

**Sixty-seventh Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 5, 2021**

HOUSE BILL NO. 1090
(Human Services Committee)
(At the request of the Department of Human Services)

AN ACT to amend and reenact sections 50-24.4-01, 50-24.4-08, 50-24.4-10, 50-24.4-15, and 50-24.4-19 of the North Dakota Century Code, relating to nursing home rates.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 50-24.4-01 of the North Dakota Century Code is amended and reenacted as follows:

50-24.4-01. Definitions.

For the purposes of this chapter:

1. "Actual allowable historical operating cost per diem" means the per diem operating costs allowed by the department for the most recent reporting year.
2. "Actual resident day" means a billable, countable day as defined by the department.
3. "Department" means the department of human services.
4. ~~"Depreciable equipment" means the standard movable resident care equipment and support service equipment generally used in long-term care facilities.~~
5. "Direct care costs" means the cost category for allowable nursing and therapy costs.
5. "Fair rental value" means the depreciated replacement value of the building, fixed equipment, moveable equipment, and land based on the facility's effective age. The calculation of the fair rental value of the building and fixed equipment must include a location factor, annual depreciation, and an annual replacement cost inflation factor.
6. "Fair rental value rate" means the per diem rate calculated using the fair rental value and rental rate.
- 6-7. "Final rate" means the rate established after any adjustment by the department, including adjustments resulting from cost report reviews and audits.
- 7-8. "Fringe benefits" means workforce safety and insurance, group health or dental insurance, group life insurance, retirement benefits or plans, and uniform allowances, and medical services furnished at nursing home expense.
- 8-9. "General and administrative costs" means all allowable costs for administering the facility, including salaries of administrators, assistant administrators, accounting personnel, data processing personnel, security personnel, and all clerical personnel; board of directors' fees; business office functions and supplies; travel, except as necessary for training programs for dietitians, nursing personnel, and direct resident care related personnel required to maintain licensure, certification, or professional standards requirements; telephone and telegraph; advertising; membership dues and subscriptions; postage; insurance, except as included as a fringe benefit; professional services such as legal, accounting, and data processing services; central or home office costs; management fees; management consultants; employee training, for any top management personnel and for other than direct resident care related personnel; and business meetings and seminars.

- ~~9-10.~~ "Historical operating costs" means the allowable operating costs incurred by the facility during the reporting year immediately preceding the rate year for which the payment rate becomes effective, after the department has reviewed those costs and determined them to be allowable costs under the medical assistance program, and after the department has applied appropriate limitations such as the limit on administrative costs.
- ~~10-11.~~ "Indirect care costs" means the cost category for allowable administration, plant, housekeeping, medical records, chaplain, pharmacy, and dietary, exclusive of food costs.
- ~~11-12.~~ "Managed care organization" means a Medicaid managed care organization as that term is defined in section 1903(m) of the Social Security Act [42 U.S.C. 1396b(m)].
13. "Margin cap" means a percentage of the price limit which represents the maximum per diem amount a nursing home may receive if the facility has historical operating costs below the price limit.
- ~~12-14.~~ "Nursing home" means a facility, not owned or administered by the state government, defined in section 43-34-01 or a facility owned or administered by the state, which agrees to accept a rate established under this chapter.
- ~~13-15.~~ "Operating costs" means the day-to-day costs of operating the facility in compliance with licensure and certification standards.
- ~~14-16.~~ "Other direct care costs" means the cost category for allowable activities, social services, laundry, and food costs.
- ~~15-17.~~ "Payment rate" means the rate determined under section 50-24.4-06.
- ~~16-18.~~ "Payroll taxes" means the employer's share of Federal Insurance Contributions Act taxes, governmentally required retirement contributions, and state and federal unemployment compensation taxes.
- ~~17-19.~~ "Private-paying resident" means a nursing home resident on whose behalf the nursing home is not receiving medical assistance payments and whose payment rate is not established by any governmental entity with ratesetting authority, including the veterans' administration or Medicare, or whose payment rate is not negotiated by any managed care organization contracting with a facility to provide services for the resident.
- ~~18-20.~~ "Rate year" means the fiscal year for which a payment rate determined under this chapter is effective, from January first to the next December thirty-first.
- ~~19.~~ "~~Real estate~~" means ~~improvements to real property and attached fixtures used directly for resident care.~~
- ~~20-21.~~ "Reporting year" means the period from July first to June thirtieth, immediately preceding the rate year, for which the nursing home submits reports required under this chapter.
- ~~21-22.~~ "Top management personnel" means owners, board members, corporate officers, general, regional, and district managers, administrators, nursing home administrators, and other persons performing functions ordinarily performed by such personnel.

