

Act No. 322
Public Acts of 2012
Approved by the Governor
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**STATE OF MICHIGAN
96TH LEGISLATURE
REGULAR SESSION OF 2012**

Introduced by Senator Hansen

ENROLLED SENATE BILL No. 884

AN ACT to amend 1978 PA 368, entitled "An act to protect and promote the public health; to codify, revise, consolidate, classify, and add to the laws relating to public health; to provide for the prevention and control of diseases and disabilities; to provide for the classification, administration, regulation, financing, and maintenance of personal, environmental, and other health services and activities; to create or continue, and prescribe the powers and duties of, departments, boards, commissions, councils, committees, task forces, and other agencies; to prescribe the powers and duties of governmental entities and officials; to regulate occupations, facilities, and agencies affecting the public health; to regulate health maintenance organizations and certain third party administrators and insurers; to provide for the imposition of a regulatory fee; to provide for the levy of taxes against certain health facilities or agencies; to promote the efficient and economical delivery of health care services, to provide for the appropriate utilization of health care facilities and services, and to provide for the closure of hospitals or consolidation of hospitals or services; to provide for the collection and use of data and information; to provide for the transfer of property; to provide certain immunity from liability; to regulate and prohibit the sale and offering for sale of drug paraphernalia under certain circumstances; to provide for the implementation of federal law; to provide for penalties and remedies; to provide for sanctions for violations of this act and local ordinances; to provide for an appropriation and supplements; to repeal certain acts and parts of acts; to repeal certain parts of this act; and to repeal certain parts of this act on specific dates," by amending section 20155 (MCL 333.20155), as amended by 2006 PA 195, and by adding section 20155a.

The People of the State of Michigan enact:

Sec. 20155. (1) Except as otherwise provided in this section and section 20155a, the department shall make annual and other visits to each health facility or agency licensed under this article for the purposes of survey, evaluation, and consultation. A visit made according to a complaint shall be unannounced. Except for a county medical care facility, a home for the aged, a nursing home, or a hospice residence, the department shall determine whether the visits that are not made according to a complaint are announced or unannounced. Beginning June 20, 2001, the department shall ensure that each newly hired nursing home surveyor, as part of his or her basic training, is assigned full-time to a licensed nursing home for at least 10 days within a 14-day period to observe actual operations outside of the survey process before the trainee begins oversight responsibilities.

(2) The state shall establish a process that ensures both of the following:

(a) A newly hired nursing home surveyor shall not make independent compliance decisions during his or her training period.

(b) A nursing home surveyor shall not be assigned as a member of a survey team for a nursing home in which he or she received training for 1 standard survey following the training received in that nursing home.

(3) Beginning November 1, 2012, the department shall perform a criminal history check on all nursing home surveyors in the manner provided for in section 20173a.

(4) A member of a survey team shall not be employed by a licensed nursing home or a nursing home management company doing business in this state at the time of conducting a survey under this section. The department shall not assign an individual to be a member of a survey team for purposes of a survey, evaluation, or consultation visit at a nursing home in which he or she was an employee within the preceding 3 years.

(5) Representatives from all nursing home provider organizations and the state long-term care ombudsman or his or her designee shall be invited to participate in the planning process for the joint provider and surveyor training sessions. The department shall include at least 1 representative from nursing home provider organizations that do not own or operate a nursing home representing 30 or more nursing homes statewide in internal surveyor group quality assurance training provided for the purpose of general clarification and interpretation of existing or new regulatory requirements and expectations.

(6) The department shall make available online the general civil service position description related to the required qualifications for individual surveyors. The department shall use the required qualifications to hire, educate, develop, and evaluate surveyors.

(7) The department shall ensure that each annual survey team is composed of an interdisciplinary group of professionals, 1 of whom must be a registered nurse. Other members may include social workers, therapists, dietitians, pharmacists, administrators, physicians, sanitarians, and others who may have the expertise necessary to evaluate specific aspects of nursing home operation.

