

**NOTICE OF PROPOSED RULEMAKING FILING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT**

For internal agency use only.

Department of Human Services, Aging and People with Disabilities (APD) 411
Agency and Division Name Administrative Rules Chapter Number

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Salem, OR 97301

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FILING CAPTION

(Must be 15 words or fewer)

APD: Amending rules related to nursing facilities, implementing SB 266 (2021) and SB 917 (2019)

Last Date and Time for Public Comment: Written comments may be submitted via email to apd.rules@dhsoha.state.or.us or mailed to Kristina Krause at 500 Summer Street NE, E-02, Salem, OR 97301 until **11/9/2021 at 5 p.m.**

TELECONFERENCE ONLY

+1 971-277-2343

<u>10/27/2021</u>	<u>2:00 p.m. - 2:30 p.m.</u>	<u>Conference ID: 227128879#</u>	<u>Staff</u>
Hearing Date	Time	Address	Hearings Officer

HEARING NOTES: If you wish to provide comment, please call in to the teleconference number no later than 15 minutes after the start time listed.

Everyone has a right to know about and use DHS|OHA programs and services. DHS|OHA provides free help. Some examples of the free help DHS|OHA can provide are: sign language and spoken language interpreters, written materials in other languages, braille, large print, audio or other formats. If you need help or have questions, please contact Kristina Krause at 503-339-6104, apd.rules@dhsoha.state.or.us or 711 TTY at least five business days before the hearing.

RULEMAKING ACTION

List each rule number separately (000-000-0000) below. Attach proposed, tracked changed text for each rule at the end of the filing.

AMEND: 411-085-0010; 411-085-0360

RULE SUMMARY:

Include a summary for each rule included in this filing.

The Oregon Department of Human Services (ODHS), Aging and People with Disabilities Program (APD) is proposing to permanently amend rules in chapter 411, division 085 to do the following:

411-085-0010: Requires surveys and inspections be conducted in-person, as required by SB 266 (2021 Regular Session).

411-085-0360: Amends title of rule to “PROHIBITION OF RETALIATION OR INTERFERENCE WITH DISCLOSURE OF INFORMATION.” Also adds language that prohibits licensee or administrator from interfering with or retaliating against an employee or volunteer who discloses information of action affecting safety or welfare of a resident in a nursing facility, as required by SB 917 (2019 Regular Session)

STATEMENT OF NEED AND FISCAL IMPACT

Need for Rule(s):

The Oregon Department of Human Services (Department) is proposing to permanently amend the above rules to implement SB 266 (2021 Regular Session) that requires inspections of nursing facilities to be conducted in person and SB 917 (2019 Regular Session) which prohibits interference with good faith disclosure of information by an employee or volunteer concerning the abuse or other action affecting the welfare of a resident in the nursing facility.

Other changes may be made to these administrative rules to correct grammatical errors, ensure consistent terminology, address issues identified during the public comment period, and to improve the accuracy, structure, and clarity of the rule.

Fiscal and Economic Impact:

The Fiscal and Economic Impact is stated below in the Department's statement of Cost of Compliance.

Statement of Cost of Compliance:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

State Agencies: The Department will need to perform licensing and complaint surveys and inspections in-person.

Units of Local Government: The Department estimates there will be no additional costs to local government.

Consumers: The Department does not believe there will be additional costs to residents based on these rules.

Providers: The department does not believe there will be additional costs to providers based on these rules.

Public: The Department estimates there will be no fiscal or economic impact on the public.

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

There are approximately 130 nursing facilities impacted by the proposed rule changes. There are 21 nursing facilities (less than 50 licensed beds) that may be considered a small business as defined in ORS 183.310.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

The proposed changes impact providers as described above in the Department's statement of cost of compliance.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

Any additional costs should be negligible.

Describe how small businesses were involved in the development of these rule(s)?

A small business, or representative of a small business, as defined in ORS 183.310 participated on the Administrative Rule Advisory Committee. Small businesses will also be included in the public review and comment period.

Documents Relied Upon, and where they are available:

For SB 266 (2021):

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB266/Enrolled>

For SB 917 (2019): ORS 443.453

https://www.oregonlegislature.gov/bills_laws/ors/ors443.html

Was an Administrative Rule Advisory Committee consulted? Yes or No? Yes.

If not, why not?

/s/ Mike McCormick, Interim Director, Aging and People with Disabilities

Signature

9/13/2021

Date

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

**CHAPTER 411
DIVISION 085**

NURSING FACILITIES/LICENSING – GENERALLY

411-085-0010 Issuance of License

(1) No person acting individually or jointly with any other person shall establish, conduct, maintain, manage, or operate a nursing facility without a license from the Department.

