



OHA Nurse Staffing Advisory Board

September 2016 Legislative Report

I. Executive summary

Oregon nurse staffing laws encourage hospitals and direct care nursing staff to work together to promote safe patient care. These laws have been part of Oregon's commitment to improving health care since 2001. Statutory changes adopted in 2015 expanded the requirements and provided for the creation of a new Nurse Staffing Advisory Board (NSAB) within the Oregon Health Authority (OHA).

Since their appointment in January 2016, NSAB members have met 11 times to support and advise on OHA's implementation of nurse staffing regulations. These efforts included taking an active role in OHA's administrative rulemaking process by serving as the agency's Rules Advisory Committee. During this process, NSAB members worked collaboratively to balance competing stakeholder needs and advise OHA of various nurse staffing practices. With this support,

OHA was able to adopt revised administrative rules that were in effect by the statutory deadline.

However, NSAB members remain concerned about specific aspects of both the rulemaking process itself and OHA's final administrative rules. NSAB's September 2016 Legislative Report describes these concerns and includes several recommendations designed to resolve them.

NSAB rulemaking process-related concerns include:

- Lack of transparency in parts of OHA's rulemaking process; and
- Lack of clarity about RAC roles and responsibilities.

NSAB rulemaking content-related concerns include:

- Statutory overtime provisions;
- An emergency circumstance that applies to Oregon State Hospital; and
- Record-keeping requirements.

To ensure the success of Oregon's nurse staffing laws, NSAB recommends that the following actions be taken:

- That NSAB continue discussions to clarify overtime regulations;
- That NSAB create a recommendation to resolve the Oregon State Hospital emergency provisions;
- That NSAB study the impact of record-keeping requirements;

- That OHA and stakeholders increase collaboration and expand their understanding of the operational aspects of nurse staffing;
- That NSAB study the functionality of the nurse staffing impasse and mediation processes;
- That the Governor fill the remaining vacancy in OHA's Nurse Staffing Advisory Board; and
- That the Governor promptly reappoint current NSAB members whose terms expire in January 2017.

For more information about Oregon hospital nurse staffing and for the full report, please visit <http://www.healthoregon.org/nursestaffing>.

II. Oregon nurse staffing overview

A. Oregon nurse staffing history

In 2001 the Oregon Legislature enacted into law requirements for direct care registered nurse (RN) staffing in hospitals. The original provisions of the law:

- Limited the number of hours direct care RNs could be required to work in a 24-hour period;
- Required hospitals to post notices summarizing hospital nurse staffing statutes;

- Mandated that the Oregon Health Authority (OHA) randomly audit at least 7 percent of Oregon hospitals each year to verify that hospitals:
 - Had a written plan for nurse staffing services;
 - Were able to obtain replacement nursing staff; and
 - Provided notice to nursing staff regarding employment outside of the hospital;
- Mandated that OHA prepare annual reports summarizing nurse staffing audit findings;
- Authorized assessment of civil penalties, when appropriate; and
- Provided whistle-blower protection to complainants.

OHA's Health Care Regulation and Quality Improvement section is responsible for the licensing and regulating all hospitals in Oregon. In 2001, it was charged with drafting the administrative rules necessary to implement the new nurse staffing laws.

In 2005 the Legislature amended the nurse staffing statutes in several key areas. These changes:

- Expanded nurse staffing laws to include licensed practical nurses (LPNs) and certified nursing assistants (CNAs) in addition to RNs in the definition of nursing staff members;

- Required the establishment of a hospital nurse staffing committee (HNSC) in each hospital that would include equal numbers of direct care RNs and nurse managers;
- Defined the composition and administrative processes of the HNSCs;
- Included factors for the HNSCs to consider when creating nurse staffing plans;
- Further limited the number of hours nursing staff members could be required to work in a 24-hour period and within one work week; and
- Treated time nursing staff members spent in meetings, required training and some on-call assignments as hours worked.

Based on these statutory revisions, OHA engaged stakeholders in a second rulemaking process and adopted revised administrative rules.

