

STATE OF NEW JERSEY

DEPARTMENT OF HEALTH

NOTICE OF RULE WAIVER/MODIFICATION/SUSPENSION

PURSUANT TO EXECUTIVE ORDER NO. 103 (MURPHY)(MARCH 9, 2020) AND EXECUTIVE ORDER NO. 119 (APRIL 7, 2020)

COVID-19 STATE OF EMERGENCY

Temporary Rule WAIVER/MODIFICATION OF N.J.A.C. 8:39-43.1, 8:39-43.2, 8:39-43.3(a), 8:39-43.4(a), 8:39-43.6(a) and (d), and 8:43I-2.5 - Requirements for Nurse Aide Certification, adopted by the DEPARTMENT OF HEALTH

Date: April 29, 2020

Authority: N.J.S.A. App. A:9-45 & App. A:9-47; Executive Order No. 103 (Murphy) (“EO 103”) and Executive Order No. 119 (Murphy) (“EO 119”)

Effective Date: **April 29, 2020**

Expiration Date: Forty-five days following the termination of the Public Health Emergency

This is an emergency adoption of a temporary rule waiver/modification of: N.J.A.C. 8:39-43.1, which sets forth the requirements for individuals working as nurse aides in licensed long-term care facilities (nurse aide); of N.J.A.C. 8:39-43.2, which sets forth the requirements for applicants to receive certification as a nurse aide in long-term care facilities (certification); of N.J.A.C. 8:39-43.3(a), which waives certain requirements to receive a nurse aide certification; of N.J.A.C. 8:39-43.4(a), which sets forth the requirement that nurse aide certificates (certificate) shall be valid for two years from the date of issue; of N.J.A.C. 8:39-43.6(a), which sets forth the requirement that certificates be renewed every two years; of N.J.A.C. 8:39-43.6(d), which sets forth the steps an individual must take if the recertification requirements are not met; and of N.J.A.C. 8:43I-2.5, which prohibits an individual who has not yet successfully completed a Nurse Aide Training and Competency Evaluation Program and passed the State skills and written or oral exam from being employed as a nurse aide for more than 120 days.

Section 6 of EO 103, issued in response to the COVID-19 pandemic, authorizes agency heads to waive/suspend/modify any existing rule, where the enforcement of the rule would be detrimental to the public welfare during the emergency, notwithstanding the provisions of the Administrative Procedure Act or any law to the contrary. EO 119 extends this authorization. Pursuant to that authority, as well as the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -31, and N.J.A.C. 8:36-2.7(a), and with the approval of the Governor and in consultation with the State Director of Emergency Management, the Department of Health is waiving its rules as follows:

COVID-19 is a contagious, and at times fatal, respiratory disease that is responsible for the 2019 novel coronavirus outbreak. The Centers for Disease Control and Prevention (CDC) expects that additional cases of COVID-19 will be identified in the coming days, including more cases in the United States, and that person-to-person spread is likely to continue to occur. As of April 26, 2020, there were at least 109,035 positive cases of COVID-19 in New Jersey, with at least 5,935 of those cases having resulted in death. If COVID-19 continues to spread in New Jersey at a rate comparable to the rate of spread in other affected areas, it will greatly strain the health care professionals charged with caring for patients ill with COVID-19

and may become too large in scope to be handled by New Jersey's currently certified health care professionals. Staffing shortages have already been reported at long-term care facilities, assisted living facilities, assisted living programs and comprehensive personal care homes throughout New Jersey.

N.J.A.C. 8:39-43.1 sets forth the requirements for nurse aide competency to work in long-term care facilities. Under the rule, individuals must have a currently valid certificate and be registered in good standing on the New Jersey Nurse Aide Registry. It also restricts the time an uncertified nurse aide is competent to be employed as a nurse aide in a long-term care facility.

Further, N.J.A.C. 8:39-43.2 sets forth the requirements for applicants to receive certification as a nurse aide in long-term care facilities. Under the rule, applicants must (1) successfully complete a nurse aide in long-term care facilities training program that has been approved by the Department; (2) provide evidence that he or she is of good moral character, including, but not limited to, compliance with the requirements of the Criminal Background Investigation Program in accordance with N.J.A.C. 8:43I; and (3) pass both the Department's clinical skills competency exam and written/oral exam.