(8) Except as otherwise provided in this section and section 20155a, the department shall make at least a biennial visit to each licensed clinical laboratory, each nursing home, and each hospice residence for the purposes of survey, evaluation, and consultation. The department shall semiannually provide for joint training with nursing home surveyors and providers on at least 1 of the 10 most frequently issued federal citations in this state during the past calendar year. The department shall develop a protocol for the review of citation patterns compared to regional outcomes and standards and complaints regarding the nursing home survey process. The review will be included in the report required under subsection (20). Except as otherwise provided in this subsection, beginning with his or her first full relicensure period after June 20, 2000, each member of a department nursing home survey team who is a health professional licensee under article 15 shall earn not less than 50% of his or her required continuing education credits, if any, in geriatric care. If a member of a nursing home survey team is a pharmacist licensed under article 15, he or she shall earn not less than 30% of his or her required continuing education credits in geriatric care.

(9) The department shall make a biennial visit to each hospital for survey and evaluation for the purpose of licensure. Subject to subsection (12), the department may waive the biennial visit required by this subsection if a hospital, as part of a timely application for license renewal, requests a waiver and submits both of the following and if all of the requirements of subsection (11) are met:

(a) Evidence that it is currently fully accredited by a body with expertise in hospital accreditation whose hospital accreditations are accepted by the United States department of health and human services for purposes of section 1865 of part C of title XVIII of the social security act, 42 USC 1395bb.

(b) A copy of the most recent accreditation report for the hospital issued by a body described in subdivision (a), and the hospital's responses to the accreditation report.

(10) Except as provided in subsection (14), accreditation information provided to the department under subsection (9) is confidential, is not a public record, and is not subject to court subpoena. The department shall use the accreditation information only as provided in this section and shall return the accreditation information to the hospital within a reasonable time after a decision on the waiver request is made.

(11) The department shall grant a waiver under subsection (9) if the accreditation report submitted under subsection (9)(b) is less than 2 years old and there is no indication of substantial noncompliance with licensure standards or of deficiencies that represent a threat to public safety or patient care in the report, in complaints involving the hospital, or in any other information available to the department. If the accreditation report is 2 or more years old, the department may do 1 of the following:

(a) Grant an extension of the hospital's current license until the next accreditation survey is completed by the body described in subsection (9)(a).

(b) Grant a waiver under subsection (9) based on the accreditation report that is 2 or more years old, on condition that the hospital promptly submit the next accreditation report to the department.

(c) Deny the waiver request and conduct the visits required under subsection (9).

(12) This section does not prohibit the department from citing a violation of this part during a survey, conducting investigations or inspections according to section 20156, or conducting surveys of health facilities or agencies for the purpose of complaint investigations or federal certification. This section does not prohibit the bureau of fire services created in section 1b of the fire prevention code, 1941 PA 207, MCL 29.1b, from conducting annual surveys of hospitals, nursing homes, and county medical care facilities.

(13) At the request of a health facility or agency, the department may conduct a consultation engineering survey of a health facility and provide professional advice and consultation regarding health facility construction and design.

A health facility or agency may request a voluntary consultation survey under this subsection at any time between licensure surveys. The fees for a consultation engineering survey are the same as the fees established for waivers under section 20161(10).

(14) If the department determines that substantial noncompliance with licensure standards exists or that deficiencies that represent a threat to public safety or patient care exist based on a review of an accreditation report submitted under subsection (9)(b), the department shall prepare a written summary of the substantial noncompliance or deficiencies and the hospital's response to the department's determination. The department's written summary and the hospital's response are public documents.

(15) The department or a local health department shall conduct investigations or inspections, other than inspections of financial records, of a county medical care facility, home for the aged, nursing home, or hospice residence without prior notice to the health facility or agency. An employee of a state agency charged with investigating or inspecting the health facility or agency or an employee of a local health department who directly or indirectly gives prior notice regarding an investigation or an inspection, other than an inspection of the financial records, to the health facility or agency or to an employee of the health facility or agency, is guilty of a misdemeanor. Consultation visits that are not for the purpose of annual or follow-up inspection or survey may be announced.

