

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

For internal agency use only.

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

	500 Summer Street NE, E-02 Salem, OR 97301	
Kristina Krause	apd.rules@dhsoha.state.or.us	503-339-6104
Rules Coordinator	Email	Telephone

	3406 Cherry Avenue NE Salem, OR 97303	
Sean Scott	Sean.P.Scott@DHSOHA.state.or.us	503-910-4703
Filing Contact	Email	Telephone

FILING CAPTION

(Must be 15 words or fewer)

APD: Amending rules related to nursing facility complaints, inspections and sanctions

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

10/27/2021	2:00 p.m. – 2:30 p.m.	Conference ID: 227128879#	Staff
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: 411-089-0010; 411-089-0040

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 89 to do the following:

411-089-0010: Requires surveys and inspections be conducted in-person, as required by SB 266 (2021 Regular Session).

411-089-0040: Allows Department to deny, suspend, revoke or refuse to renew a license of a facility that interferes with an employee or volunteer who discloses information concerning an action affecting a resident's safety or welfare, 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) that prohibits interference of 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 89**

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

411-089-0010 Inspections and Surveys

(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

**411-089-0040 Nursing Facility License Denial, Suspension,
Revocation**

(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