Further, N.J.A.C. 8:39-43.3(a) permits certain individuals who have not yet completed a nurse aide training course and clinical skills evaluation to take the written or oral examination under certain circumstances;

Further, N.J.A.C. 8:39-43.4(a) directs that a nurse aide certificate shall be valid for a period of two years from the date of issue.

Further, N.J.A.C. 8:39-43.6 requires that a nurse aide certificate be renewed every two years and establishes the process for that renewal. A nurse aide who does not meet the recertification requirement listed in subsection (b) and who wishes to be recertified, is currently required to repeat the requirements for certification at N.J.A.C. 8:39-43.2, unless the original date of issue of the certificate is within the five years prior to the expiration date listed on the certificate and the nurse aide successfully completes the skills evaluation and written or oral examination. Further, a nurse aide whose certification has expired must undergo a criminal background investigation per N.J.A.C. 8:43I, regardless of whether the individual must complete a training program.

Further, N.J.A.C. 8:43I-2.5 prohibits an individual who has not yet successfully completed a Nurse Aide Training and Competency Evaluation Program and passed the State skills and written or oral exam from being employed as a nurse aide for more than 120 days.

A. Nurse aides whose certifications have expired within the past three years

In order to effectively respond to the shortage of nurse aides in long-term care facilities, assisted living facilities, assisted living programs and comprehensive personal care homes, it is necessary to waive/modify N.J.A.C. 8:39-43.1(a)(1), N.J.A.C. 8:39-43.2(a)(1) and (3), N.J.A.C. 8:39-43.4(a), N.J.A.C. 8:39-43.6(a) and N.J.A.C. 8:39-43.6(d) for nurse aides whose certificates have expired within the past three years. Pursuant to this waiver, facilities are permitted to employ nurse aides whose certificates have expiration dates within the past three years to work as certified nurse aides. All individuals seeking to work as a certified nurse aide pursuant to this waiver must comply with the requirements for a criminal background check pursuant to N.J.A.C. 8:43I.

B. Students, graduate nurses, foreign licensed nurses and others who submit evidence of the successful, timely completion of a course in the fundamentals of nursing

It is also necessary to expand the exceptions to N.J.A.C. 8:39-43.2 set forth in N.J.A.C. 8:39-43.3. Accordingly, the Department temporarily waives/modifies N.J.A.C. 8:39-43.3 by adding new subsection (b), to permit students, graduate nurses, or foreign licensed nurses, pending licensure, who submit to a facility evidence of the successful completion of a course in the fundamentals of nursing, and other persons who submit to a facility evidence of the successful completion of a course in the fundamentals of nursing within the preceding 12 months, to be temporarily employed as certified nurse aides without completing the requirement to pass the Department's written/oral examination. This waiver/modification of the rule is necessary to effectively respond to the immediate shortage of staff in long-term care facilities while still ensuring that individuals who are hired as nurse aides receive the adequate training. All individuals seeking to work as a nurse aide pursuant to this waiver must comply with the requirements for a criminal background check pursuant to N.J.A.C. 8:43I.

C. Extension of the time during which certain uncertified nurse aides may be employed pending certification

Finally, it is necessary to waive/modify N.J.A.C. 8:43I-2.5, by extending the 120-day employment limitation for individuals who have not yet successfully completed a Nurse Aide Training and Competency Evaluation Program and passed the State skills and written or oral exam by an additional 90 days. All individuals seeking to work as a nurse aide pursuant to this waiver must comply with the requirements for a criminal background check pursuant to N.J.A.C. 8:43I.

Facilities that hire one or more nurse aides under all the modified requirements created by this waiver/modification must retain records detailing which, if any, of the above actions were implemented. The records must also include: (1) a list of the names, Social Security numbers and birth dates of the individuals temporarily hired pursuant to this waiver/modification; (2) if the waiver requires submission of evidence of the successful completion of a course in the fundamentals of nursing, the records of each individual's successful completion of a course in the fundamentals of nursing; (3) the duration of the implementation; and (4) documentation of any incidents involving the abuse, neglect or misappropriation of property of a resident of the facility, which are attributable to the nurse aides hired under this waiver/modification. Moreover, any incidents involving the abuse, neglect or misappropriation of property of a resident of the facility, which are attributable to the nurse aides hired under this waiver/modification, must be immediately reported to the Department.

