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AB-1042 Skilled nursing facilities: unpaid penalties: related parties. (2021-2022)

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Assembly Bill No. 1042

CHAPTER 475

An act to amend Sections 1324.22, 1325.5, and 1437.5 of, and to add Section 1424.3 to, the Health and Safety Code, relating to long-term health care facilities.

[Approved by Governor October 04, 2021. Filed with Secretary of State October 04, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1042, Jones-Sawyer. Skilled nursing facilities: unpaid penalties: related parties.

The Long-Term Care, Health, Safety, and Security Act of 1973 generally requires the State Department of Public Health to license and regulate long-term health care facilities and to establish an inspection and reporting system to ensure that long-term health care facilities are in compliance with state statutes and regulations. The term "long-term health care facility" includes, among other types of facilities, a skilled nursing facility.

Existing law relating to health facility data reporting requires an organization that operates, conducts, owns, or maintains a licensed skilled nursing facility to file with the Office of Statewide Health Planning and Development information as to whether the licensee, or a general partner, director, or officer of the licensee, has an ownership or control interest of 5% or more in a related party that provides any service to the skilled nursing facility. Existing law defines "related party" for those purposes as an organization related to the licensee provider or that is under common ownership or control, as defined in a specified federal regulation.

This bill would, beginning January 1, 2023, expressly authorize the department, if a licensee provider fails to pay specified penalties in full when all appeals have been exhausted and the department's position has been upheld, to give written notice to the licensee provider and related parties in which the licensee provider has an ownership or control interest of 5% or more that the department may take appropriate legal action to recover the unpaid penalty amount from the licensee provider's financial interest in the related party. The bill would also require the department, if it determines after 2 notifications that the related parties are not financially viable or recovery is unlikely, to document that determination, as specified. This bill also would require the department to give written notice to related parties when a citation has been issued against a facility licensee, and to advise the related parties of the potential action if the violation is not remedied and penalties are assessed.

Existing law specifies procedures for the appointment of a temporary manager to manage a long-term health care facility when certain circumstances exist. Existing law authorizes the department to use funds from the Health Facilities Citation Penalties Account to operate the facility after all other facility revenues are exhausted.

This bill would state that funds from that account that are used for the purposes of the facility's management constitute a debt due to the state that may be collected pursuant to appropriate legal action taken by the department to collect the debt from the licensee, including from the licensee's financial interest in a related party. The bill would require the department, beginning January 1, 2023, to give written notice to related parties that it may take action to collect the licensee's debt, as specified. The bill

would also require the department, if it determines after 2 notifications that the related parties are not financially viable or recovery is unlikely, to document that determination, as specified.

Existing law requires the State Department of Health Care Services to impose a uniform quality assurance fee on each skilled nursing facility, with certain exceptions, in accordance with a prescribed formula. Under existing law, if a skilled nursing facility fails to pay all or part of the quality assurance fee within a specified time period, among other requirements, the unpaid amount constitutes a debt to the state that may be collected pursuant to specified provisions.

This bill would also authorize the department to take appropriate legal action to recover the unpaid quality assurance fee amount, including any interest and penalties owed, from the licensee's financial interest in the related party and would require the department to give written notice to the licensee and related parties before the department takes such action.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1324.22 of the Health and Safety Code is amended to read:

1324.22. (a) The quality assurance fee, as calculated pursuant to Section 1324.21, shall be paid by the provider to the department for deposit in the State Treasury on a monthly basis on or before the last day of the month following the month for which the fee is imposed, except as provided in subdivision (e) of Section 1324.21.

(b) On or before the last day of each calendar month or quarter, as determined by the department, each skilled nursing facility shall file a report with the department, in a prescribed form, showing the facility's total resident days for the preceding quarter and payments made. If it is determined that a lesser amount was paid to the department, the facility shall pay the amount owed in the preceding quarter to the department with the report. Any amount determined to have been paid in excess to the department during the previous quarter shall be credited to the amount owed in the following quarter.