B. Recent Oregon nurse staffing changes

In 2015 the Legislature, considering input from the Oregon Nurses Association (ONA) and the Oregon Association of Hospitals and Health Systems (OAHHS), passed Senate Bill 469 with the intent of continuing to refine and improve Oregon's nurse staffing laws. SB 469 made the following changes to Oregon's nurse staffing laws:

- Clarified that hospitals must implement the nurse staffing plans approved by their respective HNSCs;

- Amended language to clarify that nursing staff members could not be required to work a total of more than 12 hours during any 24-hour period;
- Mandated the composition and record-keeping requirements of HNSCs;
- Provided additional factors for HNSCs to consider when formulating nurse staffing plans;
- Defined a mediation process to be used if an HNSC reaches an impasse;
- Created a 12-member statewide Nurse Staffing Advisory Board (NSAB);
- Defined specific timelines for nurse staffing complaint investigations;
- Increased the frequency of standard nurse staffing audits from once every 13 years to once every three years;
- Required follow-up surveys for standard audits and complaint investigations;
- Expanded hospital record-keeping requirements; and
- Clarified OHA posting requirements for public records related to nurse staffing.

In January 2016 the Governor appointed 11 of 12 NSAB members, including two co-chairs. These individuals represent the diversity of nursing staff and leadership within Oregon's hospitals. The board awaits the appointment of its final direct care member. This vacancy may be filled by an RN, a CNA or an LPN.

C. New OHA resources for Oregon nurse staffing regulation

In 2016 OHA expanded its staff to implement the most recent amendments to Oregon's nurse staffing laws and to support the agency's new advisory board. New staff positions include a nurse staffing policy analyst, a nurse staffing administrative specialist, and an additional surveyor position.

To ensure that the agency's administrative rules reflect new nurse staffing requirements, staff drafted administrative rules and facilitated a detailed review by the NSAB. Staff then guided the draft rules through the rulemaking process including the Rules Advisory Committee process and the public comment process. Staff also support quarterly NSAB meetings.

In 2016 staff initiated a variety of activities to inform stakeholders of new nurse staffing requirements. For example, in May OHA hosted the first of several educational nurse staffing open house events. In June OHA updated its website to provide revised nurse staffing information that can also be viewed on mobile platforms.

During this timeframe, NSAB members continued to provide feedback on staff outreach efforts and make outreach a priority.

III. Nurse staffing rulemaking

A. Rulemaking progress and achievements

To implement the 2015 changes to Oregon's nurse staffing laws, OHA followed Oregon's Administrative Procedures Act and assembled a Rules Advisory Committee (RAC) to review and provide input on draft rules, solicited comments from the public during a public comments period and held a formal rulemaking hearing. At the end of the rulemaking process OHA adopted permanent rules.

To ensure that final rules were in place by the statutory deadline of July 1, 2016, OHA was required to complete this rulemaking process no more than five months after NSAB members were appointed in January 2016. To this end, OHA assembled a RAC comprised exclusively of NSAB members.

In their role as OHA's RAC, NSAB members provided the agency with input about the draft administrative rules during the formal rulemaking process. In February 2016 OHA provided NSAB members with draft rules. NSAB members provided initial feedback at the February 2016 meeting and also set up workgroups to further explore specific topics.

To address key areas of concern in the draft language, NSAB members divided into three workgroups, each made up of equal numbers of direct care nurses and nurse managers. In March 2016 these workgroups met multiple times and engaged in collaborative

discussions of issues within specific rule sections. Topics addressed included:

- Nursing staff workload variables such as patient acuity, patient intensity and unit activity, and the impact of definitions and measurable standards on different patient populations and medical specialties.
- Defining the scope of the hospital nurse staffing plans and defining nurse specialties and units for purposes of determining when nurse staffing plans are necessary.
- Clarifying audit and complaint investigation processes and timelines.
- Developing a selection process for a non-union, non-RN member of the HNSC.
- Statutes and rules regarding mandatory overtime, voluntary overtime, and the impact of these regulations on hospital staffing and on-call programs.
- Creating rules that provide sufficient guidance for hospitals, while allowing hospitals to innovate and implement nurse staffing regulations individually in view of hospital size and location.

In addition to smaller workgroup meetings, NSAB members met twice in their role as RAC members to consider revised draft rules that incorporated changes proposed by the smaller RAC workgroups. At the conclusion of OHA's RAC meetings, draft rules were submitted to

the Secretary of State. OHA staff then facilitated the public comment period. OHA received numerous public comments on the draft rules.

