

November 22, 2024

Leah Solo
Executive Director
Minnesota Nursing Home Workforce Standards Board
Dept. Labor & Industry
443 Lafayette Road N., St. Paul, MN

Executive Director Solo:

We submit the enclosed minority report for inclusion to the Report to the Legislature, pursuant to *Minnesota Statutes Chapter 181.212, Sec. 4, subd. 11.*

Respectfully,

Mary Swanson
Employer Member

Katie Lundmark
Employer Member

Paula Rocheleau
Employer Member

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Introduction

As leaders in aging services, we are, and remain steadfast champions for our talented staff to earn family-sustaining wages. That is why we, alongside our Employer peers, have led the charge calling upon Minnesota's elected lawmakers to appropriate permanent funding for wages year after year.

The 2023 Minnesota legislature enacted session law chapter 53. [Article 3](#) of that law created the Minnesota Nursing Home Workforce Standards Board within Minnesota Statute Chapter 181. In addition to establishing minimum nursing home employment standards with enforcement powers given to the Minnesota Department of Labor and Industry, the Board must investigate market conditions of wages, benefits and working conditions, as well as establish certification requirements of organizations selected to provide education on employee rights established by the Board.

Since the Board was appointed in August of 2023, it has enacted bylaws of self-governance and promulgated two rules under expedited rulemaking that do not reflect the feedback or perspective of nursing home employers. This consistent practice of indifference a) calls in to question whether the board has fully executed its responsibilities, b) has a chilling effect on the willingness of other Employers to seek appointment to this Board in the long-term; and most troubling of all, c) is a detriment to the thousands of Minnesotans who rely on nursing home care or nursing home jobs.

It is our opinion that the Board's statutory construction is inherently flawed and merits urgent, significant legislative remedy.

Statement of Disagreement

- 1. The Minnesota Nursing Home Workforce Standards Board is permitted to disregard its impact on Minnesotans' access to an entitlement benefit.** The state has accepted the responsibility to ensure that Minnesota seniors have access to nursing home level of care in their home communities throughout the state through participation in the Federal Medicaid program. Despite this requirement, the Board, through interpretation of *Minn Stat sections 182.211-217*, continues to assert that requirement falls outside the scope of our charge. As Employer members with decades of experience caring for older adults, it is incongruent with our obligation to Minnesotans to disregard this impact.
- 2. The statute's flawed construction only requires consideration of the state's potential future budget impact, not upfront costs to nursing homes.** This gross oversight therefore requires nursing homes to use existing resources to cover all expenses required to comply with these standards. Due to Minnesota's nursing home payment system, this effectively creates unfunded mandates until those resources are returned via a reimbursement rate 15 to 21 months later. Agency staff and non-Employer members insist that lack of upfront funding is beyond the scope of the Board's responsibility, and by extension, not their issue to resolve. Even if that is true, it does not absolve the Legislature of its responsibility for the expenditures this appointed Board is committing on behalf of elected lawmakers.
- 3. The Board has wielded expedited rulemaking to bypass critical public accountability, analysis and transparency.** While the Legislature granted the Board expedited rulemaking authority, it is permissive, not required. Expedited rulemaking was created to allow agencies to adopt

noncontroversial rules or rules that need to be done quickly to comply with changes in state or federal law. By using this process, the Board did not complete a statement of need and reasonableness (SONAR), did not hold public hearings on proposed rules, did not complete local impact analyses, and did not have sufficient time to review pending regulations with significant requirements of compliance. Ultimately, without these established checks and balances in place, the Board ignored important feedback from nursing facilities and local units of government about the economic impact of the proposed rules.

Supporting Evidence

The Board's use of expedited rulemaking skipped essential steps in the customary rulemaking process, resulting in incomplete analyses. As a result, it failed to fulfill duties charged to the Board under Chapter 181.213, subd. 5.

- By pursuing expedited rulemaking, the Board was not required to complete a statement of need and reasonableness, pursuant to MN Statutes 14.14, subd. 1(a). By omitting this step, despite concerns raised by Employer members, the Board failed to account for:
 - o a description of the classes of persons who probably will be affected by the proposed rule, **including classes that will bear the costs of the proposed rule** and classes that will benefit from the proposed rule
 - o the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and **any anticipated effect on state revenues;**
 - o the probable costs of complying with the proposed rule, including the portion of the **total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;**
 - o an assessment of the **cumulative effect of the rule with other federal and state regulations** related to the specific purpose of the rule.
- In promulgation of rules establishing minimum wages for nursing home workers, [over 50 comments](#) requested a public hearing. When Employer members requested one in response to these comments, counsel indicated that it was not required, despite being requested. As a result, the Employer Members' request for a public hearing was dismissed.
- As identified in comments during expedited rulemaking of the minimum wage rule, close to 40 nursing homes are unique in that they are city, county, or hospital district-owned, managed or operated. Despite Employer members raising this concern, the Board determined it did not need to consider the impact to local municipalities, nor be concerned with any requirement to use local taxpayer dollars to implement the rules. In promulgation of rules establishing minimum wages for nursing home workers, comments requested a local impact analysis for publicly owned nursing homes. This request was ignored.

