

## Office memo

Date: June 11, 2024

To: Certification and Training Workgroup

From: Leah Solo

### RE: Resources for Waivers and Variances

As the Board explores ways to build a process to determine if a nursing facility should have a temporary waiver or variance from the minimum wages set by the NHWSB, staff have researched some resources that the Board can use as it makes determinations about whether a nursing home may be at risk of closure or receivership and qualifies for a waiver or variance.

#### Other Waivers or Variances from Wage Standards

Staff looked for other places where there might be waivers or variances from wage standards. Here were a few that were first to be researched:

- Minnesota Prevailing Wage- does not provide for waivers or variances.
- Colorado Direct Care Stabilization Board- their statute does not provide for waivers and variances. Additionally, they only do recommendations and have the power to examine reimbursement rates.
- California Fast Food Council- does not clearly allow for waivers and variances from initial research.

#### *California's statute on minimum wages for healthcare workers*

The closest model that staff found for the Board's purposes is the California statute on minimum wages for healthcare workers. In the fall of 2023, California Gov. Gavin Newsom signed into law a minimum wage for healthcare workers.<sup>1</sup> Included in that legislation were provisions for the creation of a waiver program. Here are the parts of the California law about the requirements for obtaining a waiver<sup>2</sup>:

(i) (2) In order to obtain a waiver, a covered health care facility shall demonstrate that compliance with this section would raise doubts about the covered health care facility's ability to continue as a going concern under generally accepted accounting principles. The evidence must include documentation of the covered health care

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<sup>1</sup> [CA minimum wage increases to \\$20 or more for 2 industries - CalMatters](#)

<sup>2</sup> [Law section \(ca.gov\)](#)

facility's financial condition, as well as the condition of any parent or affiliated entity, and evidence of the actual or potential direct financial impact of compliance with this section.

(3) Consideration of a covered health care facility's ability to continue as a going concern shall include the following factors regarding the covered health care facility or any affiliated entity:

- (A) Actual or likely closure of the covered health care facility or any affiliated entity.
- (B) Actual or likely closure of patient services or programs.
- (C) Actual or likely loss of jobs.
- (D) Whether the covered health care facility is small, rural, frontier, or serves a rural catchment area.
- (E) Whether closure of the covered health care facility would significantly impact access to services in the region or service area.
- (F) Whether the covered health care facility is in financial distress that results or is likely to result in the closure of the covered health care facility or any affiliated entity, closure of patient services or programs, or loss of jobs. Factors to consider in determining financial distress include, but are not limited to, the covered health care facility's prior and projected performance on financial metrics, including the amount of cash on hand, and whether the covered health care facility has, or is projected to experience negative operating margins.

While this language lists different factors to consider in granting the waiver than the NHWSB Act, section (2) points to "generally accepted accounting principles" and evidence of the facility or parent or affiliated entity's financial condition, and evidence of the impact of compliance with the minimum wage. Additionally, section (3)(F) points to "Factors to consider in determining financial distress include, but are not limited to, the covered health care facility's prior and projected performance on financial metrics, including the amount of cash on hand, and whether the covered health care facility has, or is projected to experience negative operating margins." These are all areas the Board could request information on from waiver or variance applicants as part of the application process.

The statute directs California's Department of Industrial Relations to have a process for this complete by March 1, 2024. A search of their website did not return any such process. One possible reason for this is that California appears to be delaying implementation of the minimum wage for healthcare workers.<sup>3</sup>

## Risk of Receivership

*What is receivership?*

Receivership is a status governed by MN statute 144A.15, in which the State takes over the governance of a nursing home that is encountering significant struggles, like a lack of funding to maintain operations. It begins with a petition to the courts and proceeds as the state appoints a receiver to take charge of the facility.<sup>4</sup> As described in a 2023 presentation from the Minnesota Department of Health, receivership is rare.<sup>5</sup> Additionally, MDH guides that there is always healthcare and safety emergency or crisis occurring, and often financial mismanagement, not just usual pressure.<sup>6</sup> Driving home how rare receivership is, the presentation tells us that

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<sup>3</sup> [Update: \\$25 California health care minimum wage could be delayed \(calmatters.org\)](https://calmatters.org/healthcare/minimum-wage-california/)

<sup>4</sup> <https://www.revisor.mn.gov/statutes/cite/144A.15#stat.144A.15.1>

<sup>5</sup> Slide 30 [Nursing Home Providers 06 27 2023 \(state.mn.us\)](https://www.state.mn.us/mdh/presentations/2023/06-27-2023/nursing-home-providers-06-27-2023.pdf)

<sup>6</sup> Slide 31 [Nursing Home Providers 06 27 2023 \(state.mn.us\)](https://www.state.mn.us/mdh/presentations/2023/06-27-2023/nursing-home-providers-06-27-2023.pdf)

there were 5 occurrences in total through 2022 and initial research tells us that there has been one additional receivership since then.<sup>7</sup>

### *Establishing Risk*

One place to look for kinds of evidence of risk of receivership is MN Statutes, section 144A.15, which lists factors to be considered in connection to a petition for receivership. These include, listed as factors for receivership, such as proceedings to suspend the license, or notice from CMS that their provider agreement will be terminated.<sup>8</sup> This is information that MDH generates or collects as part of its duties in licensing, auditing, and investigating nursing homes.