Facilities that hire one or more nurse aides under the modified requirements created by this waiver/modification must, within one week of the hiring of one or more nurse aides, provide the Department with the names, Social Security numbers and birth dates of the individuals temporarily hired pursuant to this waiver/modification by sending the information to:

Garlina Finn, Education Program Development Specialist
Certification Program
New Jersey Department of Health
P.O. Box 358
Trenton, New Jersey 08625-0358

This rule waiver/modification will allow the Department to effectively respond to the immediate shortage of staff in long-term care facilities while still ensuring that individuals who are hired as nurse aides have received adequate training.

This waiver/modification is effective through the forty-fifth day following the termination of the Public Health Emergency. Facilities will thereafter be required to return to operation in accordance with all licensure standards.

Full Text of the modified rules follows, with additional terms and conditions indicated in boldface:

8:39-43.1 - Nurse aide competency

(a) An individual who meets any of the following criteria shall be considered by the Department to be competent to work as a nurse aide in a licensed long-term care facility in New Jersey:

1. Has a currently valid nurse aide in long-term care facilities certificate and is registered in good standing on the New Jersey Nurse Aide Registry;
2. Has been employed for less than 120 days and is currently enrolled in an approved nurse aide in long term care facilities training course and scheduled to complete the competency evaluation program (skills and written/oral examination) within 120 days of employment; or
3. Has been employed for no more than 120 days, has completed the required training specified in (a)2 above, and has been granted a conditional certificate by the Department while awaiting clearance from the criminal background investigation conducted in accordance with N.J.A.C. 8:43I.

(b) Notwithstanding subsection (a)(1) above, during the existence of the Public Health Emergency and for forty-five days thereafter, an individual whose nurse aide certification has expired within the last three years must only comply with the modified requirements of N.J.A.C. 8:39-43.2, as noted below.

(c) Notwithstanding subsection (a)(2) &(3) above, during the existence of the Public Health Emergency and for forty-five days thereafter, an individual shall also be considered by the Department to be competent to work as a nurse aide in a licensed long-term care facility in New Jersey if:

- 1. The individual has been employed for less than 210 days and is currently enrolled in an approved nurse aide in long term care facilities training course and scheduled to complete the competency evaluation program (skills and written/oral examination) within 210 days of employment; or**
- 2. The individual has been employed for no more than 210 days, has completed the required training specified in (a)2 above, and has been granted a conditional certificate by the Department while awaiting clearance from the criminal background investigation conducted in accordance with N.J.A.C. 8:43I.**

(d) Nursing homes, assisted living facilities, assisted living programs and comprehensive personal care homes may temporarily employ individuals who qualify under N.J.A.C. 8:39-43.1(b) and (c). Facilities that hire one or more nurse aides under the modified requirements created by this waiver/modification must:

- 1. retain records detailing which, if any, of the above actions were implemented, including a list of the names, Social Security numbers and birth dates of the individuals temporarily hired pursuant to this waiver/modification, and the duration of the implementation; and**
- 2. document and immediately report to the Department any incidents involving the abuse, neglect or misappropriation of property of a resident of the facility,**

**which are attributable to the nurse aides hired under this waiver/modification;
and**

- 3. within one week of the hiring of one or more nurse aides, provide the Department with the names, Social Security numbers and birth dates of the individuals temporarily hired pursuant to this waiver/modification by sending the information to:**

**Garlina Finn, Education Program Development Specialist
Certification Program
New Jersey Department of Health
P.O. Box 358
Trenton, New Jersey 08625-0358**

8:39-43.2 – Requirements for Nurse Aide Certification

- (a) An applicant for certification as a nurse aide in long-term care facilities shall:
 1. Successfully complete a nurse aide in long-term care facilities training program that has been approved by the Department;
 2. Provide evidence that he or she is of good moral character, including, but not limited to, compliance with the requirements of the Criminal Background Investigation Program in accordance with N.J.A.C. 8:43I; and
 3. Pass both the Department's clinical skills competency exam and written/oral exam.
- (b) An applicant shall fulfill the requirements in (a) above in order to be listed on the New Jersey Nurse Aide Registry.
- (c) **Notwithstanding subsections (a) and (b) above, during the existence of the Public Health Emergency and for forty-five days thereafter, an individual whose nurse aide certification has expired within the last three years may be eligible for employment as a nurse aide so long as the individual complies with the requirements for a criminal background check pursuant to N.J.A.C. 8:43I.**

