F I S C A L I M P A C T R E P O R T

SPONSOR Lopez **ORIGINAL DATE** 03/04/15 **LAST UPDATED** 03/11/15 **HB**

SHORT TITLE Patient Safe Staffing Act **SB** 284/aSPAC/aSJC

ANALYST Dunbar

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	**FY17**		
$100.0		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

Responses Received From
Department of Health (DOH)
Human Services Department (HSD)
Board of Nursing (BN)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 284 inserts additional language defining the difference between large hospital nurse staffing committee established pursuant to the Patient Safe Staffing Act and small hospital nurse staffing committee. A large hospital is defined as hospitals licensed for more than forty-five beds and a small hospital is one that is licensed for forty-five or fewer beds.

Additionally, the SJC amendment creates a new section 3 which describes the makeup of the large and small hospital committee. A large hospital nurse staffing committee is composed of eleven members, seven nurses of whom provide direct patient care but are not hospital nurse managers or hospital administrators, at least one of whom provides direct care in a nurse specialty unit and four of whom are other qualified persons as determined by the hospital. A small hospital nurse staffing committee is composed of six members, four nurses who provide direct patient care but who are not hospital nurse managers or hospital administrators, at least one of whom provides direct care in nurse specialty unit and two other qualified persons as determined by the hospital.

The language change addresses concerns of DOH noting that for some small or rural hospitals there may not be seven nurses available to participate in the committee each day and in those cases compliance would be difficult or impossible to obtain while still caring for patients during the time the committee meets.

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 284 inserts additional language to the definition of "hospital". In addition to a hospital being licensed by DOH, language is included that states that a determination of noncompliance with rules regarding nursing care, staffing of nurses or staffing of ancillary staff must have been completed by DOH. Enforcing compliance issues by DOH creates significant issues and fiscal implications for the department (see below).

The amendment appears to narrow the scope of the requirements of SB 284 to apply only to those hospitals that are determined by the Department of Health to be out of compliance with "rules regarding nursing care, staffing of nurses or staffing of ancillary staff." Therefore, once DOH issues a Report of Findings following a survey of a licensed hospital, if there is a citation of non-compliance regarding "nursing care, staffing of nurses, or staffing of ancillary staff", then the hospital, as noted by DOH, would be required to:

- Establish staffing levels for hospital nursing units through an 11 person committee, seven of whom provide direct patient care but are not hospital nurse managers or hospital administrators, and four of whom are other qualified persons as determined by the hospital;
- Permit a nurse to refuse an assignment that (a) conflicts with established staffing levels, or (b) is outside the nurse's scope of practice; and
- Post its daily hospital unit patient census staffing levels, and report this daily information to DOH on a quarterly basis.

DOH notes that SB 284/aSPAC requires hospitals out of compliance with "nursing care, staffing of nurses or staffing of ancillary staff" to implement the provisions of the bill. These concepts are not defined and there are no specific areas of regulation with the titles of "nursing care, staffing of nurses or staffing of ancillary staff". DOH recognizes that there is one federal regulation that could be related to the parameters of SB284/aSPAC. The federal regulation 42 CFR 482.23(b) Staffing and Delivery of Care requires that nursing services must have an "adequate" number of nurses, nurse supervisors and other personnel to provide nursing care to all patients. In order for this regulation to be out of compliance, there must be a negative patient outcome established that was a direct result of "inadequate number" of nurses. Identifying a direct result, cause/effect relationship between a negative patient outcome and the number of nursing staff available is difficult, according to DOH, since it requires elimination of all other variables of patient care that may have contributed to the negative patient outcome. DOH is concerned that the amendment to SB 284 does not clearly indicate whether noncompliance with staffing and delivery of care would fall within the parameters of the bill and require the hospital and DOH to implement the provisions.

Synopsis of Original Bill

SB 284 appropriates $100 thousand to the DOH from the state general fund for expenditure in FY 16 for staffing and expenses associated with posting hospital staffing reports and enforcing compliance

Senate Bill 284 establishes the Patient Safe Staffing Act, which (1) requires hospitals to establish staffing levels for hospital nursing units; (2) permits a nurse to refuse an assignment that (a) conflicts with established staffing levels, or (b) is outside the nurse's scope of practice; (3) requires hospitals to post and report their daily hospital unit patient census staffing levels, and require hospitals to report this daily information to the Department of Health (DOH) on a quarterly basis; (4) authorizes the DOH to enforce compliance with the Patient Safe Staffing Act through penalties and corrective action; and (5) authorizes the DOH to promulgate rules to implement the Patient Safe Staffing Act.

