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FISCAL IMPACT REPORT

SPONSOR Trujillo, Ch **ORIGINAL DATE** 01/23/14
LAST UPDATED 02/04/14 **HB** 83/aHRC

SHORT TITLE Safe Staffing Act **SB** _____

ANALYST Weber

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY14	FY15		
	\$100.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Significant- in excess of appropriation	Significant- in excess of appropriation		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 Attorney General Office (AGO)
 Board of Nursing (BN)
 Medical Board (MB)
 Office of Superintendent of Insurance (OSI)

SUMMARY

Synopsis of HRC Amendment

The House Rules Committee amendment to House Bill 83 makes the following changes to House Bill 83:

- (1) On page 1, strike lines 11 through 23 in their entirety and strike line 24 through the semicolon.

(2) On page 1, line 24, before the period, insert "TO ENFORCE HOSPITALS' COMPLIANCE WITH REQUIRED AND RECOMMENDED NURSE AND ANCILLARY STAFFING LEVELS".

(3) Strike Sections 1 through 11 in their entirety and insert in lieu thereof:

"SECTION 1. APPROPRIATION.--One hundred thousand dollars (\$100,000) is appropriated from the general fund to the department of health for expenditure in fiscal year 2015 to enforce hospitals' stable provision of appropriate nurse and ancillary staffing levels as required and recommended by law, rule, contract and industry standard and as appropriate to meet the needs of patients. Any unexpended or unencumbered balance remaining at the end of fiscal year 2015 shall revert to the general fund."

The changes delete all the provisions of the bill but leave the same total appropriation amount for expenditure in 2015 to be used as follows:

to enforce hospitals' stable provision of appropriate nurse and ancillary staffing levels as required and recommended by law, rule, contract and industry standard and as appropriate to meet the needs of patients.

DOH notes that the bill requires the agency "enforce hospitals' stable provision of appropriate nurse and ancillary staffing levels". DOH currently monitors hospitals for compliance with state and federal rules and statutes through state licensure processes and through the United States Health and Human Services Department, Centers for Medicare and Medicaid Services (CMS) required processes.

CMS, DOH and Board of Nursing rules do not identify specific nurse and ancillary staffing levels. Through the CMS survey process, appropriate staffing for a hospital is based on patient needs and outcomes identified through patient chart review, administrative and personnel record reviews, observations and interviews. It is not set on a specific number or ratio. Though ratios may be one of several approaches and tools an organization uses, determining appropriate staffing for any given unit and/or facility is complex and should take into account myriad variables, including shift-to-shift variables, patient turnover, and the experience, education, skills and competency of available staff.

Staffing is currently measured within the time period for which the survey is conducted, generally 3 months. According to CMS, appropriate staffing is measured through patient outcomes rather than as processes and volumes of staff. According to CMS, if there are no negative outcomes for patients, then inadequate staffing levels or ratios cannot be substantiated.

HB83a states that DOH is to enforce the hospitals' "stable" provision of staffing levels. This is unclear as HB 83a does not define "stable" and, therefore, "stable" may be hard to evaluate or be measured by DOH.

HB83a would further direct the DOH to enforce appropriate staffing as required by "contract". The DOH does not have the authority to enforce terms of contracts other than the hospitals' provider agreement(s) with New Mexico Medicaid or CMS Medicare. DOH could not "enforce" any other contracts a hospital may have with an outside party, including a union's collective bargaining agreement.

HB 83a would also direct DOH to enforce appropriate staffing as required by “industry standard”. It is unclear what HB 83a would mean by an “industry standard” and how that would be measured by the DOH. A hospital is not under any obligation to implement an industry standard that is not included in a statute or rule and DOH would have no authority to enforce any such standard.

It would not be possible to oversee the compliance of 75 hospitals statewide with the appropriation included in HB 83a, which would fund just over 1.0 Full-Time Equivalent (FTE) position and related costs. Currently, DOH has no staff to perform the oversight function. Since nurse staffing would be reviewed, it would be necessary for all surveyors for this task be Registered Nurses. DOH does not have funding for annual hospital surveys focused on state requirements and could not absorb the costs of these surveys.

It is estimated that an additional 4.5 FTE would be necessary to implement the legislation: 0.50 Full Time Equivalent (FTE) (Grade Level 75) in FY15 for the development and promulgation of rules, and the development of tools and staff training to implement HB 83a, and 4.0 FTE (Grade Level 75) beginning in FY15 and recurring thereafter for compliance surveys and for the enforcement provisions of HB 83a. As previously stated, the appropriation would fund approximately 1.0 Registered Nurse Advanced FTE.

Synopsis of Original Bill

House Bill 83 proposes to establish the Safe Staffing Act, which generally would require hospitals to establish nursing staffing plans for each hospital nursing unit.