(c) On or before August 31 of each year, each skilled nursing facility subject to an assessment pursuant to Section 1324.21 shall report to the department, in a prescribed form, the facility's total resident days and total payments made for the preceding state fiscal year. If it is determined that a lesser amount was paid to the department during the previous year, the facility shall pay the amount owed to the department with the report.

(d) (1) A newly licensed skilled nursing facility shall complete all requirements of subdivision (a) for any portion of the year in which it commences operations and of subdivision (b) for any portion of the calendar month or quarter in which it commences operations.

(2) For purposes of this subdivision, "newly licensed skilled nursing facility" means a location that has not been previously licensed as a skilled nursing facility.

(e) (1) If a skilled nursing facility fails to pay all or part of the quality assurance fee within 60 days of the date that payment is due, the department shall assess interest at the rate of 7 percent per annum on any unpaid amount due, beginning on the 61st calendar day from the date the payment is due, until the unpaid amount due, plus any interest, is paid in full.

(2) (A) When a skilled nursing facility fails to pay all or part of the quality assurance fee within 60 days of the date that payment is due, the department may deduct any unpaid assessment, including any interest and penalties owed, from any Medi-Cal payments to the facility until the full amount is recovered. Any deduction shall be made only after written notice to the facility and may be taken over a period of time taking into account the financial condition of the facility.

(B) Notwithstanding any other law, for the rate period from August 1, 2020, to December 31, 2020, and every subsequent calendar year thereafter, the department may deduct any unpaid assessments, including any interest and penalties owed, attributable to a debtor facility from any Medi-Cal payments made to a related facility or entity by common ownership or control to the debtor facility within the meaning of Section 413.17(b) of Title 42 of the Code of Federal Regulations. If the department deducts any unpaid assessments from the Medi-Cal payments to a related facility or entity, the department shall provide prior written notice to both the debtor facility and the related facility or entity, and, in taking into account the financial condition of the related facility, may apply that deduction over a period of time.

(3) In addition to the requirements specified in this subdivision and subdivision (h), any unpaid quality assurance fee, including any interest and penalties owed, assessed by this article shall constitute a debt due to the state and may be collected pursuant to Section 12419.5 of the Government Code.

(4) In addition to the requirements specified in this subdivision and subdivision (h), the department may take appropriate legal action in state or federal court to recover the unpaid quality assurance fee amount, including any interest and penalties owed,

from the licensee's financial interest in the related party, as defined in subdivision (b) of Section 1424.3. Before taking any action pursuant to this paragraph, the department shall give written notice to the licensee and the related party.

(f) (1) Notwithstanding any other law, the department shall continue to assess and collect the quality assurance fee, including any previously unpaid quality assurance fee, and any interest or penalties owed, from each skilled nursing facility, irrespective of any changes in ownership or ownership interest or control or the transfer of any portion of the assets of the facility to another owner.

(2) Notwithstanding any other law, in the event of a merger, acquisition, or change of ownership involving a skilled nursing facility that has outstanding quality assurance fee payment obligations pursuant to this article, including any interest and penalty amounts owed, the successor skilled nursing facility shall be responsible for paying to the department the full amount of outstanding quality assurance fee payments, including any interest and penalties, attributable to the skilled nursing facility for which it was assessed, upon the effective date of that transaction. An entity considering a merger, acquisition, or similar transaction involving a skilled nursing facility may submit a request to the department pursuant to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code to ascertain the outstanding quality assurance fee payment obligations of the skilled nursing facility pursuant to this article as of the date of the department's response to that request.

(g) During the time period in which a temporary manager is appointed to a facility pursuant to Section 1325.5 or during which a receiver is appointed by a court pursuant to Section 1327, the State Department of Public Health shall not be responsible for any unpaid quality assurance fee assessed before the time period of the temporary manager or receiver. This subdivision shall not affect the responsibility of the facility to make all payments of unpaid or current quality assurance fees, including any interest and penalty amounts, as required by this section and Section 1324.21.

