(3)(a), or OAR 411-088-0070(1)(g), (3)(d), or (4):

(a) Is subject to a civil monetary penalty as follows:

(A) A minimum of \$500 for the first offense;

(B) A minimum of \$1,500 for the second offense; and

(C) A minimum of \$3,000 for the third and subsequent offenses.

(b) May be subject to exclusion from participation in any Federal health care program as defined in section 1128B(f) of the Patient Protection and Affordable Care Act; and

(c) Is subject to any other penalties that may be prescribed by law.

(10) A notice of civil penalty shall be sent by registered or certified mail and shall include:

(a) A reference to the specific sections of the statute, rule, standard, or order involved.

(b) A short and plain statement of the matters asserted or charged.

(c) A statement of the amount of the penalty or penalties imposed.

(d) A statement of the party's right to request a hearing.

(e) A description of specific remediation the facility must make in order to achieve substantial compliance.

(f) A statement specifying the amount of time for the elimination of the violation.

(A) The time specified shall not exceed 30 calendar days after the first notice of a violation; or

(B) In cases where the violation requires more than 30 days to correct, a reasonable time shall be specified in a plan of correction, as found acceptable by the Director.

(11) For a level 2 or level 3 violation, the Department shall hold in abeyance the penalty proposed for the period of time specified in the Notice pursuant to subsection (10)(f) above.

(12) Hearing Requests. The person to whom the notice is addressed shall have 10 calendar days from the date specified in the Notice pursuant to subsection (10)(f) above to make written application for a hearing before the Department.

(13) All hearings shall be conducted pursuant to the applicable provisions of ORS chapter 183.

(14) If the person notified fails to request a hearing within the time specified in the notice, an order may be entered by the Department assessing a civil penalty.

(15) If, after a hearing, the Department prevails, an order may be entered by the Department assessing a civil penalty.

(16) A civil penalty imposed by the Department shall be remitted or reduced in a manner consistent with the public health and safety, as follows:

(a) The Department shall reduce the penalty by not less than 25 percent if the facility self-reports abuse that results in less than serious harm.

(b) The Department shall withdraw some or all of the penalty if the facility achieves substantial compliance for a level 2 or 3 violation.

(17) If the order is not appealed, the amount of the penalty is payable within 10 calendar days after the order is entered. If the order is appealed and is sustained, the amount of the penalty is payable within 10 calendar days after the court decision. The order, if not appealed or sustained on appeal, shall constitute a judgment and may be filed in accordance with the provisions of ORS 18.005 to 18.428. Execution may be issued upon the

order in the same manner as execution upon a judgment of a court of record.

(18) A violation of any general order or final order pertaining to a nursing facility issued by the Department, other than a Level 1 violation, is subject to a civil penalty.

(19) Judicial review of civil penalties imposed under ORS 441.710 shall be as provided under ORS 183.480, except the court may, in its discretion, reduce the amount of the penalty.

(20) PAYMENT TO BE CONSIDERED ADMISSION OF VIOLATION. Unless the Department agrees otherwise, for purposes of history of the facility, any payment of a civil penalty is treated by the Department as a violation of the statutes or rules alleged in the civil penalty notice for which the civil penalty was paid.

(21) All penalties recovered are deposited in the Quality Care Fund.

Stat. Auth.: ORS 441.615, 441.637, 441.710, 441.715, 441.990
Stats. Implemented: ORS 410.070, 441.055, 441.615, 441.637, 441.715, 441.990

411-089-0040 Nursing Facility License Denial, Suspension, Revocation
(Amended 12/13/2021)

(1) Basis for Denial, Revocation -- Mandatory. A license shall be suspended or revoked, or both, or denied if a certificate of noncompliance is issued by the State Fire Marshal, Deputy, or other approved representative pursuant to ORS Chapter 479.

(2) Basis for Denial or Revocation -- Discretionary. A license may be denied or revoked by the Department when it finds the licensee or applicant:

(a) Failed to comply with nursing facility law such that the health, safety, or welfare of residents is or was jeopardized;

(b) Failed to substantially comply with nursing facility law during any three inspections within a five year period. For the purpose of this rule, "inspection" means an on-site visit to the facility by the Department for licensing or certification;

(c) Has been convicted, under any state or federal law, of a felony or of a misdemeanor associated with the operation of a health care facility or agency within the preceding ten years;

(d) Had an incident of ownership of ten percent or greater in or had a management or control interest in any facility in any state when the facility was terminated from participation in the Medicaid or Medicare program, or at a time when the facility voluntarily terminated participation in the Medicaid or Medicare program during any state or federal termination process;

(e) Had an incident of ownership of ten percent or greater in any facility in any state that failed to reimburse any state or the federal government for Medicaid or Medicare overpayments on a timely basis within the preceding five year period;

(f) Had an incident of ownership of ten percent or greater or a management or control interest in a health care facility or agency whose license was involuntarily suspended, revoked, or not renewed within the preceding five years;