SECTION 2. AMENDMENT. Section 50-24.4-08 of the North Dakota Century Code is amended and reenacted as follows:

50-24.4-08. Notice of increases to private-paying residents.

No increase in nursing home rates for private-paying residents is effective unless the nursing home notifies the resident or person responsible for payment of the increase in writing thirty days before the increase takes effect. A nursing home may adjust its rates without giving the notice required by this

section when the purpose of the rate adjustment is to reflect a necessary change in the category of care provided to a resident. If the department fails to set rates at least forty days prior to the beginning of a rate year, the time required for giving notice is decreased by the number of days by which the department was late in setting the rates, except when a facility fails to file a cost report by October first.

SECTION 3. AMENDMENT. Section 50-24.4-10 of the North Dakota Century Code is amended and reenacted as follows:

50-24.4-10. Operating costs.

1. The department shall establish procedures for determining per diem reimbursement for operating costs.
2. The department shall analyze and evaluate each nursing home's cost report of allowable operating costs incurred by the nursing home during the reporting year immediately preceding the rate year for which the payment rate becomes effective.
3. The department shall establish price limits on actual allowable historical operating cost per diems, increased by the market basket for skilled nursing facility before productivity assessment, based on cost reports of allowable operating costs taking into consideration relevant factors including resident needs, nursing hours necessary to meet resident needs, size of the nursing home, and the costs that must be incurred for the care of residents in an efficiently and economically operated nursing home. For the rate year beginning ~~2006~~2022, the department shall establish price limits for cost categories using the June 30, ~~2003~~2021, cost report year as the base period. The price limits ~~may not fall below~~ must be established using the same percentage of the median of the most recent cost report used to establish the limits for the June 30, 2020, base period. ~~Until a new base period is established, the department shall adjust the limits annually by the inflation rate for nursing home services used to develop the legislative appropriation for the department.~~ In determining allowable historical operating cost per diems for purposes of setting price limits and nursing home payment rates, the department shall divide the allowable historical operating costs by the actual number of resident days, except that when a nursing home is occupied at less than ninety percent of licensed capacity days, the department may establish procedures to adjust the computation of the indirect care cost per diem to an imputed occupancy level at or below ninety percent. To encourage the development of home and community-based services as an alternative to nursing home care, the department may waive the imputed occupancy level requirements for a nursing home that the department determines to be providing significant home and community-based services in coordination with home and community-based service providers to avoid duplicating existing services. ~~The department shall establish efficiency incentives for indirect care costs. The department may establish efficiency incentives for different operating cost categories. The department shall consider establishing efficiency incentives in care-related cost categories.~~
4. ~~Each nursing home shall receive an operating cost payment rate equal to the sum of the nursing home's operating cost payment rates for each operating cost category. The operating cost payment rate for an operating cost category must be the lesser of the nursing home's historical operating cost in the category increased by the inflation rate for nursing home services used to develop the legislative appropriation for the department for the operating cost category plus an efficiency incentive established pursuant to subsection 3 or the limit for the operating cost category increased by the same inflation rate. If a nursing home's actual historic operating costs are greater than the prospective payment rate for that rate year, there may be no retroactive cost settle-up. In establishing payment rates for one or more operating cost categories, the department may establish separate rates for different classes of residents based on their relative care needs.~~
5. ~~The efficiency incentives to be established by the department pursuant to subsection 3 for a facility with an actual rate below the limit rate for indirect care costs must include the lesser of~~

~~two dollars and sixty cents per resident day or the amount determined by multiplying seventy percent times the difference between the actual rate, exclusive of inflation rates, and the limit rate, exclusive of current inflation rates. The efficiency incentive must be included as a part of the indirect care cost rate.~~The department shall include in the ratesetting system for nursing homes those costs associated with computer software and any related technology, including cloud-based services. These expenses are allowed as a direct passthrough.