(h) If all or any part of the quality assurance fee remains unpaid, the department may take any or all of the following actions against the debtor facility, in addition to assessing interest pursuant to paragraph (1) of subdivision (e):

(1) Assess a penalty of up to 50 percent of the total unpaid fee amounts, and any interest assessed pursuant to paragraph (1) of subdivision (e) in each applicable rate or calendar year.

(2) Recommend to the State Department of Public Health that license or Medi-Cal certification renewal or approval of a change of ownership application be delayed until the full amount of the quality assurance fee, penalties, and interest is recovered.

(3) (A) In the event of a merger, acquisition, or change of ownership involving a skilled nursing facility as described in paragraph (2) of subdivision (f), the department may delay approval of a new Medi-Cal provider agreement or a transfer of an existing Medi-Cal provider agreement to a successor skilled nursing facility until the full amount of the quality assurance fees, penalties, and interest owed by the successor or previous facility owner is recovered in full, or until the successor skilled nursing facility has entered into an alternative payment agreement with the department for the outstanding quality assurance fees, penalties, and interest owed that takes into account the financial situation of the facility and the potential impact on delivery of services to Medi-Cal beneficiaries.

(B) In addition to subparagraph (A), as a condition of approving a new Medi-Cal provider agreement or a transfer of an existing Medi-Cal provider agreement to a successor skilled nursing facility, the department may require either or both of the following:

(i) The successor skilled nursing facility to enter into an agreement with the department to be financially responsible to the department for the outstanding quality assurance fees, penalties, and interest owed by the previous facility owner.

(ii) The successor facility owner to enter into an agreement with the department to pay outstanding quality assurance fees, penalties, and interest owed by the successor facility owner on an alternative payment schedule developed by the department that takes into account the financial situation of the facility and the potential impact on delivery of services to Medi-Cal beneficiaries.

(i) In accordance with the Medicaid State Plan, the payment of the quality assurance fee shall be considered as an allowable cost for Medi-Cal reimbursement purposes.

(j) The assessment process pursuant to this section shall become operative not later than 60 days from receipt of federal approval of the quality assurance fee, unless extended by the department. The department may assess fees and collect payment in accordance with subdivision (e) of Section 1324.21 to provide retroactive payments for any rate increase authorized under this article.

(k) The amendments made to subdivision (d) and the addition of subdivision (f) by the act that added this subdivision are not substantive changes, but are merely clarifying existing law.

(l) (1) Notwithstanding any other law, for the 2011–12 rate year, the department may waive the actions provided under subdivision (h), or may allow a freestanding pediatric subacute care facility to delay payments for up to six months, to ensure the facility has

the financial stability required to pay the fee.

(2) For the purposes of this article, "freestanding pediatric subacute care facility" has the same meaning as defined in Section 51215.8 of Title 22 of the California Code of Regulations.

(m) (1) Subject to paragraph (2), the department may waive a portion or all of either the interest or penalties, or both, assessed under this article with respect to a petitioning skilled nursing facility if the department determines, in its sole discretion, that the facility has demonstrated that imposing the full amount of fees under this article has a high likelihood of creating an undue financial hardship for the facility or creates a significant financial difficulty in providing services to Medi-Cal beneficiaries. A waiver pursuant to this subdivision may include, but need not be limited to, interest or penalties, or both, that accrue or are assessed with respect to a facility during the time period for which a change of ownership is pending, or for which a change of ownership is being contemplated, as determined by the department in its sole discretion.

(2) The department's waiver of some or all of the interest or penalties shall be conditioned on the skilled nursing facility's agreement to pay outstanding fee amounts on an alternative schedule developed by the department that takes into account the financial situation of the facility and the potential impact on delivery of services to Medi-Cal beneficiaries.