8:39-43.3– Exceptions

- (a) The following persons may take the Department's written/oral examination without first completing a nurse aide training course and clinical skills evaluation approved in accordance with N.J.A.C. 8:39-43.10:
 1. Students, graduate nurses, or foreign licensed nurses, pending licensure, who submit evidence of successful completion of a course in the fundamentals of nursing;
 2. Persons who submit evidence of the successful completion of a course in the fundamentals of nursing within the 12 months immediately preceding application to take the written/oral competency examination, including:
 - i. Persons certified as a nurse aide in long-term care facilities in another state by a state governmental agency and listed on that state's nurse aide registry, who do not meet the requirements for equivalency specified at (a)1 above; and

- ii. Persons who have had training and experience as a nurse aide in a military service, equivalent to that of a nurse aide;
 3. Persons who are certified as homemaker-home health aides by the New Jersey Board of Nursing, in accordance with N.J.A.C. 13:37-14, and who successfully complete the Long-Term Care Module of the Core Curriculum for Unlicensed Assistive Personnel approved by the Department;
 4. Persons who successfully complete the Core Curriculum for Unlicensed Assistive Personnel approved by the Department and the New Jersey Board of Nursing, and the Long Term Care Module of the Core Curriculum for Unlicensed Assistive Personnel approved by the Department.
- (b) Notwithstanding the above requirements, during the existence of the Public Health Emergency and for forty-five days thereafter, the following individuals may be temporarily employed as certified nurse aides without completing the requirement to pass the Department's written/oral examination:**
1. **Students, graduate nurses, or foreign licensed nurses, pending licensure, who submit to a facility evidence of the successful completion of a course in the fundamentals of nursing; and**
 2. **Other persons who submit to a facility evidence of the successful completion of a course in the fundamentals of nursing within the preceding 12 months;**
 3. **All individuals seeking to work as a nurse aide pursuant to this waiver/modification must comply with the requirements for a criminal background check pursuant to N.J.A.C. 8:43I;**
 4. **Nursing homes, assisted living facilities, assisted living programs and comprehensive personal care homes may temporarily employ individuals who qualify under N.J.A.C. 8:39-43.3(b). Facilities that hire one or more nurse aides under the modified requirements created by this waiver/modification must:**
 - a. **retain records detailing which, if any, of the above actions were implemented, including a list of the names, Social Security numbers and birth dates of the individuals temporarily hired pursuant to this waiver/modification, the records of each individual's successful completion of a course in the fundamentals of nursing, and the duration of the implementation; and**
 - b. **document and immediately report to the Department any incidents involving the abuse, neglect or misappropriation of property of a resident of the facility, which are attributable to the nurse aides hired under this waiver/modification; and**
 - c. **within one week of the hiring of one or more nurse aides, provide the Department with the names, Social Security numbers and birth dates of the individuals temporarily hired pursuant to this waiver/modification by sending the information to:**

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Certification Program
New Jersey Department of Health
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8:39-43.4 – Certificates

- (a) A nurse aide in long-term care facilities certificate shall be valid for a period of two years from the date of issue.
- (b) A nurse aide certificate shall not be retained by an employer for any reason.
- (c) A nurse aide certificate is not transferable by sale, gift, duplication, or other means and shall not be forged or altered.
- (d) During the existence of the Public Health Emergency and for forty-five days thereafter, individuals whose certificates have expired within the past three years who meet the requirements of N.J.A.C. 8:39-43.2(c) shall not be subject to the requirement set forth in subsection (a).**