(g) Had a nursing home administrator's license revoked, suspended, or not renewed in any state, excluding revocation based on failure to pay license fee or failure to maintain required continuing education requirements when not serving as an administrator, within the preceding five year period;

(h) Provided false, incorrect, or misleading information to the Department on the license application form;

(i) Provided false, incorrect, or misleading information to the Department regarding care of residents, facility finances, or resident funds;

(j) Failed to provide workers' compensation coverage for health care facility employees when required by state law in any state;

(k) Permitted, aided, or abetted any illegal act that had a significant adverse impact on resident health, safety, or welfare within the preceding five year period;

(l) Had an incident of ownership of ten percent or greater in any health care facility in any state at a time when the facility was denied an operating license, excluding denial based upon absence of bed need;

(m) Demonstrated fiscal instability within the preceding five years and such instability relates to the licensee or applicant's ability to provide care or operate a facility, or both provide care and operate a facility. Examples of fiscal instability include, but are not limited to, experiencing more than one instance of any of the following events or experiencing more than one of the following events:

(A) Failure to compensate employees in a timely manner;

(B) Failure to maintain, in any facility, an adequate inventory of medical supplies, personal supplies, or food;

(C) Failure to promptly pay any judgments, taxes, warrants, or other liens;

(D) Failure to pay utility bills or other bills related to the operation or maintenance of any facility, excluding failure to pay when the facility has a clear basis to dispute the billing; or

(E) A poor credit rating.

(n) Has demonstrated fiscal instability within the past five years by having experienced a history of poor credit or poor financial management; or

(o) Has failed to pay a civil penalty imposed by the Department.

(p) The facility shall not interfere with a good faith disclosure of information by an employee or volunteer concerning the abuse or other action affecting the welfare of a resident in the facility as described in 411-085-0360(6)(d).

(3) Notice of Intent to Revoke or Deny. The Department's notice of its intent to deny or revoke a nursing facility license shall include:

(a) A statement that the licensee or applicant has a right to a contested case hearing or a statement of the time and place of the hearing;

(b) A statement of the authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of the statute and rules involved;

(d) A short and plain statement of the matters asserted or charged;

(e) A statement that the licensee or applicant is entitled to be represented by counsel and to respond and present evidence and argument on all issues involved;

(f) A statement that the record of the proceeding to date, including information in the Department's file or files on the subject of the revocation or denial of the license, automatically becomes part of the contested case record upon default for purposes of proving the Department's prima facie case; and

(g) A statement that if the licensee or applicant fails to request a hearing within 21 days of the date the notice of revocation was received, or within 60 days of the date the notice of denial was received, whichever is applicable, the licensee or applicant shall have waived the right to a hearing.

(4) Informal Conference. When the Department issues a notice of intent to revoke or deny a license, the licensee or applicant shall be entitled to an informal conference to respond to the notice. The conference shall be held before a person authorized to issue the order or to make recommendations

regarding issuance of the order. A request for an informal conference must be received in writing by the Department within 10 days of the date the notice of the intent to revoke or deny the license was received by the licensee or applicant. If the licensee or applicant fails to submit a timely request for a conference, the licensee or applicant shall have waived the right to the conference.

(5) Hearing:

(a) Right to Hearing. When the Department issues a notice of intent to revoke or deny a license, the licensee or applicant shall be entitled to a contested case hearing in accordance with the provisions of ORS Chapter 183.

(b) Request for Hearing. A request for hearing must be in writing and must be received by the Department within:

(A) 21 days of the date the licensee received the notice of revocation; or

(B) 60 of the date the applicant received the notice of denial of licensure.

(c) Date of Hearing. The hearing shall be held within 60 days of the request for hearing unless the Department and the licensee or applicant agree to a later date.

(d) Continued Operation Prohibited. A facility may not continue operation if the facility license is immediately suspended because of serious and immediate danger to resident health or safety pursuant to OAR 411-089-0040(2).

(6) Default Order. If the licensee or applicant fails to request a contested case hearing within the prescribed time period, withdraws a previous hearing request, or fails to appear at a scheduled hearing, the Department may enter an order denying or revoking the license by default. In the event of a default, the Department's files on the subject of revocation or denial automatically become part of a contested case record for the purposes of proving the Department's prima facie case.

(7) Emergency Suspension Order.

(a) When the Department finds a serious and immediate threat to resident health and safety exists, the Department may immediately suspend a nursing facility license. An emergency suspension order must be in writing. The order may be issued without prior notice to the licensee and without prior opportunity for a contested case hearing.

(b) Except where the threat to residents is so imminent that the Department determines that pre-suspension notice is not practical, the Department must provide the licensee with a pre-suspension notice and an opportunity to object before issuing an emergency suspension order. The pre-suspension order shall:

(A) Describe generally the acts of the licensee or circumstances that are grounds for an emergency suspension order under this rule, or both;

(B) Describe generally the reasons why the acts of the licensee or the circumstances seriously and immediately endanger resident health and safety, or both; and

(C) Identify a person whom the licensee may contact at the Department who is authorized to make recommendations regarding issuance of the order.