Some NSAB members also participated in the public hearing and submitted written comments in their professional capacity. NSAB members who attended the public hearing noted several recurring concerns in the comments:

- The definition of “require” for purposes of overtime and the impact of this interpretation on direct care nursing staff hours of work, including the 10-hour rest period and hospital on-call programs;
- The emergency exception to mandatory overtime requirements for Oregon State Hospital; and
- The title given to audit reports and complaint investigation reports in the draft rules.

In May 2016 NSAB held its second quarterly meeting. This meeting occurred after the close of the public comment period. During the meeting, OHA provided a summary of the public comments submitted in the rulemaking process. Due to limitations established in the Oregon Administrative Procedures Act, NSAB members were unable to provide OHA with additional feedback about the draft rules. NSAB members expressed concern regarding the lack of transparency and dissatisfaction regarding the restrictions of administrative rulemaking procedures.

On June 30, 2016, OHA issued a hearing officer report summarizing and responding to public comments received during the public comment period. On July 1, 2016, OHA filed final rules with the Secretary of State. The rules were effective immediately.

B. The role of NSAB in the rulemaking process

In their role as OHA's RAC, individual NSAB members offered insights into the practical applications of draft language and suggested solutions to difficult regulatory problems. The brief, five-month time period between the appointment of NSAB members and OHA's statutory deadline to adopt revised rules required considerable effort and commitment from RAC members to provide input on behalf of hospitals and nurses statewide for the final rule language.

During the rulemaking process, RAC members worked collaboratively to ensure productive dialogue about differing nurse staffing realities in hospitals across the state. RAC members identified concerns and offered editorial improvements to the rules that addressed nursing staff concerns and operational issues of hospitals. During the rulemaking process, RAC members also received support from the Oregon Nurses Association and the Oregon Association of Hospitals and Health Systems.

C. NSAB concerns about OHA administrative rules

Following OHA's adoption of revised nurse staffing rules in July 2016, NSAB members have expressed concerns about the lack of

transparency in the agency's formal administrative rulemaking process and three substantive areas of the agency's revised nurse staffing rules.

Limited communications from OHA after the close of the public comments period and lack of clarity about the role of the RAC have contributed to NSAB members' concerns about the lack of transparency in the agency's formal administrative rulemaking process. OHA's RAC was assembled to provide the agency with a means of obtaining the public's views and to assist with the development of the draft rules. These functions are advisory in nature, and some NSAB members were surprised by the agency's decision to modify select rules after the conclusion of formal RAC meetings and in preparation for the public hearing.

Some NSAB members also expected OHA to give greater weight to positions expressed during informal stakeholder meetings that took place during the 2015 legislative session, but which were not part of an official legislative hearing or the official legislative history of SB 469. Although some members' views of these informal stakeholder meetings differ or do not align with the statutory language, some NSAB members remain concerned that OHA's final administrative rules do not reflect understandings reached during these meetings. Some NSAB members also were disappointed that OHA could not give greater weight to public comments that were submitted by legislative sponsors and other associations based on advice from counsel.

With respect to the final nurse staffing rules adopted by OHA, NSAB members have expressed three substantive concerns related to: (1) different interpretations of statutory overtime provisions; (2) the exemption from these limits that applies to Oregon State Hospital; and (3) record-keeping requirements.

The first concern expressed by NSAB members relates to OHA's interpretation of the overtime provisions in ORS 441.166, which state, in part, that "a hospital may not require a nursing staff member to work" in excess of specific daily and weekly limits or during the 10 hours following the 12th hour worked in a 24-hour period. NSAB members have expressed different interpretations of the statutory term "require" and its application in rule. For example, NSAB direct care members have expressed concern that the statutory and rule provisions related to the 10-hour rest period should apply after both voluntary and required work hours. In contrast, NSAB nurse manager members have expressed concern that hospitals may conceptually define "mandatory" overtime differently from other types of overtime including "voluntary" overtime and "non-voluntary" overtime.

NSAB members also expressed concern about the impact of the overtime provisions in ORS 441.166 on call schedules. While this statute does not prohibit nursing staff members from volunteering to work additional overtime hours, NSAB members have expressed different interpretations of the term "voluntary." For example, NSAB direct care members have expressed concern that nursing staff who volunteer to work additional on-call shifts may not receive statutory

protections, such as the 10-hour rest period, under the adopted final rules. In contrast, NSAB nurse manager members have expressed concern about hospitals' ability to maintain current on-call and standby schedules that ensure 24/7 hospital operations under these statutory constraints.