(16) The department shall maintain a record indicating whether a visit and inspection is announced or unannounced. Survey findings gathered at each health facility or agency during each visit and inspection, whether announced or unannounced, shall be taken into account in licensure decisions.

(17) The department shall require periodic reports and a health facility or agency shall give the department access to books, records, and other documents maintained by a health facility or agency to the extent necessary to carry out the purpose of this article and the rules promulgated under this article. The department shall not divulge or disclose the contents of the patient's clinical records in a manner that identifies an individual except under court order. The department may copy health facility or agency records as required to document findings. Surveyors shall use electronic resident information, whenever available, as a source of survey-related data and shall request facility assistance to access the system to maximize data export.

(18) The department may delegate survey, evaluation, or consultation functions to another state agency or to a local health department qualified to perform those functions. However, the department shall not delegate survey, evaluation, or consultation functions to a local health department that owns or operates a hospice or hospice residence licensed under this article. The delegation shall be by cost reimbursement contract between the department and the state agency or local health department. Survey, evaluation, or consultation functions shall not be delegated to nongovernmental agencies, except as provided in this section. The department may accept voluntary inspections performed by an accrediting body with expertise in clinical laboratory accreditation under part 205 if the accrediting body utilizes forms acceptable to the department, applies the same licensing standards as applied to other clinical laboratories, and provides the same information and data usually filed by the department's own employees when engaged in similar inspections or surveys. The voluntary inspection described in this subsection shall be agreed upon by both the licensee and the department.

(19) If, upon investigation, the department or a state agency determines that an individual licensed to practice a profession in this state has violated the applicable licensure statute or the rules promulgated under that statute, the department, state agency, or local health department shall forward the evidence it has to the appropriate licensing agency.

(20) The department may consolidate all information provided for any report required under this section and section 20155a into a single report. The department shall report to the appropriations subcommittees, the senate and house of representatives standing committees having jurisdiction over issues involving senior citizens, and the fiscal agencies on March 1 of each year on the initial and follow-up surveys conducted on all nursing homes in this state. The report shall include all of the following information:

- (a) The number of surveys conducted.
- (b) The number requiring follow-up surveys.
- (c) The average number of citations per nursing home for the most recent calendar year.
- (d) The number of night and weekend complaints filed.
- (e) The number of night and weekend responses to complaints conducted by the department.
- (f) The average length of time for the department to respond to a complaint filed against a nursing home.
- (g) The number and percentage of citations disputed through informal dispute resolution and independent informal dispute resolution.
- (h) The number and percentage of citations overturned or modified, or both.
- (i) The review of citation patterns developed under subsection (8).
- (j) Implementation of the clinical process guidelines and the impact of the guidelines on resident care.

(k) Information regarding the progress made on implementing the administrative and electronic support structure to efficiently coordinate all nursing home licensing and certification functions.

(l) The number of annual standard surveys of nursing homes that were conducted during a period of open survey or enforcement cycle.

(m) The number of abbreviated complaint surveys that were not conducted on consecutive surveyor workdays.

(n) The percent of all form CMS-2567 reports of findings that were released to the nursing home within the 10-working-day requirement.

(o) The percent of provider notifications of acceptance or rejection of a plan of correction that were released to the nursing home within the 10-working-day requirement.

(p) The percent of first revisits that were completed within 60 days from the date of survey completion.

(q) The percent of second revisits that were completed within 85 days from the date of survey completion.

(r) The percent of letters of compliance notification to the nursing home that were released within 10 working days of the date of the completion of the revisit.

(s) A summary of the discussions from the meetings required in subsection (24).

(t) The number of nursing homes that participated in a recognized quality improvement program as described under section 20155a(3).

(21) The department shall report March 1 of each year to the standing committees on appropriations and the standing committees having jurisdiction over issues involving senior citizens in the senate and the house of representatives on all of the following:

(a) The percentage of nursing home citations that are appealed through the informal dispute resolution process.

(b) The number and percentage of nursing home citations that are appealed and supported, amended, or deleted through the informal dispute resolution process.

