



## Long-Term Care Regulatory Provider Letter

**Number:** PL 2023-05 (Replaces PL 21-29) (Revised)

**Title:** End of Temporary Waivers of Certain LTCR Requirements During COVID-19 Public Health Emergency

**Provider Types:** Assisted Living Facility (ALF), Day Activity and Health Services (DAHS), Home and Community-based Services (HCS), Home and Community Support Services Agency (HCSSA), Intermediate Care Facility for Individuals with an Intellectual Disability or Related Conditions (ICF/IID), Nursing Facility (NF), Prescribed Pediatric Extended Care Center (PPECC), Texas Home Living (TxHmL)

**Date Issued:** Revised May 8, 2023

### 1.0 Subject and Purpose

The Health and Human Services Commission (HHSC) requested the Office of the Governor end waivers previously issued in response to COVID-19. The Office of the Governor granted HHSC's request to end the waivers of certain rules, meaning the rules go back into effect that were in place prior to the COVID-19 public health emergency (PHE). This letter describes the waivers that are ending, the waivers still in place, and the waivers previously ended. Revisions were made to reflect the end of the HCS program Covid-19 waivers.

### 2.0 Policy Details & Provider Responsibilities

#### 2.1 Waivers Ending immediately

The following rules and statutes were previously waived in response to COVID-19. These waivers end February 13, 2023:

- Nursing facility resident rights relating to visitors. Facilities must adhere to all rules and requirements related to a resident's right to receive visitors. (Rule: 26 TAC [§554.413\(a\)\(8\)-\(9\)](#); Statute: THSC [§242.501\(a\)\(16\)](#)).

## 2.2 Waivers Ending May 11, 2023

The Office of the Governor and the Centers for Medicare and Medicaid Services (CMS) waived provisions prohibiting a nursing facility from hiring someone to complete nurse aide tasks who is not a certified nurse aide (CNA) for longer than four months. This waiver will end on May 11, 2023. This waiver was intended to provide flexibility in staffing during the pandemic. The following rules were suspended:

- [26 TAC §554.1001\(a\)\(4\)\(A\)\(ii\)](#)
- [26 TAC §554.1001\(a\)\(4\)\(B\), \(C\), \(E\), \(F\), and \(H\)](#)

Under the CMS waiver and the suspension of nurse aide rules, Texas nursing facilities have employed and trained numerous staff who are not CNAs to complete nurse aide tasks. Once this waiver is no longer available, either through termination of the PHE declaration or end of the waiver, the staff completing these tasks will no longer be able to do so, unless the staff become CNAs. Beginning on May 11, 2023, a NF must resume ensuring a nurse aide is not employed for longer than four months unless they meet the CNA certification requirements.

Additionally, 26 TAC §554.1001(a)(4)(D) was partially suspended, only to the extent necessary to allow the employment as a nurse aide of an individual who is not listed in the nurse aide registry due solely to the individual's having no history of employment as a nurse aide.

To ensure continued staffing at nursing facilities, HHSC developed a plan to allow staff who, during the declared public health emergency, completed work training and gained experience in all subject areas required for a NATCEP to count this training and experience toward nurse aide certification. Each nurse aide candidate is still required to successfully complete both the written/oral and skills examinations prior to being certified and placed on the nurse aide registry.

Note this waiver did **not** suspend requirements for supervision or competency. Facilities must still ensure individuals completing nurse aide tasks are able to demonstrate competency in skills and techniques necessary to care for residents' needs, as identified through resident assessments, and described in the plan of care.

Additionally, the facility is responsible for training the individual on the task to be performed, return demonstration of the skill to ensure competency, and documentation of the training/return demonstration.

Likewise, this waiver did **not** suspend the requirement that prior to allowing an individual to complete nurse aide tasks, a facility must receive verification that the individual is not designated in the registry as having a finding concerning abuse, neglect or mistreatment of a resident, or misappropriation of a resident's property, subject to the exceptions specified in 26 TAC §554.1001(a)(4)(D)(i)-(ii). A nursing facility must still comply with Health and Safety Code, Chapter 250, regarding criminal history checks and registry checks.

Nurse Aide Hire Date	Certification Date
Begins employment <b>on or after 5/11/23</b>	Has 4 months from date of hire
Began employment <b>before 5/11/23</b> , but has <b>not</b> worked 4 months	Has 4 months until 9/10/23
Began employment <b>before 5/11/23</b> , and <b>has</b> worked 4 months or more	Has 4 months until 9/10/23

Read provider letter [2021-19](#) for more information.