(c) If a pre-suspension notice is issued, the licensee shall be entitled to an immediate opportunity to respond to the notice before an authorized person issues the order or makes recommendations regarding issuance of the order. The emergency suspension order may be issued at any time thereafter.

(d) When an emergency suspension order is issued, the Department must serve the order on the licensee either personally or by registered or certified mail. The order shall include the following statements:

(A) The licensee's right to a hearing, or a statement of the time and place of the hearing;

(B) The authority and jurisdiction under which the hearing is to be held;

(C) A short plain statement of the matters asserted or charged;

(D) A reference to the particular sections of the statutes and rules involved;

(E) That the licensee may elect to be represented by counsel and may respond and present evidence and argument on all issues involved;

(F) That the licensee has a right to demand a hearing, if requested, be held as soon as practical;

(G) That if the demand for a hearing is not received by the Department within 90 days of the date of the emergency suspension order, the licensee shall have waived its right to a hearing under ORS Chapter 183;

(H) The effective date of the emergency suspension order;

(I) Findings of the specific acts or omissions of the licensee that are the grounds for the suspension, and the reasons the acts or omissions seriously and immediately threaten the health and safety of the residents; and

(J) That the Department may combine the hearing on the emergency suspension order with any other Department proceeding affecting the license. The procedures for the combined proceeding shall be those applicable to the other proceeding affecting the license.

(e) If a timely request for a hearing is received, the Department must hold the hearing as soon as practical. At the hearing the Department shall consider the facts and circumstances, including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to resident health and safety; and

(B) Whether the circumstances at the time of the hearing justify confirmation, alteration, or revocation of the order.

(8) License Expiration. If the Department determines a license has expired due to the facility's discontinued operation, the licensee has a right to an informal conference under section (4) of this rule and a hearing under section (5) of this rule. The Department may issue a default order pursuant to section (6) of this rule.

Stat. Auth.: ORS 410.070, 441.030, 441.055, 441.615
Stats. Implemented: ORS 441.030, 441.615

411-089-0050 Conditions
(Amended 6/29/2018)

(1) Purpose. The purpose of this rule is to protect nursing facility residents and prospective residents from threats to their health, safety, and welfare, and to help ensure the attention of facilities with serious deficiencies is directed toward correcting those deficiencies.

(2) For the purpose of these rules, the following definitions apply:

(a) "Immediate Jeopardy" means a situation in which the failure of a nursing facility to comply with a rule of the Department has caused or is likely to cause serious injury, serious harm, serious impairment, or death to a resident.

(b) "Substantial Compliance" means a level of compliance with state law and with rules of the Department such that any identified deficiencies pose no actual harm or no more than potential for minor harm to the health or safety of residents of a facility.

(3) The Department may impose a condition on the license of a nursing facility in response to a substantiated finding of rule violation, including, but not limited to a substantiated finding of abuse, or in response to a finding of immediate jeopardy, whether or not the finding of immediate jeopardy is substantiated at the time the license condition is imposed.

(4) The Department shall immediately remove the license condition if the finding of immediate jeopardy is not substantiated within 30 calendar days after the imposition of the license condition.

(5) Conditions may be attached to a license upon a finding that:

(a) Information on the application or inspection requires a condition to protect the health and safety of residents;

(b) There exists a threat to the health, safety, and welfare of a resident;

(c) There is reliable evidence of abuse, neglect, or exploitation; or

(d) The facility is not being operated in compliance with these rules.

(6) Conditions that may be imposed on a licensee include, but are not limited to:

(a) Restricting the total number of residents;

(b) Restricting the number and impairment level of residents based upon the capacity of the licensee and staff to meet the health and safety needs of all residents;

(c) Requiring additional staff or staff qualifications;

(d) Requiring additional training for staff;

(e) Requiring additional documentation; or

(f) Restriction on admissions, if the Department makes a finding of immediate jeopardy that is likely to present an immediate jeopardy to future residents upon admission.

(7) NOTICE OF IMPENDING IMPOSITION OF LICENSE CONDITION.

(a) Except where the threat to residents is so imminent the Department determines it is not safe or practical to give the facility advance notice, the Department shall provide the licensee with a

Notice of Impending Imposition of License Condition (Notice) at least 48 hours prior to issuing an Order Imposing License Condition (Order). The Notice may be provided in writing, sent by certified or registered mail to the licensee, or provided orally in person or by telephone to the licensee or to the person represented by facility staff to be in charge at the facility. When the Notice is delivered orally, the Department must subsequently provide written notice to the licensee by registered or certified mail. The Notice must:

(A) Describe the acts or omissions of the licensee that support the imposition of the license condition and the circumstances that led to the substantiated finding of a rule violation, including, but not limited to:

(i) A substantiated finding of abuse.

(ii) A finding of immediate jeopardy.