(3) The department shall post on its internet website a list of all skilled nursing facilities that received a waiver for payment of interest or penalties, including the amount of interest or penalty that was waived.

SEC. 2. Section 1325.5 of the Health and Safety Code is amended to read:

1325.5. (a) It is the intent of the Legislature in enacting this section to empower the state department to take quick, effective action to protect the health and safety of residents of long-term health care facilities and to minimize the effects of transfer trauma that accompany the abrupt transfer of elderly and disabled residents.

(b) For purposes of this section, "temporary manager" means the person, corporation, or other entity, appointed temporarily by the state department as a substitute facility manager or administrator with authority to hire, terminate, or reassign staff, obligate facility funds, alter facility procedures, and manage the facility to correct deficiencies identified in the facility's operation.

(c) The director may appoint a temporary manager when any of the following circumstances exist:

(1) The residents of the long-term health care facility are in immediate danger of death or permanent injury by virtue of the failure of the facility to comply with federal or state requirements applicable to the operation of the facility.

(2) As a result of the change in the status of the license or operation of a long-term health care facility, the facility is required to comply with Section 1336.2, the facility fails to comply with Section 1336.2, and the state department has determined that the facility is unwilling or unable to meet the requirements of Section 1336.2.

(d) Upon appointment, the temporary manager shall take all necessary steps and make best efforts to eliminate immediate danger of death or permanent injury to residents or complete transfer of residents to alternative placements pursuant to Section 1336.2.

(e) (1) The appointment of a temporary manager shall become effective immediately and shall continue until any of the following events occurs:

(A) The temporary manager notifies the department, and the department verifies, that the facility meets state and, if applicable, federal standards for operation, and will be able to continue to maintain compliance with those standards after the termination of temporary management.

(B) A receiver is appointed under this article.

(C) The department approves a new management company.

(D) A new operator is licensed.

(E) The state department closes the facility, through an orderly transfer of the residents.

(F) A hearing or court order ends the temporary manager appointment.

(G) The appointment is terminated by the department or the temporary manager.

(2) The appointment of a temporary manager shall authorize the temporary manager to act pursuant to this section. The appointment shall be made pursuant to an agreement between the temporary manager and the state department that outlines the circumstances under which the temporary manager may expend funds. The temporary manager shall make no long-term capital investments to the facility without the permission of the state department. The state department shall provide the

licensee and administrator with a statement of allegations at the time of appointment. Within 48 hours, the department shall provide the licensee and the administrator with a formal statement of cause and concerns. The statement of cause and concerns shall specify the factual and legal basis for the imposition of the temporary manager and shall be supported by the declaration of the director or the director's authorized designee. The statement of cause and concerns shall notify the licensee of the licensee's right to petition the Office of Administrative Hearings for a hearing to contest the appointment of the temporary manager and shall provide the licensee with a form and appropriate information for the licensee's use in requesting a hearing.

(f) (1) The licensee of a long-term health care facility may contest the appointment of the temporary manager by filing a petition for an order to terminate the appointment of the temporary manager with the Office of Administrative Hearings, within 60 days from the date of mailing of the statement of cause and concerns. On the same day as the petition is filed with the Office of Administrative Hearings, the licensee shall deliver a copy of the petition to the office of the director.

(2) Upon receipt of a petition of hearing, the Office of Administrative Hearings shall set a hearing date and time within five business days of the receipt of the petition. The office shall promptly notify the licensee and the state department of the date, time, and place of the hearing. The office shall assign the case to an administrative law judge. At the hearing, relevant evidence may be presented pursuant to Section 11513 of the Government Code. The administrative law judge shall issue a written decision on the petition within five business days of the conclusion of the hearing. The five-day time periods for holding the hearing and rendering a decision may be extended by the agreement of the parties.

(3) The administrative law judge shall uphold the appointment of the temporary manager if the state department proves, by a preponderance of the evidence, that the circumstances specified in subdivision (c) applied to the facility at the time of the appointment. The administrative law judge shall order the termination of the temporary manager if the burden of proof is not satisfied.