The second concern expressed by NSAB members relates to the emergency mandatory overtime circumstance provided for Oregon State Hospital in OAR 333-510-0130. This provision treats the unplanned absence of 20 percent or more of OSH's direct care nursing staff members as an emergency and excuses OSH from mandatory overtime regulations. NSAB members have expressed concern about several aspects of this emergency circumstance:

- Whether a hospital-specific emergency circumstance that is separate from the statewide standards is justified or necessary;
- Whether the variation shows an inconsistent standard that favors state entities;
- Why NSAB did not have an opportunity to provide feedback on the OSH-specific emergency circumstance in their role as RAC members before draft rules were submitted for public comment; and
- Why OSH was allowed to provide input after RAC meetings concluded and before rules were submitted for public comment.

The third concern expressed by NSAB members is related to the record-keeping requirements described in OAR 333-510-0045. This

rule requires hospitals to maintain certain nurse staffing records for a period of no fewer than three years in order to demonstrate compliance with applicable nurse staffing laws during standard audits and complaint investigations. Some NSAB nurse manager members have expressed concern about the potential administrative burden these documentation requirements may impose on hospitals.

IV. NSAB recommendations

A. Reevaluate overtime regulations

NSAB members agree that further discussion is needed to clarify ORS 441.166, which describes when a hospital may require a nursing staff member to work. While NSAB members do not yet agree on how these terms and standards should be defined and applied, they would prefer to resolve existing ambiguities in rule without further changes to supporting nurse staffing statutes.

B. Resolve OSH-specific emergency concerns

NSAB members agree that further discussion is needed to develop recommendations related to the OSH emergency exemption or any other overtime emergency exemptions. After further study, NSAB members may recommend that this exemption be withdrawn or amended.

C. Study record-keeping requirements

NSAB members agree that the change in frequency of standard nurse staffing audits from once every 13 years to once every three years is likely to increase the administrative burden placed on hospitals to demonstrate compliance with Oregon's nurse staffing rules. NSAB members also agree that the infrequency of audits conducted under the previous regulatory framework has resulted in a lack of familiarity with the audit process. To ensure that record-keeping requirements are reasonable and expectations are clear, NSAB will evaluate stakeholder feedback and participate in future outreach activities.

D. Increase stakeholder and OHA collaboration

NSAB members agree that increased exposure to daily hospital operations and nurse staffing practices may benefit OHA staff, including its nurses who work as client care surveyors. To this end, NSAB members will explore opportunities for increased collaboration with OHA staff in order to expand understanding of the operational aspects of nurse staffing from both the hospital and direct care perspectives.

E. Refine impasse and mediation process

NSAB members agree that Oregon's hospital nurse staffing laws provide valuable mediation services for any hospital nurse staffing committee that reaches an impasse in the formulation or

implementation of its hospital-wide nurse staffing plan. NSAB members also agree that further study is needed to determine whether procedures for declaring an impasse and seeking mediation should be amended. Options to discuss include the documentation requirements and the availability of mediation services.

F. Secure appointment of the final NSAB member

NSAB members agree that the final board vacancy should be filled without delay. The board awaits the appointment of its final direct-care staff member to ensure NSAB member perspectives remain a balanced and accurate reflection of the diversity and variety among Oregon hospitals and nursing staff members.

G. Reappoint current NSAB members whose terms expire in January 2017.

The terms of four NSAB members will expire on January 1, 2017. Current NSAB members are engaged in building an effective advisory board. NSAB members agree that the expiring members play a vital role in this endeavor and would like to continue to collaborate with these members on a variety of issues.

V. Conclusion

NSAB members agree that since the passage of SB 469, great progress has been made towards the implementation of Oregon's revised nurse staffing laws. NSAB members continue to work

collaboratively with one another and with OHA staff. Stakeholder interest also demonstrates that Oregon hospitals and direct-care staff are diligently working to understand and implement the new regulatory framework.

NSAB members are guided by their commitment to safe patient care. Members recognize that nurse staffing affects direct patient care and that nurse staffing regulation must always make patient care the chief priority.

While areas of ambiguity or confusion still remain, NSAB members also agree that future audit and complaint investigations are likely to produce valuable data that NSAB members can use to evaluate new trends in nurse staffing and areas of concern in the revised rules. In the interim, NSAB members will take the actions identified above and continue to advise OHA on the administration of these rules.