(B) Describe why the acts or omissions and the circumstances create a situation for which the imposition of a license condition is warranted.

(C) Provide a brief statement identifying the nature of the impending condition.

(D) Provide a brief statement describing how the license condition is designed to remediate the circumstances that lead to the license condition.

(E) Provide a brief statement of the requirements for withdrawal of the license condition.

(F) Identify a person at the Department whom the licensee may contact and who is authorized to enter the Order or to make recommendations regarding issuance of the Order.

(G) Specify the date and time an informal conference will be held, if requested by the licensee.

(H) Specify the date and time the Order will take effect.

(b) If the threat to residents of a facility is so imminent the Department determines it is not safe or practical to give the facility advance notice of a license condition, the Department must provide the notice required under section (7)(a) within 48 hours after issuing an order imposing the license condition.

(8) INFORMAL CONFERENCE. If an informal conference is requested, the conference will be held at a location designated by the Department. If determined to be appropriate by the Department, the conference may be held by telephone.

(a) With Notice. If a Notice of Impending License Condition is issued, the licensee must be provided with an opportunity for an informal conference to object to the Department's proposed action before the license condition is scheduled to take effect. The Order Imposing License Condition may be issued at any time after the informal conference.

(b) Without Notice. If an Order Imposing License Condition is issued without a prior Notice of Impending License Condition, the licensee may request an immediate informal conference to object to the Department's action.

(9) ORDER IMPOSING LICENSE CONDITION.

(a) When an Order Imposing License Condition (Order) is issued, the Department must serve the Order to the licensee either personally or by registered or certified mail.

(b) The Order must include the following statements:

(A) The authority under which the condition is being issued.

(B) A reference to the specific sections of the statute and administrative rules involved.

(C) The effective date of the condition.

(D) A short and plain statement of the matters asserted or charged.

(E) The specific terms of the license condition.

(F) A specific description of how the scope and manner of the license condition is designed to remediate the circumstances that lead to the license condition.

(G) A specific description of the requirements for withdrawal of the license condition.

(H) Statement of the licensee's right to request a hearing.

(I) That the licensee may elect to be represented by counsel and to respond and present evidence and argument on all issues involved. If the licensee is to be represented by counsel, the licensee must notify the Department.

(J) That, if a request for hearing is not received by the Department within 21 calendar days from the date of the Order, the licensee has waived the right to a hearing under [ORS chapter 183](#).

(K) Findings of specific acts or omissions of the licensee that are grounds for the license condition, and the reasons these acts or omissions create a situation for which the imposition of a license condition is warranted.

(L) That the Department may combine the hearing on the Order with any other Department proceeding affecting the licensee. The procedures for the combined proceeding must be those applicable to the other proceedings affecting the license.

(10) Posting of Admission Restriction Order. A licensee who has been ordered to restrict admissions to a facility shall immediately post a "Restriction of Admissions Notice" on both the inside and outside faces of each door of the facility through which any person may enter or exit the facility. Such public notices shall be provided by the Department. The

notices shall not be removed, altered, or obscured until the restriction has been lifted by the Department. Removal of the notice without the Department's authorization is a Class C misdemeanor.

(11) HEARING.

(a) Right to Hearing. If the Department imposes an Order, the licensee is entitled to a contested case hearing pursuant to [ORS chapter 183](#).

(b) Hearing Request. The Department must receive the licensee's request for a hearing within 21 calendar days of the date of the Order. If a request for hearing is not received by the Department within 21 calendar days of the date of the Order, the licensee will have waived the right to a hearing under [ORS chapter 183](#).

(c) A licensee's request for a hearing does not delay enforcement.

(d) Date of Hearing. When a timely request for hearing is received, the hearing shall be held as soon as practical.

(e) Consolidation. If a request for hearing is received on an Order, and a subsequent Order is issued, the Department may consolidate the Orders into a single contested case hearing.

(f) At the hearing, the Department shall consider the facts and the circumstances including, but not limited to:

(A) Whether at the time of the issuance of the restriction there was probable cause from evidence available to the Department to believe there were grounds for the Admission Restriction Order;

(B) Whether the acts or omissions of the licensee posed an immediate threat to resident health and safety;

(C) Whether changed circumstances, including implementation of effective systems to help ensure deficiencies causing the

restriction do not recur, eliminate the need for continuing the restriction; and

(D) Whether the agency followed the appropriate procedures in issuing the restriction.

(12) REQUEST FOR REINSPECTION OR REEVALUATION

(a) Assertion of substantial compliance: Following the Order Imposing License Condition (Order) on a facility, the Department shall:

(A) Within 15 business days of receiving the facility's written assertion of substantial compliance and request for reinspection, the Department shall reinspect or reevaluate the facility to determine if the facility has achieved substantial compliance.

(B) Notify the facility by telephone or electronic means of the findings of the reinspection or reevaluation within five business days after completion of the reinspection or reevaluation.