It would require a hospital, defined by the Act as “any general or special hospital licensed by the [New Mexico Department of Health], whether publicly or privately owned,” to create a nursing staffing committee made up of seven nurses who provide direct patient care and are not nurse managers or hospital administrators, and four other qualified persons as determined by the hospital. The duties of the nursing staffing committee include (1) developing a staffing plan for each of the hospital’s nursing units; (2) selecting outcome indicators for each unit from among certain national databases; (3) conducting annual or more frequent reviews of the staffing plan for each unit; and (4) conducting annual or more frequent reviews of the outcome indicators for each unit.

The bill mandates that each hospital unit’s staffing plan shall (1) specify the minimum number of nurses and ancillary staff required for each unit shift based upon the level of intensity of patient care required and the variability in the number of admissions, discharges and transfers; (2) take into account conditions or circumstances determined by a majority vote of the committee; (3) contain an algorithm formulated and adopted by the hospital for maintaining nursing staffing levels determined by the committee; and (4) prohibit a hospital from achieving nursing staffing levels with mandated overtime.

The bill requires hospitals to conspicuously post within one hour of the start of each shift a daily report in each of its nursing units that contains information on patient census, and planned and actual staffing levels for each shift. It also requires hospitals to electronically submit to Department of Health (DOH) for public disclosure on DOH’s web site quarterly reports containing the above information for each day of the previous quarter and the number of daily admissions, discharges, and transfers for each unit shift.

The bill mandates that DOH shall (1) prescribe the format, form and due dates for the hospital

quarterly reports to ensure that reports permit consumers of hospital services to make meaningful comparisons of hospital nursing staffing levels; (2) promptly publish each hospital quarterly report on its web site for public inspection; (3) periodically audit the information contained in the hospital quarterly reports; (4) enforce a hospital's compliance with the act and any related rules promulgated by DOH through the imposition of penalties and corrective action, which enforcement actions also shall be published on DOH's web site; and (5) promulgate rules necessary to implement and enforce the act.

The bill affords nurses the right to refuse an assignment if the nurse lacks the requisite education, training and experience to ensure patient safety, or if the assignment is outside the nurse's scope of practice. It also contains a whistleblower protection provision making it unlawful for a hospital to discriminate or retaliate against an employee as a result of a grievance or complaint relating to the various provisions of the Act, including a nurse's right to refuse an assignment.

House Bill 83 appropriates \$100,000 from the general fund to the Department of Health for the purpose of administering the Safe Staffing Act. Of the total \$65,000 is designated for staffing and \$35,000 for other required expenses.

FISCAL IMPLICATIONS

The appropriation of \$100,000 contained in this bill is a recurring expense to the general fund. Of the total \$65,000 is designated for staffing and \$35,000 for other required expenses. Any unexpended or unencumbered balance remaining at the end of Fiscal Year 2015 shall revert to the general fund.

DOH adds that currently hospital surveys are only done when an initial license application is received or directed by CMS. HB 83 would require the DOH to survey each hospital "periodically" to enforce compliance with its provisions. Since HB 83 is a state requirement, DOH would have to fund the surveys solely from the general fund, no federal funds could be used for this purpose.

The appropriation in HB 83 would not be sufficient to cover DOH's costs of implementation of HB 83. It would not be possible to oversee the compliance of 75 hospitals statewide for the amount specified for staffing. Currently, DOH has no staff to perform the oversight function. Since nurse staffing would be reviewed, it would be necessary for all surveyors for this task be registered nurses. DOH does not have funding for hospital licensure surveys and could not absorb the costs of these surveys.

HB 83 would also require DOH to develop and oversee a website to publish the hospitals' quarterly reports. Once the website is developed, the appropriation would not support continued maintenance of the website. DOH could not absorb the cost of this function with existing staff. Additionally, the costs to DOH would be recurring and the appropriation is for one year only.

SIGNIFICANT ISSUES

DOH comments:

HB 83 proposes that each hospital shall develop a "nursing staffing committee" composed of seven members, that provide direct patient care but are not hospital nurse managers or hospital administrators, and four of whom are other qualified persons as determined by the hospital. The

nursing staff committee will give consideration to the “recommendations” of various individuals and groups of individuals in developing the nursing staffing levels for each of the hospital’s units. These individuals and groups of individuals – “the hospital’s chief nursing officer, direct patient care nurses, ancillary staff, professional nursing organizations and other appropriate resources” – have potentially competing interests respective to staffing levels. HB 83 does not provide for the participation of the Director of Nursing (DON) or other nurse managers/administrator unless it would be one of the four “other qualified persons” the hospital may choose to add to the committee. Notably, union interests are not included in the bill. These competing interests may make consensus extremely difficult, if not impossible, to achieve.