### *Occurrence*

Given the extremely rare occurrence of receivership, the Board should be aware that it is much more likely to hear from a nursing home facing closure than receivership and that if a nursing home is at risk of receivership, they are certainly in a dire situation. If they are in receivership, the NHWSB may want to consider a procedure to that is very simple to waive the rules for that organization as the state works with the nursing home.

## **Risk of Closure**

### *What is a nursing home closure?*

To understand the risk of closure, it seems helpful to understand what a process of closing a nursing home actually is. A nursing home cannot just close its doors. It must go through a process involving many agencies and relocating residents with as little trauma for them. Minnesota Department of Health provides this guidance for the closure: [Nursing Facility Resident Relocation Guide \(mn.gov\)](#) Statute can be found here: [Sec. 144A.161 MN Statutes](#)

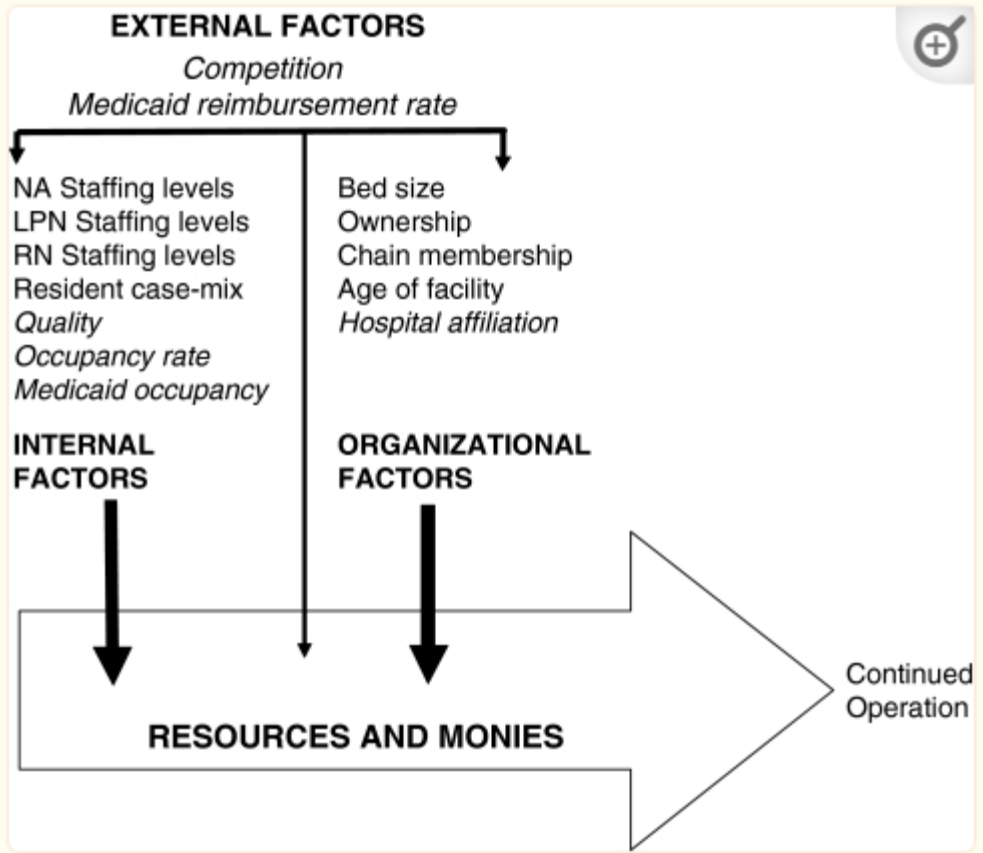
### *Evaluation Tool for Risk of Closure*

Understanding how to evaluate if an individual facility is at risk of closure is complicated when there are many factors to consider. In conversation with staff, one article surfaced that can help us understand some of the factors that would go into evaluating a facilities risk of closure. From this article, [Factors Associated with Increasing Nursing Home Closures - PMC \(nih.gov\)](#), this graphic was found:

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<sup>7</sup> <https://www.msn.com/en-us/money/realestate/its-finances-and-facility-in-shambles-red-wing-nursing-home-will-close-in-july/ar-BB1mWpXg?ocid=socialshare>

<sup>8</sup> MN statute 144A.15 subd 1 (1)-(5) [Sec. 144A.15 MN Statutes](#)



This can help us evaluate different facilities. For instance, if two nursing homes have the same amount of cash on hand, but one has a lower occupancy, is older, and independent, while the other is at capacity, just had a major renovation, and is part of a chain, the latter is at a lower risk of closure. The Board however, is not limited to only the factors listed here, and members should use their experience in the field and their particular expertise to determine what weight to give any factor in evaluating the risk of closure.