### 2.3 Waivers Ending May 1, 2023

The following rules and statutes were previously waived in response to COVID-19. These waivers will end May 1, 2023:

- Requirements related to clinical and skills training in a nursing facility and the requirement of classroom training to be in person for CNAs and medication aides. This waiver allowed NATCEPs and medication aide training programs to complete classroom training online and clinical/skills training in a laboratory setting. (Rules: [26 TAC §556.3\(h\)-\(j\)](#) and [§557.119](#)).
- Requirements related to application submission and processing timeframes for CNAs and medication aides. This waiver allowed

flexibility on extending certificates and permits while a late application is being processed and permitted a nurse aide to work with an expired certification and a medication aide to work with an expired permit until HHSC required renewal. (Rules: [26 TAC §556.9\(d\)](#) and [§557.115\(a\)\(1\)-\(3\) and \(6\); \(c\)\(1\)-\(4\)](#); Statutes: [THSC §242.610\(e\), \(h\)-\(k\)](#)).

Beginning May 1, 2023:

- A NATCEP can only offer clinical training in a laboratory setting if there is not an appropriate and qualified clinical site located within 20 miles of the location of the NATCEP. A NATCEP must request the ability to complete clinical training hours in a laboratory setting under these circumstances.<sup>1</sup>
- Rules permit both a NATCEP and a medication aide training program to offer classroom training virtually, in-person, or a combination of both.<sup>2</sup>
- A nurse aide whose certificate expired on or before April 30, 2023, must renew their certificate by April 30, 2023.
- A nurse aide whose certificate expires on or after May 1, 2023, must renew their certificate timely.<sup>3</sup> A nurse aide's certificate and listing of "active" in the nurse aide registry normally expires within 24 months of being issued or listed.
- A medication aide whose permit expired on or before April 30, 2023, must renew their certificate by April 30, 2023.
- A medication aide whose permit expires on or after May 1, 2023, must renew their permit timely.<sup>4</sup> A medication aide's permit normally expires within 12 months of being issued.

#### **2.4 HCS Waivers Ending May 11, 2023**

On May 11, 2023, the COVID-19 federal public health emergency (PHE) is expected to expire. As a result of the anticipated end of the PHE, the temporary Long-term Care Regulation Home and Community-based Services (HCS) waivers in response to the PHE will also end May

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<sup>1</sup> 26 TAC [§556.3\(e\)](#)

<sup>2</sup> 26 TAC [§556.2\(6\)](#) and [§557.119\(b\)\(2\)](#)

<sup>3</sup> 26 TAC [§556.9](#)

<sup>4</sup> 26 TAC [§557.115](#)

11, 2023. After May 11, 2023, HHSC Long-term Care Regulation will require the following:

- All four-person residences must return to regular capacity in accordance with 40 TAC §9.153(39)(B). Once the program provider resumes regular business operations, it must notify HHSC at [lcr-fieldoperations@hhs.texas.gov](mailto:lcr-fieldoperations@hhs.texas.gov) that the affected individuals have returned to their original residences.
- HCS providers must ensure at least one complete staff shift change per day for individuals receiving residential support in accordance with 40 TAC §9.174(a)(38)(C).

HCS no longer offers day habilitation services as of March 1, 2023.

## **2.5 Waivers Previously Ended**

The waivers for the following rules and statutes previously ended, meaning these rules and statutes are already back in effect:

NF:

- Medicaid Occupancy Reporting Requirement. The waiver of the rules for Medicaid bed occupancy reporting ended on September 3, 2021. (Rule: [26 TAC §554.2322\(I\)](#)).
- Three-day leave and discharge requirements. The waiver of the rules related to three-day leaves ended on October 3, 2021. Starting October 3, 2021, NFs were required to submit a discharge notice to a resident leaving the facility for three or more days in accordance with state rules. (Rule: [26 TAC §554.2603\(b\)\(3\)](#)).
- Nurse aide exam for second-year nursing students. The waiver of the rules related to second-year nursing students having to complete the nurse aide exam prior to performing nurse aide functions ended on October 3, 2021. Ending this waiver allowed HHSC to place second-year nursing students on the Nurse Aide Registry, if the nursing student completed the nurse aide exam. Nursing students may still perform nurse aide tasks under the federal and state CNA waivers without being required to take the nurse aide exams if they are operating as a temporary nurse aide. (Rule: [26 TAC §556.11\(c\)\(1\)\(D\)-\(E\)](#)).