(g) The decision of the administrative law judge is subject to judicial review as provided in Section 1094.5 of the Code of Civil Procedure by the superior court sitting in the county where the facility is located. This review may be requested by the licensee of the facility or the state department by filing a petition seeking relief from the order. The petition may also request the issuance of temporary injunctive relief pending the decision on the petition. The superior court shall hold a hearing within five business days of the filing of the petition and shall issue a decision on the petition within five days of the hearing. The state department may be represented by legal counsel within the state department for purposes of court proceedings authorized under this section.

(h) If the licensee of the long-term health care facility does not protest the appointment, it shall continue in accordance with subdivision (e).

(i) (1) If the licensee of the long-term health care facility petitions the Office of Administrative Hearings pursuant to subdivision (f), the appointment of the temporary manager by the director pursuant to this section shall continue until it is terminated by the administrative law judge or by the superior court, or it shall continue for 30 days from the date the administrative law judge or the superior court upholds the appointment of the temporary manager, whichever is earlier.

(2) At any time during the appointment of the temporary manager, the director may request an extension of the appointment by filing a petition for hearing with the Office of Administrative Hearings and serving a copy of the petition on the licensee. The office shall proceed as specified in paragraph (2) of subdivision (f). The administrative law judge may extend the appointment of the temporary manager as follows:

(A) Upon a showing by the state department that the conditions specified in subdivision (c) continue to exist, an additional 60 days.

(B) Upon a finding that the state department is seeking a receiver, until the state department has secured the services of a receiver pursuant to this article.

(3) The licensee or the state department may request review of the administrative law judge's decision on the extension as provided in subdivision (g).

(j) The temporary manager appointed pursuant to this section shall meet the following qualifications:

(1) Be qualified to oversee correction of deficiencies on the basis of experience and education.

(2) Not have been found guilty of misconduct by any licensing board.

(3) Have no financial ownership interest in the facility and have no member of their immediate family who has a financial ownership interest in the facility.

(4) Not currently serve, or within the past two years have served, as a member of the staff of the facility.

(5) Be acceptable to the facility.

(k) Payment of the temporary manager's salary or fee shall comply with the following requirements:

(1) Shall be paid directly by the facility while the temporary manager is assigned to that facility.

(2) Shall be equivalent to the sum of the following:

(A) The prevailing salary or fee paid by licensees for positions of the same type in the facility's geographic area.

(B) Additional costs that reasonably would have been incurred by the licensee if the licensee had been in an employment relationship.

(C) Any other reasonable costs incurred by the appointed temporary manager in furnishing services pursuant to this section.

(3) May exceed the amount specified in paragraph (2) if the department is otherwise unable to attract a qualified temporary manager.

(l) (1) The state department may use funds from the Health Facilities Citation Penalties Account, pursuant to Section 1417.2, to operate the facility after all other facility revenues are exhausted.

(2) Funds used pursuant to this subdivision shall constitute a debt due to the state and may be collected pursuant to appropriate legal action taken by the department to collect the debt from the licensee, including from the licensee's financial interest in related parties described in subdivision (a) of Section 1424.3. Beginning January 1, 2023, the department shall give written notice to related parties that it may take action to collect the licensee's debt as described in this paragraph. If the department determines, after two notifications, that the related parties are not financially viable or recovery is unlikely, the department shall document this determination. The documentation shall include the names of the related parties notified, detailed information on the methods used by the department to make the determination, and a clear justification for the department's determination. The documentation of the department's determination and supporting explanation shall be available to the public by request, unless the records are not subject to disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of Government Code), in which case the department shall provide the reason for not disclosing the records.

(m) The state department shall adopt regulations for the administration of this section on or before December 31, 2001.

