

TEMPORARY FILING
INCLUDING STATEMENT OF NEED & JUSTIFICATION
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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FILING CAPTION

APD: Prohibits nursing facilities from retaliating against whistleblowers, SB 917 (2019)

Agency Approved Date: [6/16/2021]

Effective Date: [6/18/2021] through [12/14/2021]

RULEMAKING ACTION

List each rule number separately (000-000-0000). Attach clean text for each rule at the end of the filing

AMEND: 411-085-0360

RULE SUMMARY:

Include a summary for each rule included in this filing.

411-085-0360: Prohibits licensee or administrator from interfering with or retaliating against an employee or volunteer who discloses information of mistreatment of a resident in the nursing facility.

STATEMENT OF NEED AND JUSTIFICATION

Need for the Rule(s):

The Department needs to immediately amend rule to be in compliance with SB 917 (2019).

Justification of Temporary Filing:

Failure to act promptly and immediately amend OAR chapter 411, division 085 will result in serious prejudice to the public interest, the Department, and residents of nursing facilities. These rules need to be adopted promptly so that nursing facilities will not be able to interfere with or retaliate against a whistleblower who discloses information regarding mistreatment in a nursing facility.

OAR chapter 411, division 085 needs to be amended promptly because it is important to protect staff and volunteers who, in good faith, disclose information concerning potential mistreatment within facilities (protect whistleblowers).

Documents Relied Upon, and where they are available:

<https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/SB917>
https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2019orlaw0381.pdf

/s/ Mike McCormick, Interim Director, Aging and People with Disabilities 6/16/2021
Signature Date

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

**CHAPTER 411
DIVISION 085**

NURSING FACILITIES/LICENSING – GENERALLY

411-085-0360 Abuse

(Temporary effective 06/18/2021 through 12/14/2021)

(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 licensee, employees, and agents shall not interfere with the good faith disclosure of information by an employee or volunteer concerning the abuse or mistreatment 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