- ~~6. Each nursing home must receive an operating margin of at least three percent based upon the lesser of the actual direct care and other direct care costs and the limit rate prior to inflation. The operating margin will then be added to the rate for direct care and other direct care cost categories.~~
- ~~7. A new base period must be established at least every four years beginning with the cost report period June 30, 2006~~2023.
- ~~7. The margin cap used for the rate year beginning 2022 price limits must be no less than three and forty-six hundredths percent.~~
- ~~8. The market basket for skilled nursing facility before productivity adjustment is the preferred index to adjust historical operating costs when a new base period is established and to adjust the price rate in subsequent years until a new base rate period is established.~~
- ~~9. For the rate years beginning 2022 and 2023, the department shall inform the nursing home of the operating rate using historical operating costs and the operating rate using price limits. The nursing home shall inform the department if the nursing home wants to accept the operating rate using historical operating costs as the established rate.~~

SECTION 4. AMENDMENT. Section 50-24.4-15 of the North Dakota Century Code is amended and reenacted as follows:

50-24.4-15. Property-related costs.

1. The department shall include in the ratesetting system for nursing homes a fair rental value payment mechanism for the use of real and personal property ~~which provides for depreciation and related interest costs.~~ The property cost payment mechanism must:
 - a. ~~Recognize the valuation basis of assets acquired in a bona fide transaction as an ongoing operation after July 1, 1985, limited to the lowest of:~~
 - (1) ~~Purchase price paid by the purchaser;~~
 - (2) ~~Fair market value at the time of sale; or~~
 - (3) ~~Seller's cost basis, increased by one-half of the increase in the consumer price index for all urban consumers (United States city average) from the date of acquisition by the seller to the date of acquisition by the buyer, less accumulated depreciation.~~
 - b. ~~Recognize depreciation on land improvements, buildings, and fixed equipment acquired, as an ongoing operation over the estimated useful remaining life of the asset as determined by a qualified appraiser.~~
 - c. ~~Recognize depreciation on movable equipment acquired as an ongoing operation after August 1, 1995, over a composite remaining useful life.~~
 - d. ~~Provide for an interest expense limitation determined by the department and established by rule.~~
 - e. ~~Establish~~.

2. The department shall establish a per bed property cost limitation considering single and double occupancy construction. The double room limit effective July 1, 2015, is one hundred fifty-six thousand seven hundred eighty-three dollars and the single room limit is two hundred thirty-five thousand one hundred seventy-six dollars.
 - f. ~~Recognize increased lease costs of a nursing home operator to the extent the lessor has incurred increased costs related to the ownership of the facility, the increased costs are charged to the lessee, and the increased costs would be allowable had they been incurred directly by the lessee.~~
 - g. ~~Recognize any mandated costs, fees, or other moneys paid to the attorney general through transactions under sections 10-33-144 through 10-33-149.~~
2. For rate years beginning after December 31, 2003, the limitations of paragraph 3 of subdivision a of subsection 1 do not apply to the valuation basis of assets purchased between July 1, 1985, and July 1, 2000. The provisions of this subsection may not be applied retroactively to any rate year before July 1, 2005. The per bed property cost limitation must apply to construction or renovation projects currently in process or which have approved financing in place on or before December 31, 2021. The nursing home must have agency approval of the project by December 31, 2022. The nursing home shall notify the department within thirty days of receiving financial approval for any construction or renovation projects that financing is in place on or before December 31, 2022.
3. For rate years beginning after December 31, 2007, the limitations of subdivision e of subsection 1 do not apply to the valuation basis of assets acquired as a result of a natural disaster before December 31, 2006. The provisions of this subsection may not be applied retroactively to any rate year before January 1, 2008. The maximum allowable movable equipment replacement value per licensed bed must be fifteen thousand dollars when calculating the fair rental value.
4. The department shall include in the ratesetting system for nursing homes those costs associated with computer software and any related technology, including cloud-based services. These expenses are allowed as a direct passthrough. The maximum allowable square footage per licensed bed must be nine hundred fifty square feet [88.26 square meters] when calculating the fair rental value.
5. The maximum allowable rental rate must be eight percent when calculating the fair rental value rate.
6. Effective with the 2023 rate year, the property rate component of the payment rate, exclusive of startup and passthrough costs, must be the greater of the rate calculated using allowable property-related costs or the fair rental value rate. If the fair rental value rate is greater than the rate calculated using allowable property-related costs, the increase must be phased in over a four-year period.
7. Effective with the 2023 rate year, if the fair rental value rate is greater than the rate calculated using allowable property-related costs, the increase must be reserved until a major renovation or construction is placed in service.
8. Effective with the 2023 rate year and subsequent rate years, if the fair rental value rate is less than the rate calculated using allowable property-related costs, the department shall inform the nursing home of the property rate using allowable property-related costs and the fair rental value. Before the start of each rate year, the nursing home shall inform the department if the nursing home wants to accept the property rate using allowable property-related costs as the established rate. The allowable property-related costs must be calculated using only the allowable depreciation on capital assets and interest on debt as of June 30, 2022, for all rate years. Once the fair rental value rate is equal to or greater than the rate calculated using allowable property-related costs, or the nursing home does not inform the department the