(C) Issue a written report to the facility within 30 business days after the reinspection or reevaluation notifying the facility of the Department's determinations.

(b) If the Department finds the facility has achieved substantial compliance and that systems are in place to ensure similar deficiencies do not reoccur, the Department shall withdraw the Order.

(c) If after reinspection or reevaluation, the Department determines the violation continues to exist, the Department may not withdraw the Order and is not obligated to reinspect or reevaluate the facility again for at least 45 business days after the first reinspection or reevaluation.

(A) The Department shall provide the facility notice of the decision not to withdraw the Order in writing.

(B) The notice shall inform the facility of the right to a contested case hearing pursuant to ORS chapter 183.

(d) If the Department does not meet the requirements of this section, a license condition is automatically removed on the date the Department failed to meet the requirements of this section, unless the Director extends the applicable period for no more than 15 business days. The Director may not delegate the power to make a determination regarding an extension under this paragraph.

(e) Nothing in this section limits the Department's authority to visit or inspect the facility at any time.

(13) Exceptions to Admission Restriction Order. While an Admission Restriction Order is in place, the Department, in its sole discretion, may authorize the facility to admit former residents with a right of return or right of readmission. The Department, in its sole discretion, may also authorize the facility to admit new residents for whom the Department determines that alternate placement is not feasible.

Stat. Auth.: ORS 410.070, 441.030, 441.055, 441.615
Stats. Implemented: ORS 441.030, 441.615

411-089-0070 Facility Fund
(Amended 06/28/2015)

(1) Moneys in the Facility Fund are appropriated to the Department to pay for the reasonable expenses of a trustee or temporary manager.

(2) BASIS FOR APPOINTMENT.

(a) A trustee may be appointed when a court finds the health and welfare of facility residents are in jeopardy pursuant to ORS 441.281.

(b) A temporary manager may be appointed by the Department, with consent of the licensee, if the Department determines the health or safety of facility residents is in jeopardy pursuant to OAR 411-089-0075.

(3) LICENSEE REPAYMENT TO FACILITY FUND. When the Department is required to utilize the Facility Fund to meet expenses of a trustee or

temporary manager, the amount used shall constitute a loan to the facility and shall be repayable to the Facility Fund.

(4) FACILITY FUND FEE ASSESSMENT.

(a) Licensees shall pay an annual fee that does not exceed the annual license fee until the Facility Fund balance reaches \$750,000.

(b) When the Facility Fund balance reaches \$750,000, annual fee collection shall be discontinued.

(c) When the Facility Fund balance falls below \$600,000, annual fee collection shall be reinstated.

(5) ALLOWABLE COST. The facility payment described in section (4)(a) of this rule shall be considered an allowable cost.

Stat Auth.: ORS 441.341, 441.615, 441.637, 441.710, 441.715, 441.990
Stats Implemented: ORS 441.301, 441.303, 441.336

411-089-0075 Temporary Manager
(Amended 06/28/2015)

(1) **APPOINTMENT.** The Department, with the consent of the licensee, may appoint a temporary manager to assume control of the day-to-day operation of the facility in accordance with Oregon Laws 2009, chapter 539, sections 14 through 18. The appointment may be for a period not to exceed six months.

(2) **CRITERIA.** A temporary manager may be appointed if the Department determines the health or safety of residents in the facility are, or in the immediate future shall be, in jeopardy based upon:

(a) The licensee's unwillingness or inability to comply with Department rules in the operation of the facility;

(b) The imminent insolvency of the facility;

(c) The Department's revocation or suspension of the license of the facility; or

(d) The Department's determination the licensee intends to cease operations and to close the facility without adequate arrangements for the relocation of the residents.

(3) DUTIES AND POWERS. The temporary manager has all of the duties and powers, as agreed upon between the Department and the licensee, that are necessary to ensure the safety and well-being of the residents and the continued operation of the facility.

(4) QUALIFICATIONS. In order to qualify for appointment as temporary manager, the prospective appointee must:

(a) Be familiar with the Department's rules for the operation of the facility to be served;

(b) Be familiar with the needs of the resident population in the facility to be served; and

(c) Have a demonstrated history (five year minimum) of operating and managing a similar facility in substantial compliance with Department rules.

Stat. Auth.: ORS 441.615, 441.637, 441.710, 441.715, 441.990

Stats. Implemented: ORS 410.070, 441.055, 441.615, 441.637, 441.715, 441.990

Complaints, Inspections & Sanctions

411-089-0100 Complaint Intake, Investigation

(Amended 06/28/2015)

(1) Complaint Intake. The local APD or Type B AAA office receiving a complaint shall ask questions to obtain as much of the information requested on the APD Complaint Intake Form as possible. The local APD or Type B AAA office shall have at least one person designated and available to receive complaint calls throughout the work day.

(2) Complaint Investigation.

(a) All Complaints Investigated. The Department shall ensure all complaints, including anonymous complaints, received regarding violation of nursing facility laws are investigated.