HB 83 places the decision-making authority for determining staffing levels for nurses and ancillary staff with a committee and removes it from the DON. The United States Health and Human Services, Centers for Medicare and Medicaid Services (CMS) requires that the DON make decisions about nurse staffing levels for the hospital. The committee decision-making responsibility of HB 83 would be in direct conflict with CMS Medicare requirements for determining staffing levels. Hospitals would be put in the position of meeting the requirements of HB 83 or meeting the reimbursement requirements of CMS regarding decision making processes for determining levels of staff needed to provide nursing care. If the hospital followed HB 83 requirements, it would not be in compliance with CMS requirements and would not be able to bill Medicare for services provided.

HB 83 also places the DOH in an irreconcilable position since it is required to monitor hospitals for compliance with CMS Medicare requirements. The bill would also require DOH to monitor for compliance with HB 83 requirements. Since the requirements are contradictory, DOH would determine every hospital is out of compliance with one or the other requirement.

DOH has seven facilities that rely on nursing staff for patient care. There is a national and statewide nursing shortage. HB 83 states that “a hospital shall not achieve nursing staffing levels with mandatory overtime.” If a hospital is unable to hire nurses due to the staff shortage and unable to meet the requirement of mandatory overtime, it is possible that they will face the imposition of penalties and corrective action. This could have unintended negative consequences on the ability of facilities to maintain available staffed beds for patients in need of treatment.

Although HB 83 states that a hospital “shall not discriminate or retaliate in any manner” against an employee who exercises the right to “refuse an assignment pursuant to the Safe Staffing Act,” a nurse may be hesitant to reveal that he or she does not possess the capability to perform a given assignment (whether the reason is a lack of experience, training or both), since the nurse may believe that his or her standing as a nurse relative to other nurses, and indeed his or her viability as an employee of the hospital, may hang in the balance. In such cases, the nurse may attempt to perform an assignment for which he or she is not sufficiently prepared or qualified to perform, thereby putting the safety and welfare of a patient at risk.

HB 83 would require eleven staff to participate in the staffing level decision making process and would require seven direct-care nurses to be part of the committee. For some small or rural hospitals there may not be seven nurses available to participate in the committee each day. Sometimes the committee of eleven persons would include the entire medical staff of the hospital. In those cases compliance would be difficult or impossible to obtain while still caring for patients during the time the committee meets. HB 83 makes no provision for smaller

hospitals to meet the requirements of the bill.

If the committee specified in HB 83 made decisions that would increase the number of nurses required for each shift, it would be difficult to find a sufficient number of nurses in more rural areas since New Mexico is currently experiencing a nursing shortage in many rural areas of the state.

The New Mexico Board of Nursing does not support regulated nurse patient staffing ratios to resolve staffing issues. Though ratios may be one of several approaches and tools an organization uses, determining appropriate staffing for any given unit and/or facility is complex and should take into account myriad variables, including shift-to-shift variables, patient turnover, and the experience, education, skills and competency of available staff. Mandated ratios imply a one-size-fits-all approach that the New Mexico Board of Nursing feels is inappropriate for the diverse healthcare organizations of New Mexico.

TECHNICAL ISSUES

The AGO points out that Section 3 does not indicate who or how the seven nurses serving on the nursing staffing committee are selected, nor does it provide any criteria for the other four “qualified persons” serving on the committee. Section 7 of the Bill states that a nurse may refuse an assignment if the nurse lacks the requisite education, training and experience, or the assignment is outside the nurse’s scope of practice but does not indicate who or what entity makes the determination regarding these requisites or scope of practice

Both DOH and BN also include that the federal register (42.IV.G.482.23.b) already codifies nursing staffing standards for hospitals that receive CMS funding. The standards are not presented as minimum ratios, but do require nursing supervision of nursing activities and the provision of continuous nursing care for patients, verification of licensure, guidance for nursing care assignments and a requirement of adequate numbers of registered nurses, licensed practical nurses and other nursing personnel. <http://www.gpo.gov/fdsys/granule/CFR-2011-title42-vol5/CFR-2011-title42-vol5-sec482-23/content-detail.html>

ALTERNATIVES

The BN offers that Welton (2008) proposes that instead of imposing mandatory ratios, which would result in increased overall cost of care, an alternative approach would be to provide market-based incentives to hospitals to optimize nursing staffing levels by unbundling nursing care from current room and board charges. The revenue code data, used to charge for inpatient nursing care, could be used to benchmark and evaluate inpatient nursing care performance by case mix across hospitals. A nursing intensity adjustment to hospital payment, such as that described above, has already been endorsed by national nursing organizations. In this way, nursing care would be billed based on intensity of nursing care provided.

Reference

Welton, J.M. (2008). Mandatory Hospital Nurse to Patient Staffing Ratios: Time to Take a Different Approach. Medscape Nurses. Retrieved at <http://www.medscape.com/viewarticle/569391>

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