(c) A summary of the quality assurance review of the amended citations and related survey retraining efforts to improve consistency among surveyors and across the survey administrative unit that occurred in the year being reported.

(22) Subject to subsection (23), a clarification work group comprised of the department in consultation with a nursing home resident or a member of a nursing home resident's family, nursing home provider groups, the American medical directors association, the state long-term care ombudsman, and the federal centers for medicare and medicaid services shall clarify the following terms as those terms are used in title XVIII and title XIX and applied by the department to provide more consistent regulation of nursing homes in this state:

(a) Immediate jeopardy.

(b) Harm.

(c) Potential harm.

(d) Avoidable.

(e) Unavoidable.

(23) All of the following clarifications developed under subsection (22) apply for purposes of subsection (22):

(a) Specifically, the term "immediate jeopardy" means a situation in which immediate corrective action is necessary because the nursing home's noncompliance with 1 or more requirements of participation has caused or is likely to cause serious injury, harm, impairment, or death to a resident receiving care in a nursing home.

(b) The likelihood of immediate jeopardy is reasonably higher if there is evidence of a flagrant failure by the nursing home to comply with a clinical process guideline adopted under subsection (25) than if the nursing home has substantially and continuously complied with those guidelines. If federal regulations and guidelines are not clear, and if the clinical process guidelines have been recognized, a process failure giving rise to an immediate jeopardy may involve an egregious widespread or repeated process failure and the absence of reasonable efforts to detect and prevent the process failure.

(c) In determining whether or not there is immediate jeopardy, the survey agency should consider at least all of the following:

(i) Whether the nursing home could reasonably have been expected to know about the deficient practice and to stop it, but did not stop the deficient practice.

(ii) Whether the nursing home could reasonably have been expected to identify the deficient practice and to correct it, but did not correct the deficient practice.

(iii) Whether the nursing home could reasonably have been expected to anticipate that serious injury, serious harm, impairment, or death might result from continuing the deficient practice, but did not so anticipate.

(iv) Whether the nursing home could reasonably have been expected to know that a widely accepted high-risk practice is or could be problematic, but did not know.

(v) Whether the nursing home could reasonably have been expected to detect the process problem in a more timely fashion, but did not so detect.

(d) The existence of 1 or more of the factors described in subdivision (c), and especially the existence of 3 or more of those factors simultaneously, may lead to a conclusion that the situation is one in which the nursing home's practice makes adverse events likely to occur if immediate intervention is not undertaken, and therefore constitutes immediate jeopardy. If none of the factors described in subdivision (c) is present, the situation may involve harm or potential harm that is not immediate jeopardy.

(e) Specifically, "actual harm" means a negative outcome to a resident that has compromised the resident's ability to maintain or reach, or both, his or her highest practicable physical, mental, and psychosocial well-being as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. Harm does not include a deficient practice that only may cause or has caused limited consequences to the resident.

(f) For purposes of subdivision (e), in determining whether a negative outcome is of limited consequence, if the "state operations manual" or "the guidance to surveyors" published by the federal centers for medicare and medicaid services does not provide specific guidance, the department may consider whether most people in similar circumstances would feel that the damage was of such short duration or impact as to be inconsequential or trivial. In such a case, the consequence of a negative outcome may be considered more limited if it occurs in the context of overall procedural consistency with an accepted clinical process guideline adopted under subsection (25), as compared to a substantial inconsistency with or variance from the guideline.

(g) For purposes of subdivision (e), if the publications described in subdivision (f) do not provide specific guidance, the department may consider the degree of a nursing home's adherence to a clinical process guideline adopted under subsection (25) in considering whether the degree of compromise and future risk to the resident constitutes actual harm. The risk of significant compromise to the resident may be considered greater in the context of substantial deviation from the guidelines than in the case of overall adherence.