SEC. 3. Section 1424.3 is added to the Health and Safety Code, to read:

1424.3. (a) (1) Beginning January 1, 2023, if a licensee provider fails to pay a penalty assessed pursuant to Section 1424.5 or 1425 in full when all appeals have been exhausted and the department's position has been upheld, the department shall give written notice to the licensee provider and related parties in which the licensee provider has an ownership or control interest of 5 percent or more that the department may take appropriate legal action to recover the unpaid penalty amount from the provider licensee's financial interest in the related party. If the department determines, after two notifications, that the related parties are not financially viable or recovery is unlikely, the department shall document this determination. The documentation shall include the names of the related parties notified, detailed information on the methods used by the department to make the determination, and a clear justification for the department's determination. The documentation of the department's determination and supporting explanation shall be available to the public by request, unless the records are not subject to disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of Government Code), in which case the department shall provide the reason for not disclosing the records.

(2) When a citation is issued under Section 1424, the department shall give initial written notice to related parties of the basis for the citation, and the subsequent disciplinary action that is imminent if the violation is not remedied immediately, up to and including assessment of administrative penalties, for which the related party may be held responsible pursuant to this subdivision.

(b) "Related party" has the same meaning as in Section 128734.

SEC. 4. Section 1437.5 of the Health and Safety Code is amended to read:

1437.5. (a) If a facility is certified to participate in the federal Medicare program as a skilled nursing facility under Title XVIII of the Social Security Act, in the medicaid program as a nursing facility under Title XIX of the Social Security Act, or in both and any of the following occurs, the state department may rescind its regular license to operate and issue a provisional license under Section 1437:

(1) The facility's provider agreement is terminated, by the federal government or the department.

(2) A temporary manager is appointed, under federal law, to operate it.

(3) Payment becomes due on a federal civil money penalty of seven thousand dollars (\$7,000) per day, or greater, imposed on it.

(4) A federal civil monetary penalty of any amount is imposed and has continued for a period of 30 days or more.

(5) A federal civil monetary penalty of any amount is imposed and has accrued in an amount equal to, or greater than, thirty-five thousand dollars (\$35,000).

(b) The state department may not take action pursuant to subdivision (a) until a final administrative decision is issued if the facility has requested a hearing pursuant to federal law, until a facility has waived its right to a hearing under federal law, or until the time for requesting a hearing under federal law has expired and a hearing request was not received by federal authorities.

(c) If a receiver or temporary manager is appointed to operate a skilled nursing facility or an intermediate care facility, specified in paragraphs (1) and (2) of subdivision (a) of Section 1418, pursuant to state law, or as otherwise specified in regulations adopted by the department, the state department may rescind its regular license to operate and issue a provisional license under this section.

(d) (1) A provisional license issued pursuant to this section shall terminate six months from the date of issuance unless extended by the department.

(2) At least 30 days prior to the termination of a provisional license, the department shall give the facility a full and complete inspection. Beginning January 1, 2023, the department shall provide written notice to related parties described in subdivision (a) of Section 1424.3, of the outcome of the inspection and the possible outcomes set forth in this paragraph. If, at the time of the inspection, it is determined that the facility meets all applicable requirements for licensure, a regular license shall be restored. If, at the time of the inspection, it is determined that the facility does not meet the requirements for licensure, but the facility has made substantial progress towards meeting the requirements, as determined by the department, the provisional license shall be renewed for six months. If, at the time of the first inspection, the department determines that there has not been substantial progress towards meeting the requirements for licensure, or, if at any subsequent inspection the department determines that there has not been substantial progress towards meeting requirements identified at the most recent previous inspection, a regular license shall not be issued.

(e) The facility may request a hearing in writing within 10 days of the receipt of notice from the department denying a regular license under this section. The provisional license shall remain in effect during the pendency of the hearing. The hearing shall be held in accordance with Section 100171. The hearing officer shall uphold the denial of a regular license if the department proves, by a preponderance of the evidence, that the licensee did not meet the requirements for licensure.