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SB 190 – Health Facility Certificate of Need 2018 Indiana General Assembly

Brief Summary

SB 190 creates a new Certificate of Need (CON) process for the construction of new skilled nursing facilities or the addition of beds to an existing skilled nursing facility. The law does not apply to any type of assisted living or residential care facilities. The CON process does not permit licensure of new beds or Medicaid certifications, rather the construction of a new skilled nursing facility or addition of beds to an existing skilled nursing facility would come from beds transferred to the area of need from other areas of the state with excess capacity. The law provides for several exemptions from the CON process.

The law becomes effective on July 1, 2018 and the first CON review period begins July 1, 2019. Between the effective date and the first CON review period the ISDH will adopt rules to implement the program.

The moratorium on skilled nursing facilities, a law that is separate from the CON law, will expire when state regulations required to be adopted under the CON law become effective. This creates an overlap between the two laws, including the exemptions, and this timing that should be considered if your facility or company desires to seek an exemption under either law.

Additional Details

SB 190 establishes the CON program at the ISDH for the purpose of permitting movement of excess comprehensive care beds between counties based upon demographic need. The CON process consists of two main elements: (1) a formula that calculates which counties have need for beds and which have excess supply; and (2) written criteria that an applicant must complete in the application process. The law also specifies the timing of how a CON application is processed by the ISDH.

CON Formula

Each year, the ISDH will calculate the State Bed Need Rate and each county's comprehensive care bed need based upon the State Bed Need Rate. A chart will be published by the ISDH before each July 1, beginning in 2019, to determine which counties are eligible to receive beds via transfer. The goal is to permit even distribution of beds across the state based upon the projected age 65+ population. The formula works as follows:

Step 1

- State Bed Need Rate is calculated by using examining current utilization and bed supply, comparing these figures to an ideal utilization of 90%, and then applying this ideal utilization the future population of individuals age 65+ (future population is a two-year projection based on current census data).
- County Comprehensive Care Bed Need is calculated by applying the State Bed Need Rate to each county's age 65+ population and current bed supply.
- This process determines whether a county has excess supply or is in need of beds for the age 65+ population.

Step 2

- If a county is found to have need for beds, then the occupancy in that county is examined to determine if beds can be transferred into that county from another county that has excess supply.
- The minimum occupancy required to transfer beds into a county that has need is 85%. In addition, the number of beds permitted to be transferred in cannot cause the county to dip below 85%.
- Occupancy is calculated based on data from Medicaid and Medicare cost reports filed 2 years prior to the CON review period. This means that for the review period that would start July 1, 2019, bed days available and total inpatient days from the 2017 cost report year will be used to calculate occupancy (total inpatient days ÷ bed days available = occupancy per facility).
- Any county that has excess supply, as determined in Step 1, from which beds are transferred from must maintain at least 50 beds in reserve. For example, if a county is determined to have 175 beds in excess, then during that CON period only 125 beds could be transferred from that county to a county that has need.

CON Application Criteria

The CON law lists the below elements as part of a CON application. An entity applying for a CON will provide information to the ISDH about the proposed project that are in line with these elements.

- Need of the population to be served
- Quality record of the applicant
- Staffing plan for the project
- Financing and cost effectiveness of the project, including impact on other providers, consumers, and the Medicaid program.
- For CONs that involve an existing facility, the historical, current and projected use of the facility
- The long-range plan of the applicant and project
- Effect of the project on meeting needs of low income, disabled, and minority populations
- Availability and impact of the project on ancillary services that relate to the project (dental care, pharmacy, diagnostic services, therapy, transportation, vision, lab)
- Compliance with applicable licensure standards
- History of compliance with CON processes

- Applicant’s legal right to the beds proposed to be transferred

In addition to these criteria, all submitted applications for a CON will be posted and public comment may be submitted on the applications.

CON Review Timeline, Process, and Rule Adoption

The review process will occur every year and begin on July 1 and last until the following June 30. The first review period will begin July 1, 2019. The law sets out the review period as follows:

July 1	Before July 1 the ISDH shall publish the results of the county by county need formula
July 31	Applications for a CON shall be accepted through July 31
August 15	Submitted CON applications published by August 15
October 15	Public comment accepted on submitted CON applications through October 15
April 30	Any decision on a submitted CON shall be issued not later than April 30

Comparative Review - It is possible for more than one CON application to be submitted for the same number or an overlapping number of beds to be transferred. In these circumstances, the ISDH will compare these applications. The law requires the ISDH to adopt regulations that would assign a points system to each of the items under the CON Application Criteria, above, and applications would be scored according to the ISDH’s review of the information submitted by the applicant. The applicant with the highest point total would be awarded the CON. For ties, the ISDH Commissioner makes the final decision.