(b) Multiple Problems. If the complaint alleges more than one problem, each allegation of abuse or another rule violation shall be treated as a separate complaint, and shall be given a separate finding. This is not intended to require a separate status report or complaint investigation report for each allegation.

(c) Complainant Interview. The APD or Type B AAA office representative shall interview the complainant immediately and, as necessary, during the investigation.

(d) Accompany Investigator. The investigator shall ask if the complainant, a designee, or both wish to accompany the investigator to the site. The purpose of allowing the complainant or a designee to accompany the investigator is to identify individuals and circumstances relevant to the complaint. If someone is to accompany the investigator, the investigator shall notify such party of the time and allow the party to accompany the investigator during the site visit.

(e) Timeframe to Begin Investigation. The investigations shall be initiated as follows:

(A) If the complaint alleges a resident's health or safety is in imminent danger or the resident has recently died, been hospitalized, or been treated in an emergency department, the on-site investigation shall begin within two hours of the complaint.

(B) If the complainant alleges circumstances that may result in abuse and the circumstances may place a resident's health or safety in imminent danger, the on-site investigation shall begin before the end of the first working day following receipt of the complaint.

(C) All other complaint investigations shall begin and be completed within 90 days following receipt of the complaint.

(f) Prior Notification Prohibited. Neither the Department nor the local APD or Type B AAA office shall contact the facility before the on-site investigation.

(g) Facility Visit. The investigation shall include at least one unannounced visit to the facility. Upon arrival at the facility, the investigator shall announce his or her presence to the administrator or other person designated to be in charge. The investigator shall explain the purpose of the visit, unless the investigator has reason to believe that disclosing the purpose of the visit would impede the investigation.

(h) Witness Interview. Reasonable effort shall be made to interview all possible witnesses, including alleged perpetrators (if any), the involved residents and any other persons, including other residents, identified by any source as having personal knowledge about any allegations.

(A) Investigators have the authority to conduct the interview in private unless the witness expressly makes an unsolicited request that a third party be present.

(B) The investigator shall obtain the mailing address of the alleged perpetrator.

(C) If the investigator is unable to interview a witness identified by the complainant, the complainant shall be notified before the investigation is concluded.

(i) Investigation Format. In addition to interviews, the investigator shall make personal observations of physical circumstances and review any documentation, including clinical records. The facility shall promptly provide all requested documentation that is available, for review and copying.

Stat. Auth.: ORS 410.070, 441.055, 441.637
Stats. Implemented: ORS 441.637, 441.650

411-089-0110 Initial Status Report (Abuse Complaints Only)
(Amended 06/28/2015)

(1) Initial Status Report for Abuse Investigations (Local APD or Type B AAA Office). Except in cases where the investigation is part of a general inspection pursuant to federal law, the local APD or Type B AAA office shall complete an Initial Status Report for all abuse investigations within two working days of the start of the investigation.

(2) Content. The Initial Status Report shall include:

(a) A summary of the complaint identifying each alleged incident or problem. The Initial Status Report shall not include names of residents, complainants, or other people interviewed during the investigation;

(b) The status of the investigation;

(c) Whether the complaint was filed at the direction of facility administration;

(d) A determination of whether action to protect the residents is needed and whether the facility must take action;

(e) The name and telephone number of the investigator;

(f) The projected date the Complaint Investigation Report must be completed; and

(g) A statement that the Complaint Investigation Report is available upon request after the Department issues a Letter of Determination.

(3) Distribution. The Initial Status Report shall be provided either in person or by mail to the following individuals as soon as practical, but no later than two working days after its completion:

(a) The complainant, unless the complainant waives the requirement;

(b) If the complaint involves a specific resident or residents, to the residents or persons designated to receive information concerning the residents;

(c) A representative of the Long Term Care Ombudsman, upon request;

(d) The facility; and

(e) OLRO.

(4) Availability of Initial Status Report. Upon completion, the Initial Status Report shall be placed in the local APD or Type B AAA facility files and available for public inspection.

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.650

411-089-0120 Complaint Investigation Report (Local APD or Type B AAA Office)

(Amended 06/28/2015)

(1) Report Required. The investigator shall write a complaint investigation report after each investigation is completed.

(2) Content. The complaint investigation and the findings of the investigation shall be summarized on the complaint investigation report form. The form shall not include the names of any resident, complainant, or persons interviewed. The investigation report shall include:

(a) The nature of the allegations;

(b) The investigator's personal observations relating to relevant evidence, including the dates and times of each incident (as appropriate);

(c) A summary of the documents reviewed;

(d) A summary of each interview;

(e) The investigator's findings regarding the incident or problem alleged in each allegation; and

(f) The factual basis for the finding.

(3) Investigator's Conclusions. For each alleged wrongdoing, the investigator shall prepare a separate evaluation and written conclusion. The conclusion shall be:

- (a) The alleged wrongdoing is substantiated;
- (b) The alleged wrongdoing is not substantiated; or
- (c) The investigator is unable to determine whether the alleged wrongdoing is substantiated or not substantiated because necessary, relevant information is unable to be obtained; or following a complete investigation, a reasonable person is unable objectively to conclude whether it was likely the wrongdoing occurred.