(h) To improve consistency and to avoid disputes over avoidable and unavoidable negative outcomes, nursing homes and survey agencies must have a common understanding of accepted process guidelines and of the circumstances under which it can reasonably be said that certain actions or inactions will lead to avoidable negative outcomes. If the "state operations manual" or "the guidance to surveyors" published by the federal centers for medicare and medicaid services is not specific, a nursing home's overall documentation of adherence to a clinical process guideline with a process indicator adopted under subsection (25) is relevant information in considering whether a negative outcome was avoidable or unavoidable and may be considered in the application of that term.

(24) The department shall conduct a quarterly meeting and invite appropriate stakeholders. Appropriate stakeholders shall include at least 1 representative from each nursing home provider organization that does not own or operate a nursing home representing 30 or more nursing homes statewide, the state long-term care ombudsman or his or her designee, and any other clinical experts. Individuals who participate in these quarterly meetings, in conjunction with the department, may designate advisory workgroups to develop recommendations on the discussion topics that should include, at a minimum, all of the following:

(a) Opportunities for enhanced promotion of nursing home performance, including, but not limited to, programs that encourage and reward providers that strive for excellence.

(b) Seeking quality improvement to the survey and enforcement process, including clarifications to process-related policies and protocols that include, but are not limited to, all of the following:

(i) Improving the surveyors' quality and preparedness.

(ii) Enhanced communication between regulators, surveyors, providers, and consumers.

(iii) Ensuring fair enforcement and dispute resolution by identifying methods or strategies that may resolve identified problems or concerns.

(c) Promoting transparency across provider and surveyor communities, including, but not limited to, all of the following:

(i) Applying regulations in a consistent manner and evaluating changes that have been implemented to resolve identified problems and concerns.

(ii) Providing consumers with information regarding changes in policy and interpretation.

(iii) Identifying positive and negative trends and factors contributing to those trends in the areas of resident care, deficient practices, and enforcement.

(d) Clinical process guidelines.

(25) Subject to subsection (27), the department shall develop and adopt clinical process guidelines. The department shall establish and adopt clinical process guidelines and compliance protocols with outcome measures for all of the following areas and for other topics where the department determines that clarification will benefit providers and consumers of long-term care:

(a) Bed rails.

- (b) Adverse drug effects.
- (c) Falls.
- (d) Pressure sores.
- (e) Nutrition and hydration including, but not limited to, heat-related stress.
- (f) Pain management.
- (g) Depression and depression pharmacotherapy.
- (h) Heart failure.
- (i) Urinary incontinence.
- (j) Dementia.
- (k) Osteoporosis.
- (l) Altered mental states.
- (m) Physical and chemical restraints.
- (n) Culture-change principles, person-centered caring, and self-directed care.

(26) The department shall biennially review and update all clinical process guidelines as needed and shall continue to develop and implement clinical process guidelines for topics that have not been developed from the list in subsection (25) and other topics identified as a result of the meetings required in subsection (24). The department shall consider recommendations from an advisory workgroup created under subsection (24) on clinical process guidelines. The department shall include training on new and revised clinical process guidelines in the joint provider and surveyor training sessions as those clinical process guidelines are developed and revised.

(27) Beginning November 1, 2012, representatives from each nursing home provider organization that does not own or operate a nursing home representing 30 or more nursing homes statewide and the state long-term care ombudsman or his or her designee shall be permanent members of any clinical advisory workgroup created under subsection (24). The department shall issue survey certification memorandums to providers to announce or clarify changes in the interpretation of regulations.

(28) The department shall maintain the process by which the director of the division of nursing home monitoring or his or her designee or the director of the division of operations or his or her designee reviews and authorizes the issuance of a citation for immediate jeopardy or substandard quality of care before the statement of deficiencies is made final. The review shall be to assure that the applicable concepts, clinical process guidelines, and other tools contained in subsections (25) to (27) are being used consistently, accurately, and effectively. As used in this subsection, “immediate jeopardy” and “substandard quality of care” mean those terms as defined by the federal centers for medicare and medicaid services.

(29) Upon availability of funds, the department shall give grants, awards, or other recognition to nursing homes to encourage the rapid implementation or maintenance of the clinical process guidelines adopted under subsection (25).

(30) The department shall instruct and train the surveyors in the clinical process guidelines adopted under subsection (25) in citing deficiencies.