(2) Each nursing facility license issued by the Department applies only to person or persons named on the license. The license is not transferable or assignable. The license is valid only for the specific premises designated on the license and for the time period specified on the license.

(3) A license may not be issued for a new facility, an expanded facility, or a facility offering new services unless the Oregon Health Authority has issued a certificate of need for said facility or service, or has determined a certificate of need is not required.

(4) APPLICATION FOR INITIAL LICENSURE AND LICENSE RENEWAL.

(a) The application must be on a form or forms provided by the Department and must include all information requested by the Department including, but not limited to, identity and financial interest of any person, including stockholders who have an incident of ownership in the applicant representing an interest of 10 percent or more or 10 percent of a lease agreement for the facility. Facilities applying for Medicaid, Medicare, or both Medicaid and Medicare

certification are required by federal law to identify applicants representing a 5 percent or more interest.

(b) If the owner of the nursing facility business is a different entity from the operator of the nursing facility, an application for licensure is required from both the operator and the owner. Only one license fee is required. Each application must be signed and dated by a legally authorized representative of the entity submitting the application. The names of owners and operators shall appear on the license.

(c) The applicant must identify any person who has 10 percent incident of ownership, direct or indirect, in a pharmacy or in any business that provides services or supplies to nursing facilities. If any such person exists, the applicant must identify the person and the name and address of the pharmacy or business.

(d) The applicant must identify the number of beds the facility is presently capable of operating considering existing equipment, ancillary service capability, and the physical requirements as specified within OAR chapter 411, divisions 85-89. The number of beds requested to be licensed may not exceed the number identified on the license to be renewed unless prior approval has been issued by the Department or a certificate of need has been issued when required pursuant to ORS chapter 442.

(e) The applicant must include a floor plan showing the location of each bed and the dimensions and room number of each room in which a bed is located. The plan must also show the location of dining and activities areas, shower and tub rooms, toilet rooms, clean and dirty utility rooms, therapy service areas, laundry areas, and dietary service areas. After the first filing, plans need only be submitted when changes in the information required in this subsection occur or when requested by the Department.

(f) The applicant must include a copy of all leases, management, and ownership of the facility.

(g) The applicant must list all states in which the applicant or persons having a 10 percent or more incident of ownership in the facility currently are or previously have been licensed to provide long-term care.

(h) If a renewal is desired, the licensee must apply at least 45 days before the expiration date of the existing license.

(i) The license fee must accompany the application.

(j) If the applicant fails to provide complete and accurate information on the application, the Department may deny or revoke the license if the Department determines the missing or corrected information is needed to determine if a license shall be granted.

(k) An application is not considered to be complete until all requested information and signatures have been provided.

(l) Each application for a new license (excludes license renewal) must include a completed and signed credit and background check authorization form for the applicant and each person with 10 percent incident of ownership in the applicant.

(m) Applicants for license renewal must provide the Department with a completed and signed credit and background check authorization form for the applicant and each person with incident of ownership in the applicant, when required by the Department.

(n) Applications must state whether or not the applicant and persons with incident of ownership in the applicant, have ever been convicted of a crime associated with operation of a health care facility or agency under federal law or the laws of any state.

(o) Applicants must provide such other information and documentation as the Department may reasonably require for proper administration of these rules including, but not limited to, information about ownership interest in other business enterprises, if relevant.

(p) The Department shall issue the license or issue a denial of licensure within 60 days of receipt of the license fee, completed application, and after determination of substantial compliance with the on-site in-person inspection.

(5) DEMONSTRATED CAPABILITY.

(a) Before issuance of a license or a license renewal, the applicant must demonstrate to the satisfaction of the Department that the applicant is capable of providing care in a manner consistent with the requirements of the rules in OAR chapter 411, divisions 85-89.

(b) The Department may consider the background and qualifications of any person owning 10 percent or more interest in the nursing facility operation when determining whether an applicant may be licensed.

(c) The Department may consider the applicant's history of compliance with Department rules and orders, including the history of compliance of each person with a 10 percent or more incident of ownership in the applicant.

(d) Any person with a past or present interest of 10 percent or more incident of ownership in any nursing facility operation shall be considered responsible for acts occurring during, and relating to, the operation of the nursing facility for the purpose of licensing.

(6) SEPARATE BUILDINGS. Separate licenses are not required for separate buildings located contiguously and operated as an integrated unit by the same ownership or management.

Stat. Auth.: ORS 410.070, 441.025, 441.060

Stat. Implemented: ORS 441.025, 441.060

411-085-0360 Abuse

(1) ABUSE IS PROHIBITED. The facility employees, agents, and licensee must not permit, aid, or engage in abuse of residents under their care.