(4) Timeframe for Completion Processing (Local APD or Type B AAA Office).

- (a) If a complaint alleges abuse, the complaint report shall be completed within five working days after the investigation is completed, but not later than 60 days after receipt of the complaint.
- (b) All other complaint investigation reports shall be completed within 90 days of the receipt of the complaint.
- (c) Investigation reports shall be sent to OLRO promptly upon completion.

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.650, 441.676

411-089-0130 Division Findings for Complaint Investigations (OLRO)
(Amended 06/28/2015)

OLRO Review. OLRO shall review the Complaint Investigation Report and any evidence submitted with the report.

(1) OLRO Determination. OLRO shall review the Complaint Investigation Report and shall determine for each alleged violation:

(a) There is "Substantiated abuse," which means a reasonable person is able objectively to conclude it is more likely than not abuse occurred, including identification of rule violated;

(b) There is "Substantiated, non-abuse," which means a reasonable person is able objectively to conclude it is more likely than not a rule violation, other than abuse, occurred, including identification of rule violated;

(c) Is "Unsubstantiated," which means a reasonable person is able objectively to conclude it is unlikely any rule violation occurred; or

(d) Is "Unable to Substantiate," which means an investigation is not completed because necessary, relevant information is unable to be obtained; or that following a complete investigation, a reasonable person is unable objectively to conclude whether it was more or less likely a rule violation occurred.

(2) If OLRO determines there is substantiated abuse, OLRO shall determine whether the facility, or an individual, or both, were responsible. In determining responsibility, OLRO shall consider intent, knowledge, ability to control, and adherence to professional standards, as applicable.

(a) Facility Responsible. Examples of when OLRO shall determine the facility is responsible for the abuse include, but are not limited to the following:

(A) Failure to provide minimum staffing in accordance with OAR 411-086-0100(2), without reasonable effort to correct;

(B) Failure to check for, or act upon, relevant information available from a licensing board;

(C) Failure to act upon information from any source regarding a possible history of abuse by any staff or prospective staff;

(D) Failure to adequately train or orient staff;

(E) Failure to provide adequate supervision of staff or residents, or both;

- (F) Failure to allow sufficient time to accomplish assigned tasks;
- (G) Failure to provide adequate services;
- (H) Failure to provide adequate equipment or supplies; or
- (I) Failure to follow orders for treatment or medication.

(b) Individual Responsible. Examples of when OLRO shall determine an individual is responsible shall include, but are not limited to:

- (A) Intentional acts against a resident including assault, rape, kidnapping, murder, sexual abuse, or verbal or mental abuse;
- (B) Acts contradictory to clear instructions from the facility, unless the act is determined by OLRO to be caused by a "facility problem" such as those identified in paragraph (2)(b)(A) of this rule;
- (C) Callous disregard for resident rights or safety; or
- (D) Intentional acts against a resident's property (e.g., theft, misuse of funds).

(c) An individual shall not be considered responsible for the abuse if the individual demonstrates the abuse was caused by factors beyond the individual's control. "Factors beyond the individual's control" are not intended to include such factors as misuse of alcohol or drugs or lapses in sanity.

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.650, 441.665, 441.677

411-089-0140 Letters of Determination

(Amended 06/28/2015)

Within 60 days of receipt by the Department of the investigation report, the Department shall issue a letter of determination.

(1) CONTENT. The letter of determination shall:

- (a) Explain the nature of each allegation;
- (b) Include the date and time of each occurrence;
- (c) For each allegation, include a determination of whether the allegation is substantiated, unsubstantiated, or unable to substantiate;
- (d) For each substantiated allegation, state whether the violation was abuse or another rule violation;
- (e) For each substantiated allegation of abuse, explain the Department's determination of responsibility;
- (f) Include a copy of the complaint investigation report;
- (g) State that the complainant, any individual found responsible for abuse, and the facility have 10 days to provide additional or different information; and
- (h) Explain, when applicable, if sanctions (e.g., civil penalty, license revocation) are pursued, a formal appeal process shall be available.

(2) APPEAL RIGHTS, NURSING ASSISTANT. The letter of determination, in cases of substantiated abuse by a nursing assistant, shall explain the following:

- (a) The Department's intent to enter the finding of abuse into the Nursing Assistant Registry;
- (b) The nursing assistant may provide additional information for inclusion in the Nursing Assistant Registry if provided within 10 days;
- (c) The Nursing Assistant Registry;
- (d) The nursing assistant has 10 days to respond in writing with different or additional information, 30 days to request in writing a

contested case hearing as provided in ORS 183.411 to 183.470, and the consequences of failure to respond; and

(e) If the opportunity to request a contested case hearing expires without a request for hearing by the nursing assistant, the nursing assistant shall be found responsible for the abuse and the finding shall be entered in the Nursing Assistant Registry.