## ALF:

- An individual's right to receive visitors is vital to their health and well-being. Facilities must adhere to all rules and requirements related to a resident's right to receive visitors. (Rule: [26 TAC §553.125\(a\)\(3\)\(j\)-\(k\)](#); Statute: [HSC §247.064\(b\)\(7\)-\(8\)](#)).
- Requirement for ALFs to notify residents and, if applicable, the residents' legally authorized representative of changes in policy. The suspension of the rules for ALFs to notify residents and, if applicable, the residents' legally authorized representative in advance of a policy change ended on September 3, 2021. (Rule: [26 TAC §553.41\(d\)\(5\)](#), as of August 31, 2021, this section can be found in [26 TAC §553.259\(c\)\(5\)](#)).
- Requirement for PPECCs to provide 30 days' advance notice of suspending operations. The suspension of the rules for PPECCs to provide 30 days' advance notice of suspending operations ended on September 3, 2021. Starting September 3, 2021, all PPECCs must provide advance notice of suspending operations in accordance with state rules. (Rule: [26 TAC §550.202\(c\)\(1\), \(5\), and \(6\)](#); Statute: [THSC §248A.157](#)).

## ICF/IID:

- Therapeutic Leave. This waiver ended on August 24, 2021. (Rule: [26 TAC §261.226\(a\)-\(f\)](#); Statute: [HSC §252.203\(2\)](#)).

## License Submission and Processing Timelines:

- The waiver of license application and renewal timeline requirements ended on October 3, 2021. All application requirements must be followed in accordance with the appropriate rules listed below.
  - NF:
    - Rules: 26 TAC [§554.205](#), [§554.208\(e\)-\(f\)](#), [§554.210\(e\)](#), [§554.212\(a\) and \(e\)](#)
    - Statutes: THSC [§242.033\(f\)](#) and [§242.0336\(g\)](#)
  - ALF:
    - Rules: 26 TAC [§553.33\(a\) and \(c\)](#)
    - Statute: THSC [§247.023](#)
  - ICF/IID:

- Rules: 26 TAC [§551.15\(a\), \(d\), and \(e\)](#) and [§551.21\(a\), \(c\), and \(e\)](#)
- DAHS Facility
  - Rules: 26 TAC [§559.11\(d\), §559.15\(a\)\(2\) and \(e\)-\(h\), §559.18\(a\), \(c\), and \(e\), §559.20\(a\)\(2\), §559.21\(b\)](#)
  - Statute: THRC [§103.006\(b\), §103.007\(c\)-\(d\)](#)
- PPECC:
  - Rules: 26 TAC [§550.106\(a\)-\(c\) and \(e\)-\(f\)](#)
  - Statutes: THSC [§248A.053\(b\)\(1\) and \(c\)](#)
- HCSSA:
  - Rules: 26 TAC [§558.17\(g\) and \(i\), §558.25\(1\) and \(4\), §558.3\(b\) and \(c\), §558.13, §558.31](#)
  - Statute: THSC [§142.0105](#)
- Nursing Facility Administrators:
  - Rules: 26 TAC [§555.32\(b\), §555.34\(a\)-\(d\)](#)
  - Statute: THSC [§242.310](#) (text of subchapter effective until federal determination of failure to comply with federal regulations)

Fire Marshal Approval Documentation:

- Waivers related to having an approved fire marshal report to submit an application for facility licensure ended on November 2, 2021. Any application submitted on or after November 2, 2021, must include the required fire marshal approval documentation, regardless of the due date of the application or license expiration date. Waivers for the following rules and statutes ended November 2, 2021:
  - NF: 26 TAC [§554.202](#)
  - ALF: 26 TAC [§553.39\(c\)](#)
  - ICF/IID: 26 TAC [§551.12\(a\)](#)
  - DAHS: 26 TAC [§559.12\(a\)](#)
  - PPECC: 26 TAC [§550.103\(a\)](#)

### 3.0 Background/History

HHSC requested the Office of the Governor waive certain regulatory requirements in response to the state of disaster declared in Texas and the United States relating to COVID-19. In accordance with section 418.016 of

the Texas Government Code, the Office of the Governor granted HHSC's request to temporarily waive these rules and statutes.

#### **4.0 Resources**

[PL 2021-19](#), Certification Process for Nurse Aides Training and Working Under a Waiver.

#### **5.0 Contact Information**

If you have any questions about this letter, please contact the Policy and Rules Section by email at [LTCRPolicy@hhs.texas.gov](mailto:LTCRPolicy@hhs.texas.gov) or call (512) 438-3161.