(31) A nursing home shall post the nursing home’s survey report in a conspicuous place within the nursing home for public review.

(32) Nothing in this amendatory act shall be construed to limit the requirements of related state and federal law.

(33) As used in this section:

(a) “Consecutive days” means calendar days, but does not include Saturday, Sunday, or state- or federally-recognized holidays.

(b) “Form CMS-2567” means the federal centers for medicare and medicaid services’ form for the statement of deficiencies and plan of correction or a successor form serving the same purpose.

(c) “Title XVIII” means title XVIII of the social security act, 42 USC 1395 to 1395kkk.

(d) “Title XIX” means title XIX of the social security act, 42 USC 1396 to 1396w-5.

Sec. 20155a. (1) Nursing home health survey tasks shall be facilitated by the licensing and regulatory affairs bureau of health systems to ensure consistent and efficient coordination of the nursing home licensing and certification functions for standard and abbreviated surveys. The department shall develop an electronic system to support the coordination of these activities and shall submit a report on the development of an electronic system, including a proposed budget for implementation, to the senate and house appropriations subcommittees for the department, the senate and house representatives standing committees having jurisdiction over issues involving senior citizens, and the senate and house fiscal agencies by November 1, 2012. If funds are appropriated for the system, the department shall implement the system within 120 days of that appropriation.

(2) When preparing to conduct an annual standard survey, the department shall determine if there is an open survey cycle and make every reasonable effort to confirm that substantial compliance has been achieved by implementation of the nursing home's accepted plan of correction before initiating the annual standard survey while maintaining the federal requirement for standard annual survey interval and state survey average of 12 months.

(3) The department shall seek approval from the centers for medicare and medicaid services to develop a program to provide grants to nursing homes that have achieved a 5-star quality rating from the centers for medicare and medicaid services. The department shall seek approval from the centers for medicare and medicaid services for nursing homes to be eligible to receive a grant, up to \$5,000.00 per nursing home from the civil monetary fund for nursing homes that meet the centers for medicare and medicaid services standards for the 5-star quality rating. Grants to nursing homes shall be used to implement evidence-based quality improvement programs within the nursing home. Each nursing home that receives a grant shall submit a report to the department that describes the final outcome from implementing the program.

(4) All abbreviated complaint surveys shall be conducted on consecutive days until complete. All form CMS-2567 reports of survey findings shall be released to the nursing home within 10 consecutive days after completion of the survey.

(5) Departmental notifications of acceptance or rejection of a nursing home's plan of correction shall be reviewed and released to the nursing home within 10 consecutive days of receipt of that plan of correction.

(6) A nursing-home-submitted plan of correction in response to any survey must have a completion date not to exceed 40 days from the exit date of survey. If a nursing home has not received additional citations before a revisit occurs, the department shall conduct the first revisit not more than 60 days from the exit date of the survey.

(7) Letters of compliance notification to nursing homes shall be released to the nursing home within 10 consecutive days of all survey revisit completion dates.

(8) The department may accept a nursing home's evidence of substantial compliance instead of requiring a post survey on-site first or second revisit as the department considers appropriate in accordance with the centers for medicare and medicaid services survey protocols. A nursing home requesting consideration of evidence of substantial compliance in lieu of an on-site revisit must include an affidavit that asserts the nursing home is in substantial compliance as shown by the submitted evidence for that specific survey event. There may be no deficiencies with a scope and severity originating higher than level D. If there is no enforcement action, the nursing home's evidence of substantial compliance may be reviewed administratively and accepted as evidence of deficiency correction.

(9) Informal dispute resolution conducted by the Michigan peer review organization shall be given strong consideration upon final review by the department. In the annual report to the legislature, the department shall include the number of Michigan peer review organization-referred reviews and, of those reviews, the number of citations that were overturned by the department.

(10) Citation levels used in this section mean citation levels as defined by the centers for medicare and medicaid services' survey protocol grid defining scope and severity assessment of deficiency.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Ray E. Randall

Clerk of the House of Representatives

Approved

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Governor