If a CON is issued to an applicant, the applicant has 18 months to act on the CON and maintain active and ongoing construction until the project is completed. In addition, approved CONs are not transferrable or assignable to other parties.

The ISDH will adopt rules to (1) set fort the process of public comment on CON applications; (2) develop the points system for comparative review of CON applications; and (3) set fees for CON applications and any other implementation needs. These rules should be in effect by June 30, 2019.

Exemptions to CON Review

Several exemptions were adopted in the law, many of which are familiar from prior laws that limited construction of skilled nursing facilities. The exemptions are:

- Construction of a replacement facility constructed within the same county. The replacement facility cannot be larger than the facility it is replacing unless the replacement facility obtains beds from another facility located in the same county.
- Modifications/renovations/additions to existing facilities so long as no new beds are added, unless those beds come from another facility inside the same county.
- Bed transfers between facilities within the same county. Facilities do not have to have common ownership or control in order to transfer beds. This exemption requires the transferring facility to decrease the number of beds it is licensed to operate and the receiving facility to increase the bed count of the beds it is licensed to operate. Transfer of only a certification for a bed to bill Medicaid is not permitted.
- Nursing facilities for bona fide religious and fraternal organizations are exempt when a majority of the beds in those facilities are used for members of the religious or fraternal organization. Beds added by these entities are restricted from any conveyance for 20 years, unless the conveyance is to another bona fide organization.
- Small House Health Facilities for purposes of adding up to 100 beds per year overall and 50 beds per operator.
- Continuing Care Retirement Communities for purposes of the entity fulfilling a continuing care contract regulated under Indiana securities law.

Expiration of the Nursing Facility Moratorium and Overlap with CON Law

Both the moratorium law and CON law prohibit the construction of new nursing facilities, addition of new beds, and transfer of beds unless exempted or a CON is issued. The moratorium law (IC 26-28-2.5) is set to expire upon the effective date of the regulations adopted by the ISDH that implement the CON law. It is likely those regulations will become effective between April 1, 2019 and June 30, 2019. With the CON law becoming effective on July 1, 2018 an overlap of each of these laws' prohibitions and exemptions will occur until the moratorium expires upon the effective date of the CON regulations.

Both the moratorium and CON laws contain exemptions. Though many of the exemptions are the same, there are a couple exemptions that only exist in one law or the other. The CON law expressly states that the exemptions under the moratorium law are also exempt under the CON law. Therefore, exemptions in the moratorium law that are not also in the CON law can be acted upon until the moratorium law expires. The reverse is not true, however. The moratorium law was not amended to permit exemptions in the CON law that only exist in the CON law to come into effect early. This means that exemptions in the CON law that are not also exemptions in the moratorium law will only come into effect when the moratorium expires.

A facility that desires to take advantage of any of the exemptions in the moratorium law before expiration should do so as quickly as possible so as not to run up against the expiration date. Any issues that would delay a transaction beyond the effect of the moratorium exemption could complicate or kill the transaction all together. The below sets out each exemption and the timing of effect or expiration.

Exemption Type	Moratorium Exemption	CON Exemption	Timing of Effect or Expiration
Replacement facility constructed within the same county with same number of beds or fewer	Yes	Yes	No gap in time for this exemption
Modifications/renovations/additions to existing facilities with no new beds	Yes	Yes	No gap in time for this exemption
Bed transfers between facilities within the same county	No	Yes	Effective upon expiration of moratorium*
Replacement facility constructed within f the same county and adding beds from transfers from inside the county	No	Yes	Effective upon expiration of moratorium*
Modifications/renovations/additions to existing facilities with adding beds from transfers within the county	No	Yes	Effective upon expiration of moratorium*
Nursing facilities for bona fide religious and fraternal organizations	No	Yes	Effective upon expiration of moratorium*
Small House Health Facilities	Yes	Yes	No gap in time for this exemption
Continuing Care Retirement Communities	Yes	Yes	No gap in time for this exemption
Facilities under development as of July 1, 2015	Yes	No	Ability to use is fixed and passed
Construction of comprehensive care facility or addition of beds in counties that have occupancy in excess of 90% on either Jan. 1 or July 1 of each year	Yes	No	Will expire upon expiration of moratorium*
Closure of at least one (1) existing facility and transfer of beds from that closed facility to any other facility in the state	Yes	No	Will expire upon expiration of moratorium*
Closure of two (2) or more facilities and beds from the closed facilities are used to construct a new facility or facilities	Yes	No	Will expire upon expiration of moratorium*

* Moratorium expires upon effective date of regulations required to be adopted under the CON law (approximately between April 1, 2019 and June 30, 2019)

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