

# PUBLICATION

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## Nursing Homes a Top Area of Focus in Presidential State of the Union Address

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**As part of his State of the Union address on Tuesday night, President Joe Biden focused on nursing homes as among the most important issues our nation is currently facing. While his speech did not devote a lot of time to the nursing home topic, there are substantive plans in place for reform. A day before the speech, on February 28, the White House released a detailed document titled, "Fact Sheet: Protecting Seniors and People with Disabilities by Improving Safety and Quality of Care in the Nation's Nursing Homes." The Fact Sheet foreshadows substantially stiffer oversight and harsher enforcement.**

The Fact Sheet lays out three key elements: staffing, accountability and transparency. These translate into heightened focus, expectation and enforcement to "crack down on bad actors."

Nursing homes owned by "private equity firms" are targeted with a broadside claim that their financial decision-making leads to "significantly worse" outcomes for residents, particularly associated with hospitalizations, emergency department visits, increased antipsychotic medication use, lower staffing rates and increased infection control deficiencies.

The Fact Sheet announces four new initiatives, spearheaded by the Centers for Medicare and Medicaid Services (CMS).

- Minimum nursing home staffing requirements will be developed to identify staffing levels associated with safe and quality care, based on a new research study leading to proposed rules within one year.
- Plans to explore ways to accelerate phasing out rooms with three or more residents and to promote single occupancy rooms will be developed.
- Changes to the Medicare Skilled Nursing Facility Value-Based Purchasing Program to base payment on staffing adequacy (including over weekends) and retention and the resident experience.
- While noting the "dramatic decrease" in the use of antipsychotic drugs in nursing homes in recent years, CMS is still launching a new effort to identify problematic diagnoses and bring down "inappropriate use" of such drugs.

The federal government will take five major steps to increase accountability and oversight and make enforcement stiffer and more costly:

- CMS will receive a half billion dollars in additional funding for health and safety inspections, a 25 percent increase. No detail is provided on whether or how this will translate into funding for state survey and certification agencies.
- The Special Focus Facility program will be "overhauled" to become "tougher and more impactful," with faster time frames. Facilities that fail to improve will face increasingly larger enforcement actions

including enhanced risk of termination.

- Financial and other penalties will increase based on desk reviews of data submissions, in addition to on-site inspections. CMS will use data, predictive analytics and other information processing. Reversing an approach of the former administration, CMS is exploring making per-diem penalties the default penalty for noncompliance versus per instance fines. Per instance financial penalties for poorly performing facilities would increase from \$21,000 to \$1 million.
- President Biden plans to initiate and support legislation to give CMS additional authority to require "minimum corporate competency" to participate in Medicare and Medicaid. This could include enabling CMS to "prohibit an individual or entity from obtaining a Medicare or Medicaid provider agreement for a nursing home (new or existing) based on the Medicare compliance history of their other owned or operated facilities (previous or existing)." Such initiatives will include seeking authorization to impose CMS enforcement authority on owners and operators even after a facility closes, as well as on owners or operators that provide persistent substandard and noncompliant care in some facilities while continuing to operate others.
- Quality Insuring Organizations will be the vehicle for providing nursing homes with technical assistance to improve through enhanced trainings and information.

Greater accountability of owners and operators is coming under the guise of transparency. This will be done in four ways:

- A new database will track owners and operators nationwide, using provider enrollment and health and safety survey inspection information, and will be available for use by states and review by the public.
- Provide the public with additional information about owners and operators using Nursing Home Compare, using the Affordable Care Act and collecting and reporting tools.
- Nursing Home Compare will disclose information on compliance with the new staffing requirements that will be developed. Verifiable information with accountability for self-disclosed information will be used to craft legislation proposing enhanced penalties for incorrect information.
- The federal government will examine the role of private equity, real estate investment trusts and other investment ownership arrangements and "inform the public when corporate entities are not serving their residents' best interests."

The Fact Sheet also points to three measures to improve pathways to good paying jobs with the free and fair choice to join a union:

- Lowering financial barriers to nurse aide training and certification, as well as introducing new requirements to notify nursing aide trainees of their potential entitlement to training reimbursement upon employment.
- CMS will develop a "template" to assist and encourage states requesting to tie Medicaid payments to clinical staff wages and benefits, including additional pay for experience and specialization.

- A "robust nationwide campaign" to recruit staff and develop pathways into nursing careers will be developed, including apprenticeships along with other nongovernmental organizations, such as labor unions."

The Fact Sheet also focuses on the COVID-19 pandemic and correlated emergency preparedness, with five initiatives:

- Support for continued COVID-19 testing in long term care facilities;
- Continued support for COVID-19 vaccinations and boosters in long term care facilities;
- Increased requirements for staffing of on-site infection preventionists;
- Enhanced requirements for pandemic and emergency preparedness, including weather related events; and
- Changes to the Requirements of Participation "around fire safety, infection control and other areas using an equity lens."

This is a summary, not an editorial. At the same, we would be remiss if we did not point out the dissonance in the messaging we often hear about deep appreciation for health care heroes doing their utmost in the compassionate care of residents at great personal sacrifice, but at the same time evidencing a punitive and negative attitude about caregiving facilities. Nursing homes are one essential part of a continuum of care in a broad health care delivery system. They do not exist or deliver care in an isolated, segmented setting and should not be treated as such. Nursing homes are a valuable part of all communities and are entitled to the respect, support and appreciation they deserve. We hope the measures are considered with this in mind.

For more information, contact [Howard L. Sollins](#) or your Baker Donelson [Long Term Care](#) attorney.