FISCAL IMPLICATIONS

The appropriation contained in this bill of $100 thousand is a recurring expense from the general fund. The bill appropriates:

- $60 thousand for staffing expenses
- $35 thousand for expenses associated with the DOH's internet website to ensure that the hospitals' quarterly reports are posted

The appropriation in SB 284 is not included in the Executive Budget Request.

Currently, the DOH surveys hospitals only when an initial license application is received from the hospital or when directed by CMS. SB 284 would require the DOH to survey each hospital "periodically" to enforce compliance with its provisions. Since SB 284 is a state requirement, DOH would have to fund the surveys solely with state GFs. No federal funds could be used for this purpose.

The appropriation in SB 284 is not sufficient to cover DOH's costs of implementation of SB 284. DOH states that it would not be possible to oversee the compliance of 77 hospitals statewide for the proposed amount allocated for staffing. Currently, DOH lacks staff to perform the oversight function. Since nurse staffing would be reviewed, it would be necessary for all surveyors for this task be Registered Nurses. Additionally, SB 284 would require DOH to survey hospitals "periodically".

It is estimated that an extensive additional staff and budget resources would be required for the enforcement of SB 284 provisions. SB 284 would also require DOH to develop and oversee a website to publish the hospitals' quarterly reports. Once the website is developed, the appropriation would not support continued maintenance of the website. DOH could not absorb the cost of this function with existing staff.

The Board of Nursing specifies that this bill would result in a larger nursing workforce, but that SB 284 does not provide a sufficient basis for a projected number of new nurses and therefore no dollar amount can be estimated for the fiscal impact on this agency. Any increase in nursing workforce will create costs related to both the licensing of those nurses and the regulation of a

larger nursing workforce: compliance auditing, complaint processing, investigation, hearings, discipline enforcement, and discipline monitoring.

SIGNIFICANT ISSUES

SB 284 proposes that each hospital shall develop a "nursing staffing committee" composed of eleven members, seven of whom provide direct patient care but are not hospital nurse managers or hospital administrators, and four of whom are other qualified persons as determined by the hospital. The nursing staff committee will give consideration to the "recommendations" of various individuals and groups of individuals in developing the nursing staffing levels for each of the hospital's units. According to DOH, these individuals and groups of individuals – "the hospital's chief nursing officer, direct patient care nurses, ancillary staff, professional nursing organizations and other appropriate resources" – have potentially competing interests respective to staffing levels. SB 284 does not provide for the participation of the Director of Nursing (DON) or other nurse managers/administrator unless it would be one of the four "other qualified persons" the hospital may choose to add to the committee. Notably, union interests are not included in the bill. These competing interests may make consensus extremely difficult, if not impossible, to achieve.

SB 284 further notes that hospital shall formulate and adopt an algorithm for maintaining nursing staffing levels determined by the committee, which may require the hiring of additional nurses.

SB 284 places the decision-making authority for determining staffing levels for nurses and ancillary staff with a committee and removes it from the DON. DOH states that the United States Health and Human Services, Centers for Medicare and Medicaid Services (CMS) requires that the DON make decisions about nurse staffing levels for the hospital. The committee decision-making responsibility of SB284 would be in direct conflict with CMS Medicare requirements for determining staffing levels. Hospitals would be put in the position of meeting the requirements of SB 284 or meeting the reimbursement requirements of CMS regarding decision making processes for determining levels of staff needed to provide nursing care.

If the hospital was not in compliance with CMS requirements, it would not be reimbursed for services provided and would ultimately lose its Medicare and Medicaid certification. The hospital may not be able to maintain financial viability without Medicaid or Medicare certification and reimbursement.

A point of contention raised by DOH is that SB 284 would require eleven staff to participate in the staffing level decision making process and would require seven direct-care nurses to be part of the committee. For some small or rural hospitals there may not be seven nurses available to participate in the committee each day. Sometimes the committee of eleven persons would include the entire medical staff of the hospital. In those cases compliance would be difficult or impossible to obtain while still caring for patients during the time the committee meets. SB 284 makes no provision for smaller hospitals to meet the requirements of the bill.

If the committee specified in SB 284 made decisions that would increase the number of nurses required for each shift, it would be difficult to find a sufficient number of nurses in more rural areas since New Mexico is currently experiencing a nursing shortage in most rural areas.

DOH is responsible for seven facilities that rely on nursing staff for patient care. SB 284 states

that "a hospital shall not achieve nursing staffing levels with mandatory overtime." If a hospital is unable to hire nurses due to the state shortage of nurses and is unable to meet the requirement of mandatory overtime, it is possible that they will face the imposition of penalties and corrective action. This could have unintended negative consequences on the ability of facilities to maintain available staffed beds for patients in need of treatment.