Board and Work Group Discussions pertaining to the impact of proposed rules are not reflected in fiscal analyses nor official actions by Board

- MN Statutes 181.213, subdivision 2, subpart (c) outlines a process the Board must use to determine when a standard passed by the Board requires an appropriation because it increases future Medicaid rates under MN Statutes 256R. While this is a necessary component of

implementing a standard, it is far from sufficient. Providers have long argued that the payment system under 256R is flawed because it bases rates on costs from 15 to 27 months prior to the time of payment, leaving providers susceptible to inflation and other cost increases. The implementation of wage standards exacerbates this problem, because **the cost of any new standard is experienced immediately but the rates under 256R do reflect those costs for a full two years.**

- The Board's fiscal analysis (done "in consultation with the Department of Human Services" according to statute) does not consider the impact of the standards on individual nursing facilities. The Board approved minimum wages standards without knowing which nursing facilities could meet the standards and which ones would require additional funding on Day One. In particular, the Board adopted a creative but obviously flawed interpretation of the holiday pay rule that says it can go into effect without approval by the Legislature because it does not increase future rates under 256R. As Employer members, we disagreed with this interpretation and drew attention to the numerous providers who commented on the draft rule in strong disagreement with that interpretation. Dozens of comments identified how the rule would impose new costs on providers and increase Medicaid costs to the state, but those comments were disregarded. **As a result, a rule that will increase costs for providers and the state is going to be allowed to go into effect without any legislative review.**
- Another example of the inadequacy of the fiscal analysis conducted by the Board and DHS is related to the impact of the minimum wage standard, in particular, the "wage compression" impact of employers needing to increase the pay of employees not directly impacted by a minimum wage standard, but would expect acknowledgement of their time of employment such that they would be paid a fair amount above new hires (who have to be paid at the standard). DHS in its report to the Board acknowledged this was a real impact but that they did not know how to estimate it, and therefore excluded it from the analysis. **As a result, the required appropriation being reported to the Legislature for that rule is a significant understatement of the actual cost the state will experience.** In addition, this is another cost that providers will absorb at the time of implementation while waiting two years for Medicaid rates to reflect the impact.
- **The Minimum Wage Rule does not reflect secondary financial impacts to other Long-Term Services and Supports providers who want to retain workers in an uneven labor market.** This is no more apparent than on a senior living campus where an employee must earn a specific salary if they work in a nursing home but would earn less when cross the street and work in the assisted living community owned by the same employer. Most, if not all employers in this circumstance would want to do right by that employee and honor a consistent wage; however, this too would be an unfunded cost.
- The Holiday Pay Rule, requiring 150% pay for the 11 state holidays, effective January 1, 2025, does not take the most frequently cited comment from Employers into account: unrecognized costs and operational feasibility. **With an anticipated date of this final rule in December of 2024, any reasonable person would agree that there are financial and operational limitations to implementing this fairly and consistently within such a narrow window of time.** State holidays do not account for holidays and observances that employers already honor; payroll and

timekeeping systems need to be updated; company policies must be updated. These are just a small sampling of the feedback we received. These challenges were acknowledged during Board discussion, and though we sought flexibility on behalf of nursing homes, this too was minimized and dismissed upon official action.

Employer members' efforts to seek critical information and fulfill their duties were minimized and their motives impugned.

- On March 28, 2024, eight nursing home employer executives were asked to attend a meeting with representatives from the Governor's Office and organized labor representatives where it was communicated that lawmakers' support for caregiver wages was contingent upon collective bargaining opportunities available to communities across Minnesota. As Employer members who learned of this meeting after the fact, we could not help but wonder what this Board's purpose is, if workers' wages and the state's resources to pay for them are to be determined in a back room deal.
- Employer members have consistently articulated support for nursing home workers and have called for the Legislature to fund competitive wages and benefits. Despite this consistent position, we were made aware of a letter impugning our motives and actions on behalf of this board implying otherwise
[\[https://www.dli.mn.gov/sites/default/files/pdf/nhwsb_letter_100224.pdf\]](https://www.dli.mn.gov/sites/default/files/pdf/nhwsb_letter_100224.pdf).

Summary of dissent & recommendations

Collectively we have devoted hundreds of hours fulfilling our responsibilities as Board members, and while there have been glimpses of collegiality and collaboration, **the products of this Board including creation of bylaws and regulatory labor standards, are not reflective our feedback or expertise.**

We each have decades of service caring for older adults and building dynamic teams of caring professionals. We accepted appointments to this Board under the assumption that we had an opportunity to support our caregiving staff and prioritize care of older adults in Minnesota. The routine practice of indifference to our perspective and that of our Employer peers is a detriment to the thousands of Minnesotans who rely on nursing home care or nursing home jobs. It also has a chilling effect on the willingness of other Employers to seek appointment to this Board in the long-term.

For the benefit of Minnesotans, we therefore recommend:

1. The Minnesota Nursing Home Workforce Standards Board should be repealed or substantively amended to eliminate the permissive use of expedited rulemaking, and ensure that standards cannot erode Minnesotan's entitlement benefit to access nursing home care, pursuant to *U.S.C. § 1396a(a)(10)(D)*.
2. The underlying statute creating the Workforce Standards Board must be changed to give nursing home employers affirmative voting rights under *Minnesota Statutes §181.212, Sec. 4, Subd.7*.

3. Minnesota Statute Chapter 182 must be amended to require prospective funding in full before any rule with financial impact to nursing homes becomes effective.