8:39-43.6 – Recertification

- (a) The Department shall require the renewal and updating of a nurse aide listing on the registry at least once every two years on a schedule established by the Department.
- (b) In order to be recertified, an individual shall have a currently valid nurse aide in long-term care facilities certificate and shall have been employed performing nursing or nursing-related services for at least seven hours for pay, in a licensed health care facility or for an agency licensed by the Department, within the past 24 months from the date of expiration as specified on the nurse aide certificate, and shall not have had his or her certificate revoked in accordance with N.J.A.C. 8:39-43.5(a), and shall not have his or her certificate suspended in accordance with N.J.A.C. 8:39-43.5(b).
- (c) The designated facility representative shall verify such employment by signing the individual's recertification data mailer upon request of the individual.
- (d) Any individual who does not meet the recertification requirement listed in (b) above and who wishes to be recertified, shall repeat the requirements for certification at N.J.A.C. 8:39-43.2, unless the original date of issue of the certificate is within the five years prior to the expiration date listed on the certificate and the nurse aide successfully completes the skills evaluation and written/oral examination.
 - 1. Any individual who has allowed his or her certificate to expire must undergo a criminal background investigation as required by N.J.A.C. 8:43I, regardless of whether the person must complete a training program.

- (e) Subsections (a) and (d) are waived during the existence of the Public Health Emergency and for forty-five days thereafter, for individuals whose nurse aide in long-term care facilities certification has expired within the last three years, except that the individual must comply with the requirements for a criminal background check pursuant to N.J.A.C. 8:39-43.2(c) and N.J.A.C. 8:43I.**

8:43I-2.5 Conditional Certification

- (a) An applicant for certification as a nurse aide may be issued a conditional certification and may be employed in the capacity of a nurse aide for a period of up to 120 days, as follows:
1. The Department will issue a conditional certification to the applicant for a period not to exceed 120 days if the application demonstrates that the candidate has provided a sworn statement indicating that her or she has not been convicted of any of the offenses listed at N.J.A.C. 8:43I-2.3, and has not been placed on the Department's Nurse Aide Abuse Registry pursuant to N.J.A.C. 8:39-43.7(b).
 2. All conditional certification documents issued by the Department shall bear the issue and expiration date, and are non-renewable.
 3. Nothing in this chapter shall be construed as to permit an individual with a conditional certification authority to perform those duties of a nurse aide for which the applicant has not yet been trained or authorized to perform.
 4. Nothing in this chapter shall be construed as to permit an individual to remain employed as a nurse aide for more than 120 days prior to successfully completing a NATCEP and passing the State skills and written or oral exam as required by 42 U.S.C. §§ 1396r(b)5 or 1395I-3(b)5.
 5. If a conditionally certified applicant is disqualified from certification, the Department shall issue a notice to the applicant and employer, if known. The notice to the employer shall state that the applicant is disqualified, but shall not disclose the offenses upon which the disqualification is based.
 - i. Upon receipt of the notice, the employer shall immediately remove the person from duties which require regular contact with patients, residents or clients. The person shall not have unsupervised contact with any patient, resident or client, nor shall the property of those persons be entrusted to any disqualified applicant.
 - ii. If the employer receives notice from the Department that the applicant has filed for a hearing to contest the accuracy of their criminal history record background investigation, the person may remain employed pending a final decision on the person's petition, but the employer shall not permit the person to have unsupervised contact with elderly patients, residents or clients.
 - iii. The Department will notify the employer of any requests for hearings, and the results of any hearings, within five days of receipt of such request or disposition.

(b) Notwithstanding subsection (a)(1) and (4) above, an applicant for certification as a nurse aide may also be issued a conditional certification and may be employed in the capacity of a nurse aide for a period of up to 210 days during the existence of the Public Health Emergency and for 45 days thereafter, as follows:

1. The Department will issue a conditional certification to the applicant for a period not to exceed 210 days if the application demonstrates that the candidate has provided a sworn statement indicating that he or she has not been convicted of any of the offenses listed at N.J.A.C. 8:43I-2.3, and has not been placed on the Department's Nurse Aide Abuse Registry pursuant to N.J.A.C. 8:39-43.7(b).

I find that waiver/modification of the rules above is necessary because enforcement of the existing rules would be detrimental to the public welfare during this emergency.

JUDITH M. PERSICHILLI, RN, BSN, MA
COMMISSIONER
DEPARTMENT OF HEALTH

DATE

4/29/2020

Judith M. Persichilli

WAIVER – N.J.A.C. 8:39-43.1(a)(1), 8:39-43.2(a)(1) and (3), 8:39-43.4(a) and 8:39-43.6(a) and (d)