(3) DISTRIBUTION.

(a) The letter of determination shall be distributed to the facility, the complainant (if known), and the local APD or Type B AAA office;

(b) The letter of determination shall be sent by certified mail or delivered in person to any nursing assistant found responsible for abuse. In the case of a nursing assistant, notice sent to the nursing assistant's last known address is sufficient to meet the requirements of this rule;

(c) The letter of determination shall also be mailed to any health-related board or agency that certified or licensed an individual determined to be responsible for abuse. However, if the party determined to be responsible is a nursing assistant, the letter may not be mailed to the State Board of Nursing until the nursing assistant has exhausted all his or her appeal rights; and

(d) A copy of the letter of determination shall be placed in the Department's facility complaint file.

(4) REVISION.

(a) The Department may reinvestigate a complaint, issue a revised letter of determination, or both if the Department determines further information provided by the complainant, accused individual, or facility merits such action.

(b) If the Department issues a revised letter of determination, the letter shall be distributed to all individuals identified in section (3) of this rule.

(5) FAILURE TO REQUEST HEARING OR TO APPEAR.

(a) If the nursing assistant fails to request a contested case hearing in writing within 30 days of the letter of determination, or if the nursing assistant scheduled to attend the hearing fails to attend, the Department shall affirm the letter of determination and notify the State Board of Nursing of the Department's finding. The abuse finding shall be entered into the Nursing Assistant Registry.

(b) If the nursing assistant is scheduled to appear at a contested case hearing, but fails to attend at the scheduled time, or within 15 minutes thereafter, the nursing assistant shall be considered to have waived the right to a hearing. The hearing may be rescheduled if:

(A) A written request to reschedule the hearing is received by the Department within 10 days after the scheduled hearing; and

(B) The causes for not attending at the scheduled time for the hearing and for not requesting a postponement of the hearing before the hearing were beyond the control of the nursing assistant.

(6) JUDICIAL REVIEW. The nursing assistant found to be responsible for abuse shall be provided notice of the opportunity for judicial review pursuant to ORS 183.482. This notice shall accompany or be incorporated within the Department's final order regarding the nursing assistant's responsibility for abuse.

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.677

411-089-0150 Administrative Review for Nursing Assistants (Abuse)
(Repealed 7/1/2010)

EXHIBIT 89-1 Civil Penalty Chart (OAR 411-089-0030)

(Amended 04/01/2014)

I. RANGE OF CIVIL PENALTIES

| | | |
|----|---|--------------------|
| A. | Abuse: ORS 441.715(1)(c) | \$2,500 - \$15,000 |
| B. | Abuse: ORS 441.995(3) | \$500 - \$1,000 |
| C. | Injury, Serious ¹ | \$500 - \$1,000 |
| D. | Injury, Moderate ² | \$300 - \$500 |
| E. | Injury, Minor ³ | \$100 - \$300 |
| F. | Injury, Potential | \$100 - \$300 |
| G. | Other | \$100 - \$500 |
| | a. Involuntary seclusion | |
| | b. Corporal punishment | |
| | c. Verbal abuse | |
| | d. Financial abuse (consider amount taken/expended) | |
| | e. Emotional abuse | |
| | f. Loss of dignity | |

II. MODIFIERS (The history for the 24 months prior to the incident is used to determine whether penalty is assessed at the upper or lower penalty ranges listed above)

- A. Citation of "related problem"⁴ through survey, complaint investigation, or letter (increases penalty).
- B. Civil penalty issues for "related problem" (increases penalty).
- C. Facility history of preventing, correcting other violations. If the Department determines the licensee took significant action to correct "related problem," the Department may waive part or all of the modifier (IIA & IIB).
- D. Facility history relating to current violation. The Department may increase the penalty if the facility fails to correct the situation or eliminate the threat after being made aware of the situation or incident. Decrease or suspend penalty after evaluating facility response to incident and efforts to eliminate recurrence.
- E. Extended duration. If the Department determines the licensee or facility staff had opportunity to correct the deficiency after it first occurred but action was delayed, the Department may either increase the civil penalty by up to 100% or issue the civil penalty on a "per day" basis.
- F. Facility Financial Benefit. The Department may increase the base civil penalty or the modifier based upon the Department's estimate of the cost savings to the facility.
- G. Complaint is self-reported (reduces penalty).
- H. Multiple residents: Potential or actual injury (increases penalty).

¹ Serious injury means permanent physical injury that creates a substantial risk of death or that causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.

² Moderate Injury means an injury, which would ordinarily be temporary loss of functioning in a typical person or illness or pain lasting more than 24 hours, even if controlled by medication.

³ Minor injury means an injury resulting in temporary discomfort or pain, treated in-house, including medication or treatment or bed rest for short duration, ordinarily not more than 24-48 hours.

⁴ Related problem means the same staff or resident involved or the same rule, same harm, or same underlying cause.