

TITLE 26 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 556 NURSE AIDES

ADOPTION PREAMBLE

The Executive Commissioner of Health and Human Services (HHSC) adopts on an emergency basis in Title 26, Part 1, Chapter 556 Nurse Aides, new §556.100, concerning an emergency rule in response to COVID-19 describing the process for individuals who have been trained as nurse aides and have been completing nurse aide tasks under a waiver to become certified as nurse aides. As authorized by Texas Government Code §2001.034, the Commission may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for no longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020, proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. HHSC accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule for Nurse Aide Transition from Temporary Status.

To protect residents living in a nursing facility and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to permit individuals with work experience gained at a nursing facility during the pandemic to be counted as classroom and clinical training hours required as part of a Nurse Aide Training and Competency Evaluation Program (NATCEP).

Because of the COVID-19 pandemic, the Centers for Medicare and Medicaid Services (CMS) waived federal requirements that nursing facilities not employ anyone for longer than four months unless the person meets the training and certification requirements under 42 Code of Federal Regulations (CFR) §483.35(d). The Office of the Governor approved a corresponding suspension of state regulations. On April 9, 2020, HHSC issued a provider letter (PL 20-26) related to the governor's suspension of provisions prohibiting a nursing facility from hiring a non-certified nurse aide to complete nurse aide tasks for longer than four months. The suspension was intended to provide flexibility in staffing during the pandemic and did not suspend the requirements for supervision, competency, employee

misconduct registry verification, or criminal background checks (Texas Health and Safety Code Chapter 250).

Pursuant to these flexibilities, facilities have employed and trained numerous staff to complete nurse aide tasks who are not certified nurse aides. Once these flexibilities are no longer available the staff completing these tasks will no longer be able to perform them, unless the staff have become certified as nurse aides. To ensure continued staffing at nursing facilities, a transition plan needs to be in place.

The individuals at issue have been trained as nurse aides and have been completing nurse aide tasks under the current flexibilities. To provide individuals with credit for this experience, the emergency rule will allow time trained and time worked at a nursing facility during the pandemic (work training and experience) to be counted as classroom and clinical training hours required as part of a NATCEP.

Under current regulations, the training provided by a NATCEP must be associated with a nursing facility that meets the requirements of 42 CFR §483.151(b)(2) - (3). This requirement is included in 26 TAC §556.3(e). State regulations provide a waiver for this under certain circumstances, but only for nursing facilities prohibited from providing a NATCEP, when another NATCEP is not available within a reasonable distance from the facility employing the individual. In the current pandemic, no nursing facility is a "reasonable" distance from another, considering the risk of exposure to COVID-19 posed to facility residents by non-employees or by non-essential visitors of their facility.

To provide a path for certification of temporary nurse aides who have been working in nursing facilities under a waiver of training requirements during the COVID-19 pandemic, HHSC is adopting a new emergency rule to allow time trained and time worked in a nursing facility during the pandemic to be counted as classroom and clinical hours required as part of a NATCEP. The purpose of the new rule is to describe the requirements related to certification as a nurse aide based on this work during the pandemic.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055 and Texas Health and Safety Code §250.0035 and §242.037. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Health and Safety Code §250.0035 requires the Executive Commissioner of HHSC to make and enforce rules prescribing minimum training requirements to be listed on the nurse aid registry. Texas Health and Safety Code §242.037 requires the Executive Commissioner of HHSC to enforce rules and minimum standards to implement Chapter 242 of the Health and Safety Code.

The new section implements Texas Government Code §531.0055 and §531.021 and Texas Health and Safety Code §250.0035.

This agency hereby certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ADDITIONAL INFORMATION

For further information, please call: (512) 438-3161.

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§556.100. Nurse Aide Transition from Temporary Status.

(a) An individual who has accumulated hours of work training and work experience in a nursing facility during the determination that a public health emergency exists due to COVID-19 issued by the United States Secretary of Health and Human Services is allowed to count such hours worked under a qualified instructor (work training and experience) towards classroom and clinical training hours required as part of a Nurse Aide Training and Competency Evaluation Program (NATCEP). Due to the current public health emergency where the containment of the spread of the COVID-19 virus is necessary, work training and experience will be accepted for this purpose from all nursing facilities regardless of the facilities' eligibility to provide or their establishment of a NATCEP.

(b) The work training and experience described in subsection (a) of this section must include the minimum requirements in §556.3(j) of this chapter (relating to Nurse Aide Training and Competency Evaluation Program (NATCEP) Requirements).

(c) The instructor for the work training and experience described in subsection (a) of this section must meet the requirements in §556.5(b) of this chapter (relating to Program Director, Program Instructor, Supplemental Trainers, and Skills Examiner Requirements).

(d) For an individual with work training and experience described in subsection (a) of this section to count work training and experience hours as classroom and clinical training hours, the facility where the work training and experience was performed must complete a form provided by HHSC. The facility must document the following on the form:

 (1) the name of the nurse instructor responsible for training and supervising the individual and an attestation that meets the requirements in §556.5(b) of this chapter;

 (2) a list of the training requirements with an attestation that the individual was trained in each;

 (3) an attestation that the duration of the work training and experience is at least 100 hours; and

 (4) the signature of the nurse instructor.

(e) A facility without a NATCEP that seeks to have an employed individual certified as a nurse aide must work with an approved NATCEP to complete the criminal

background check and approve the individual for the nurse aide certification examinations.

(f) Each nurse aide candidate must successfully complete both the written or oral examination and the skills demonstration required by §556.6(g) of this chapter (relating to Competency Evaluation Requirements), to be certified and placed on the nurse aide registry.

(g) To be considered in lieu of formal training, an individual's work training and experience must be completed during the duration of the declared COVID-19 public health emergency.

(h) Under the provisions of this section, a nurse aide must be certified within four months following the end of the COVID-19 public health emergency determination issued by the United States Secretary of Health and Human Services.