(2) REPORTERS AND MANDATORY REPORTERS. All persons are encouraged to report abuse and suspected abuse. The following persons are required to immediately report abuse and suspected abuse to The Department or law enforcement agency:

- (a) Physicians, including any resident physician or intern;
- (b) Licensed practical or registered nurses;
- (c) Employees of the Department, Area Agency on Aging, county health department, or community mental health program;
- (d) Nursing facility employees or any individual who contracts to provide services in a nursing facility;
- (e) Peace officers;
- (f) Clergy;
- (g) Licensed social workers;
- (h) Physical, speech, or occupational therapists; and

(i) Family members of a resident, guardians, or legal counsel for a resident.

(3) FACILITY REPORTING OF ABUSE OR SUSPECTED ABUSE.

(a) The nursing facility administration must immediately notify the Department, local designee of the Department, or local law enforcement agency of any incident of abuse or suspected abuse. Physical injury of an unknown cause must be reported to the Department as suspected abuse, unless an immediate facility investigation reasonably concludes the physical injury is not the result of abuse.

(b) The local law enforcement agency must be called first when the suspected abuse is believed to be a crime (for example, rape, murder, assault, burglary, kidnapping, or theft of controlled substances).

(c) The local law enforcement agency must be called if the offices of the Department or designee are closed and there are no arrangements for after hours investigation.

(4) ABUSE COMPLAINT. The oral or written abuse complaint must include the following information when available;

(a) Names, addresses, and phone numbers of alleged perpetrators, residents, and witnesses;

(b) The nature and extent of the abuse or suspected abuse, including any evidence of previous abuse;

(c) Any explanation given for the abuse or suspected abuse; and

(d) Any other information the person making the report believes might be helpful in establishing the circumstances surrounding the abuse and the identity of the perpetrator.

(5) PRIVILEGE. In the case of abuse of a resident, the physician-patient privilege, the husband-wife privilege, and the privileges extended under ORS 40.225 to 40.295 shall not be a ground for excluding evidence regarding the abuse, or the cause thereof, in any judicial proceeding resulting from an abuse complaint made pursuant to this section.

(6) ~~IMMUNITY AND~~ PROHIBITION OF RETALIATION OR
INTERFERENCE WITH DISCLOSURE OF INFORMATION.

(a) The facility licensee, employees, and agents must not retaliate in any way against anyone who participates in the making of an abuse complaint, including, but not limited to, restricting otherwise lawful access to the facility or to any resident or, if an employee, to dismissal or harassment.

(b) The facility licensee, employees, and agents must not retaliate against any resident who is alleged to be a victim of abuse.

(c) Anyone who, in good faith, reports abuse or suspected abuse shall have immunity from any liability that might otherwise be incurred or imposed with respect to the making or content of an abuse complaint. Any such person shall have the same immunity with respect to participating in judicial or administrative proceedings relating to the complaint.

(d) 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. The information shared may include the reporting of violations of licensing or certification requirements, criminal activity at the facility, violations

of state or federal laws or any practice that threatens the health and safety of a resident of the facility to:

(A) The Long-Term Care Ombudsman, the Oregon Department of Human Services, the Centers for Medicare and Medicaid Services, a law enforcement agency or other entity with legal or regulatory authority over the facility; or

(B) A family member, guardian, friend, or other person who is acting on behalf of the resident.

(e) Unless performed with the intent to comply with state or federal law, including but not limited to protecting residents' rights or carrying out a facility's policies and procedures that are consistent with state and federal law, it is interference with the disclosure of information as described in subsection (d) if a facility licensee, employee, or agent:

(A) Asks or requires an employee or volunteer to sign a nondisclosure or similar agreement prohibiting the employee or volunteer from disclosing the information;

(B) Trains an employee or volunteer not to disclose the information; or

(C) Takes actions or communicates to the employee or volunteer that the employee or volunteer may not disclose the information.

(f) This rule does not authorize the disclosure of protected health information, as defined in ORS 192.556, other than as is permitted by the federal Health Insurance Portability and Accountability Act privacy regulations, 45 C.F.R. parts 160 and 164, ORS 192.553 to 192.581 or by other state or federal laws limiting the disclosure of health information.

(7) INVESTIGATION BY FACILITY. In addition to immediately reporting abuse or suspected abuse to the Department or law enforcement agency, the facility must promptly investigate all reports of abuse and suspected abuse and must take measures necessary to protect residents from abuse and prevent recurrence of abuse.

Stat. Auth.: ORS 410.070, 441.055

Stats. Implemented: ORS 441.055, 441.615, 441.630, 441.637, 441.640, 441.645, 441.655