### Evaluating Finances

The statute, as it relates to waivers and variances, reads that risk of closure or receivership must be coming from compliance with our standards in order to qualify for a waiver or variance. The major factor that could lead to risk of closure or receivership is a nursing home’s finances. Our discussions around waivers and variances have therefore focused on finding ways to evaluate finances of a nursing home.

### Financially Distressed Nursing Facility Loan Program

The 2023 Legislature allocated \$100 million for DHS to administer a Financially Distressed Nursing Facility Loan Program. According to an overview of the program, “the primary purpose of the loan program is to provide no-interest operating loans to nursing facilities and board and care homes in severe financial distress so that they maintain operations and vital services for their communities.” The overview describes an operating loan as “a loan to finance the facility’s everyday operations. These loans are not intended to be used to buy long-term assets or investments and are, instead, used to provide the working capital that

covers short-term operational needs.” The information DHS is collecting in administering the Financially Distressed Nursing Facility Loan Program looks for nursing facilities who cannot make daily operating expenses, a factor notes in Minn. Stat. § 144A.15, subd. 1(4). Finally, their criteria for considering a loan includes demonstrating that the facility is at risk of closure<sup>9</sup>, meaning their application will likely include items that seek information that the Board could also ask of applicants for a waiver or variance from the standards.

### *Distressed Loan Application Contents*

Over the last year, DHS has worked to implement this program, including distributing applications for loans. The application has three parts, many of which echo what we saw in the California statute on waivers and variances. These items included the following requests for nursing homes to provide<sup>10</sup>:

- Details on ownership of the nursing home and of the physical plant.
- Previous experiences with loans, including delinquencies on loans.
- Financial statements “including a working trial balance, outstanding accounts payable listing and cash flow statement for the last two years. A current year-to-date working trial balance and cash flow statement must be provided. DHS also requires the audited financial statements or working trial balances for every organization with which the facility conducts business and is owned in whole or in part by an individual or entity which has an ownership interest in the facility for the last two years.”
- Ratios- “Provide the following current financial ratios for the Applicant facility, along with the supporting documentation used to calculate the ratios. For chain organizations, the ratios should be computed for each nursing facility that the loan is being requested for.”
- Projected Cash Flow Statement – “A cash flow projection, which includes the monthly loan repayment, is required for a minimum of 36 months after the estimated date of loan funding (April 2024).”
- Budget- “Provide the current year’s operating budget for the nursing facility. If an operating budget has been prepared for the next budget year, please also provide a copy of the future operating budget.”

### *Evaluation of Waiver and Variance Applications*

DHS’s process includes that each loan application will be examined by “individuals with expertise in health care finance, reimbursement, and health care programs.<sup>11</sup>” Depending on the volume of applications for waivers and variances that the Board receives, the Board will need to decide how to evaluate the applications.

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<sup>9</sup> Page 3, Program overview document.

<sup>10</sup> Pages 5-7, Loan Application

<sup>11</sup> Page 4, Program overview document.

## *Confidentiality of Distressed Loan Applications*

The program includes this information about confidentiality of information, which could be a helpful model for the Board<sup>12</sup>:

“The Minnesota Department of Human Services (DHS) is not planning to make the data in the submitted loan applications publicly available. DHS anticipates receiving requests from legislators or others asking which facilities received a loan, the amount of the loan, and total disbursement of loan proceeds used from the legislative appropriation. This information would be considered public. However, if DHS receives a request for other data in the loan applications pursuant to the Minnesota Government Data Practices Act, DHS will work internally to determine on a case-by-case basis what information must be publicly released based on the content of the information request.”

### **Further Guidance on Confidentiality**

The primary concern of the Board should remain with gathering the data it will need to make informed decisions regarding which nursing home applicants qualify for a waiver or variance, and not the public or nonpublic nature of that data. If there are concerns over data privacy and confidentiality, additional measures, such as a legislative fix to ensure data privacy and a temporary classification of data in the meanwhile, can be sought.

### **Next Steps**

Staff recommend that some next steps would be to review the information in the Financially Distressed Nursing Facility Loan Program and consider which pieces specifically might meet the Board’s obligations. Ultimately, the Board must determine what information it will request from applicant to determine if it qualifies for a waiver or variance and how to weigh the information supplied. Next would be to discuss the Board’s capacity and expertise needed to read financial statements that would potentially be provided to the Board. An evaluation criterion would also be important to develop along with the differences between qualifying for a waiver or a variance. A final consideration might be how the Board would like to communicate out to nursing homes about a waiver and variance process.

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<sup>12</sup> Page 4, Program overview document.