nursing home wants to accept the property rate using allowable property-related costs, the department no longer need inform the nursing home of the property rate using allowable property-related costs and the rate must be calculated using the fair rental value methodology.

SECTION 5. AMENDMENT. Section 50-24.4-19 of the North Dakota Century Code is amended and reenacted as follows:

50-24.4-19. Prohibited practices.

A nursing home is not eligible to receive medical assistance payments unless it refrains from all of the following:

1. Charging private-paying residents rates for similar services which exceed those rates which are approved by the department for medical assistance recipients, as determined by the prospective desk audit rate, except under the following circumstances: the nursing home may charge private-paying residents a higher rate for a private room and charge for special services which are not included in the daily rate if medical assistance residents are charged separately at the same rate for the same services in addition to the daily rate paid by the department of human services. Services covered by the payment rate must be the same regardless of payment source. Special services, if offered, must be offered to all residents and charged separately at the same rate. Residents are free to select or decline special services. Special services must not include services which must be provided by the nursing home in order to comply with licensure or certification standards and that if not provided would result in a deficiency or violation by the nursing home. Services beyond those required to comply with licensure or certification standards must not be charged separately as a special service if they were included in the payment rate for the previous reporting year. A nursing home that charges a private-paying resident a rate in violation of this chapter is subject to an action by the state or any of its subdivisions or agencies for civil damages. A private-paying resident or the resident's legal representative has a cause of action for civil damages against a nursing home that charges the resident rates in violation of this chapter. The damages awarded shall include three times the payments that result from the violation, together with costs and disbursements, including reasonable attorney's fees or their equivalent.
2. Requiring an applicant for admission to the home, or the guardian or conservator of the applicant, as a condition of admission, to pay any fee or deposit ~~in excess of one hundred dollars~~, loan any money to the nursing home, or promise to leave all or part of the applicant's estate to the home.
3. Requiring any resident of the nursing home to utilize a vendor of health care services who is a licensed physician or pharmacist chosen by the nursing home.
4. Providing differential treatment on the basis of status with regard to public assistance.
5. Discriminating in admissions, services offered, or room assignment on the basis of status with regard to public assistance. Admissions discrimination shall include, but is not limited to:
 - a. Basing admissions decisions upon assurance by the applicant to the nursing home, or the applicant's guardian or conservator, that the applicant is neither eligible for nor will seek public assistance for payment of nursing home care costs.
 - b. Engaging in preferential selection from waiting lists based on an applicant's ability to pay privately.

The collection and use by a nursing home of financial information of any applicant pursuant to a preadmission screening program does not raise an inference that the nursing home is utilizing that information for any purpose prohibited by this chapter.

6. Requiring any vendor of medical care, who is reimbursed by medical assistance under a separate fee schedule, to pay any portion of the vendor's fee to the nursing home except as payment for the fair market value of renting or leasing space or equipment of the nursing home or purchasing support services, if those agreements are disclosed to the department.
7. Refusing, for more than twenty-four hours, to accept a resident returning to the resident's same bed or a bed certified for the same level of care, in accordance with a physician's order authorizing transfer, after receiving inpatient hospital services.
8. Violating any of the rights of health care facility residents enumerated in section 50-10.2-02.
9. Charging a managed care organization a rate that is less than the rate approved by the department for a medical assistance recipient in the same classification.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-seventh Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1090.

House Vote: Yeas 94 Nays 0 Absent 0

Senate Vote: Yeas 47 Nays 0 Absent 0

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2021.

Approved at _____ M. on _____, 2021.

Governor

Filed in this office this _____ day of _____, 2021,

at _____ o'clock _____ M.

Secretary of State