Existing CMS and DOH requirements currently address appropriate staffing for a hospital. Current state and federal statute and rules do not require specific nurse and ancillary staffing numbers, levels or ratios. Rather, CMS and DOH rules about appropriate staffing are based on patient needs and patient care outcomes rather than on an established, specified number, level or ratio of nursing and other staff. Though ratios may be one of several approaches and tools an organization uses, determining appropriate staffing for any given unit or facility is complex and should take into account myriad variables, including shift-to-shift variables, patient turnover, and the experience, education, skills and competency of available staff. Determinations of non-compliance with appropriate staffing are based on the evidence of a negative patient outcome, (i.e., a patient was harmed) because appropriate care (the medications or treatments) was not delivered as required.

Other comments made by DOH indicate (1) that there is no known evidence that associates inadequate care and negative patient outcomes directly to nursing and ancillary staffing levels. There are usually multiple factors that contribute to the problem. (2) Even when there are gaps between the staffing schedule the hospital designed and the staffing schedule that was actually worked, it is difficult to relate the insufficient patient care specifically to numbers of nurses and ancillary staff present throughout a work shift because supplemental personnel may be summoned to assist on an ad hoc basis. (3)Additionally, the actual number or ratio of nurses in a hospital, as the sole determining factor for inadequate patient care, does not equate to the quality of care provided.

According to DOH, SB 284 places the department in an irreconcilable position since it is required to monitor hospitals for compliance with CMS Medicare requirements as well as requirements of SB 284. Since some requirements are contradictory, DOH would determine every hospital is out of compliance with one or the other requirement.

DOH would promulgate rules to prescribe for all hospitals in New Mexico (approximately 77) to include the format, form and due date for each hospital's quarterly submission of the report required pursuant to SB 284. DOH would then publish each quarterly report on its web site for public inspection

Whistleblower protections are included such that a hospital shall not discriminate or retaliate against an employee as a result of a grievance or complaint relating to this Act.

Board of Nursing points out that nursing care is provided in a great many settings: hospitals, skilled nursing facilities, homes, schools, clinics, urgent care centers, community settings. BN questions the fact that bill is only concerned with hospital nurse staffing? Most of the complaints and questions received at the Board of Nursing concerning staffing or alleging abandonment related to staffing come from skilled nursing facility settings.

Another issue brought up by BN is the consideration of an **equal** mix of more-experienced and less experienced nurses (Page 4 line 23-24) in relation to the safest staffing modality? Some

patient care areas are poorly suited for novice nurses and patients may get the safest care from more seasoned nurses. If forced to include "less experienced nurses," there may be unintended consequences of a lower standard of care.

Although the bill addresses conditions under which a nurse may refuse an assignment, it does not address the ongoing care of the patients that the oncoming nurse may refuse to care for.

The Board of Nursing currently licenses 25,724 Registered Nurses, and 2,773 Licensed Practical Nurses.

ADMINISTRATIVE IMPLICATIONS

SB 284, if adopted, would place significant administrative oversight challenges for DOH. Currently, DOH surveys hospitals either when an initial license is requested by the hospital or when we are directed to do so by CMS. SB 284 would require DOH to survey each hospital "periodically" to enforce compliance with its provisions. DOH states that it does not currently survey hospitals for annual licensure renewals. DOH does not have staff or funding to perform this function and would have to utilize staff assigned to complete the required federal survey workload to complete this task. That would leave DOH in the position of either not monitoring compliance with the requirements of SB 284 or not completing the federally required workload and thus losing federal funds. SB 284 would also require the DOH to promulgate rules, develop a new survey tool and train staff in order to complete compliance surveys.

SB 284 would also require DOH to develop and oversee a website to publish the hospitals' quarterly reports. Once the website is developed, staff would be responsible for continued maintenance of the website. DOH does not have sufficient staff to absorb this function.

TECHNICAL ISSUES

Other issues which the sponsor may wish to consider as specified by the Board of Nursing are:

- Lack of definition of *scope of practice* noted in the bill, but it is the criterion by which a nurse may refuse an assignment (page 5 lines 14-15). A general definition of scope of practice can be found in the Nursing Practice Act [§61-3-3-P**]**, but may not be specific enough to invoke the refusal of a patient care assignment.
- Definition of "nurse" as a registered nurse or a licensed practical nurse. [Page 2 line 19-20]. The definitions of professional registered nursing *[§61-3-3.N)]* and licensed practical nursing *[§61-3-J.]* are very different and should not considered interchangeable. What each brings to patient care and to a staffing modality is very different and should have unique consideration.

BD/bb