

CDPH Program Flexibility

March 15, 2020 update: The California Department of Public Health (CDPH) has revised its process and form for requesting a COVID-19-related program flexibility as follows:

1. Hospitals should send a request for program flex directly to the Center for Health Care Quality Duty Officer in Sacramento at chcqduyofficer@cdph.ca.gov. The Sacramento office will inform the hospital's district office of all flexes every night.
2. All requests for program flex, including for flex of the nurse staffing ratios, should be made using [CDPH Form 5000 A](#). Be sure to use the version of the form that was revised on 3/2020. The date is found on the bottom left hand corner of the form.

Authority

CDPH has the authority to grant flexibility to a hospital in how the hospital meets the intent of licensing *regulations*. This is called "program flexibility," and applies to Title 22 requirements. This authority always exists; it is not related to COVID-19.

In addition, the Governor's proclamation of emergency dated March 4, 2020 gives CDPH the authority to waive licensing *statutes* (found in the Health and Safety Code) during the COVID-19 emergency period (which at this time has no specified end date). Pursuant to the Governor's proclamation, any facility granted a waiver must be operated in accordance with its disaster and mass casualty plan (this requirement does not apply to facilities granted a Title 22 program flex). CDPH will inform the hospital when a condition of approval includes operation in accordance with the disaster and mass casualty plan. CDPH will post these waivers on its website.

Note: This document describes the process for flexes/waivers of state laws. For information about waiver of federal laws, see "Other Flex Requests," below.

Process

The process for requesting program flexibility or a waiver is the same at this time (both are called "flex" in this document). The hospital should submit a flex request to the Medical and Health Coordination Center (MHCC) in Sacramento at chcqduyofficer@cdph.ca.gov for priority action. The Office of Statewide Health Planning and Development (OSHPD) and other state agencies are included in, or working with, the MHCC to help expedite processing of COVID-19 flex requests.

The MHCC's goal is to respond to requests within 24 hours. A site visit is often not required. Hospitals with questions about flexes or the status of a flex request should contact the Center for Health Care Quality duty officer at chcqduyofficer@cdph.ca.gov. The MHCC is sending a list of approved and pending flexes to the district offices every night.

The information to be included in the request is detailed below.

Space Flexes

Many hospitals have been granted flexes related to space. For example, a hospital may wish to set up a tent in its parking lot to screen potential COVID-19 patients or put med/surg patients in same-day surgery or PACU space. The hospital should outline what it wants to do in the box labeled “Additional Information” on the CDPH 5000 A form or on a separate page. CHA has posted sample, redacted flex requests for [space conversion](#), [patient accommodation](#), and [tent use](#).

Staffing Flexes

CDPH has requested that hospitals unable to meet the nurse staffing ratios on a prolonged or sustained basis due to COVID-19 submit a request for program flexibility. CDPH has requested the following information be included in the program flex request the box labeled “Additional Information” on the CDPH 5000 A form or on a separate page:

1. Why is the hospital requesting the flex? For example, are staff furloughed due to exposure to COVID-19? Are they calling in sick, or staying home to care for children because school is closed? Is the hospital’s usual temporary staffing service unable to provide nurses because they are declining to work in California? Is there normal staffing, but a patient surge?
2. What has the hospital done to obtain additional staffing? Have temporary staffing agencies been called? Has the hospital imposed voluntary or mandatory overtime or called in recently-retired nurses?
3. Specifically, what does the hospital plan to do instead of meeting the ratios? For example, which units will be staffed differently? What nurse staffing level is proposed? Is the hospital proposing to use a higher proportion of LVNs than permitted by the regulation, or will other types of licensed or unlicensed staff be used instead of licensed nurses?
4. Duration: Is this flex requested for the duration of the COVID-19 surge, or for a shorter time period?

This process is not needed for one-time or isolated incidents of noncompliance with the nurse staffing ratios. The ratio regulation provides an explicit exception for such noncompliance related to the change in patient census:

The hospital shall plan for routine fluctuations in patient census. If a healthcare emergency causes a change in the number of patients on a unit, the hospital must demonstrate that prompt efforts were made to maintain required staffing levels. A healthcare emergency is defined for this purpose as an unpredictable or unavoidable occurrence at unscheduled or unpredictable intervals relating to healthcare delivery requiring immediate medical interventions and care. [Title 22, California Code of Regulations, Section 70217(q)]

For one-time or isolated incidents of noncompliance with the nurse staffing ratios, regardless of the reasons, hospitals should make prompt efforts to mitigate the noncompliance, and retain documentation in the event of a later survey. There is no requirement to report such incidents to CDPH.

Other Flex Requests

On March 13, the President declared a national emergency under the National Emergencies Act due to the COVID-19 pandemic. The declaration is retroactive to March 1. Coupled with the Jan. 31 declaration of a public health emergency by the Secretary of the U.S. Department of Health and Human Services (HHS), the HHS Secretary now has the authority to waive certain laws. This authority is sometimes referred to as an “1135 waiver,” as it is authorized by Section 1135 of the Social Security Act.

The federal government has issued blanket waivers that apply to all facilities. Hospitals do not need to request an individual waiver to be relieved from compliance with these laws. In addition, HHS announced that it will issue further waivers over the weekend and early next week, including an EMTALA waiver and telehealth waivers. If a blanket waiver is insufficient to meet your needs, you can submit a request to operate under an individual Section 1135 waiver. Information about federal blanket waivers and individual waivers is described [here](#).

Other state agencies and licensing authorities may also have the ability to waive or flex various legal requirements. CHA is working with other agencies to obtain additional waivers and will inform hospitals as more information becomes available.

Hospitals with general questions about licensing matters or program flexes may contact BJ Bartleson at bjbartleson@calhospital.org or (916) 552-7537.