



TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

APD 45-2020

CHAPTER 411
DEPARTMENT OF HUMAN SERVICES
AGING AND PEOPLE WITH DISABILITIES AND DEVELOPMENTAL DISABILITIES

FILED

10/21/2020 9:58 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Establish COVID-19 testing requirements for nursing facilities, assisted living facilities and residential care facilities

EFFECTIVE DATE: 11/01/2020 THROUGH 01/10/2021

AGENCY APPROVED DATE: 10/20/2020

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NEED FOR THE RULE(S):

Due to the COVID-19 pandemic, the Department is adopting OAR chapter 411, division 60, which requires COVID-19 testing in Nursing Facilities, Assisted Living Facilities and Residential Care Facilities.

JUSTIFICATION OF TEMPORARY FILING:

Failure to act promptly and immediately adopt OAR chapter 411, division 060 will result in serious prejudice to the public interest and may continue the spread of COVID-19. These rules need to be adopted promptly so that Oregon can serve vulnerable adults during this pandemic.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

None.

RULES:

411-060-0000, 411-060-0005, 411-060-0010, 411-060-0020, 411-060-0025, 411-060-0027, 411-060-0028, 411-060-0030, 411-060-0040, 411-060-0050, 411-060-0060

ADOPT: 411-060-0000

SUSPEND: Temporary 411-060-0000 from APD 34-2020

RULE SUMMARY: Created to state the purpose and scope of these rules. The purpose of these rules has been changed to include routine testing of staff.

CHANGES TO RULE:

411-060-0000

Purpose

The purpose of these rules in OAR chapter 411, division 060 is to establish requirements for Nursing Facilities.

Assisted Living Facilities and Residential Care Facilities to ensure all residents, Facility Staff and Associated Staff are tested for COVID-19. The scope of these rules includes requirements for admission testing, routine testing of staff, and ongoing outbreak-associated testing. The standards are designed to protect vulnerable Residents, prevent transmission among Residents, Facility Staff and Associated Staff, and improve prevention efforts during the COVID-19 pandemic.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

ADOPT: 411-060-0005

SUSPEND: Temporary 411-060-0005 from APD 34-2020

RULE SUMMARY: Created to list the applicable definitions for COVID-19 testing. Definitions relating to initial testing have been deleted. The definition for "Associated Staff" has been updated and definitions for "Positivity Rate" and "Routine Testing" have been added.

CHANGES TO RULE:

411-060-0005

Definitions

- (1) "Assisted Living Facility" refers to entities licensed under rules contained in Oregon Administrative Rule chapter 411, division 054.¶
- (2) "Associated Staff" means individuals providing direct care services to facility residents via a contractual relationship with the facility such as supplemental staffing agencies. Associated staff also includes volunteers, hospice personnel, caregivers who provide care and service to residents on behalf of the facility, individuals providing environmental (housekeeping, laundry) or food services via a contractual relationship with the facility, and students in the facility's nurse aide training program or from affiliated academic institutions. ¶
- (3) "Associated Staffing Provider" means a separate legal entity, including an entity that has contracted with a Facility to provide staffing for the Facility, which employs Associated Staff.¶
- (4) "Authority" means the Oregon Health Authority.¶
- (5) "COVID-19" refers to Coronavirus disease 2019, which is defined as an illness caused by a novel coronavirus now called severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).¶
- (6) "Department" means the Department of Human Services.¶
- (7) "Facility" means an Assisted Living Facility, Nursing Facility and Residential Care Facility licensed by the Oregon Department of Human Services.¶
- (8) "Facility Staff" means anyone directly employed by the Facility who is scheduled, or anticipated, to work at the Facility in the future.¶
- (9) "Hospital" means Hospital as defined in ORS 442.015.¶
- (10) "Isolation" means the separation of sick people with, or presumed to have, a contagious disease, including COVID-19, from people who do not have that contagious disease.¶
- (11) "Legal Representative" means that term as defined in OAR 411-085-0005.¶
- (12) "Local Public Health Authority" means Local Public Health Authority (LPHA) as defined in ORS 431.003.¶
- (13) "Nursing Facility" means an entity licensed by the Department pursuant to Oregon Administrative Rule chapter 411, division 085 to 089.¶
- (14) "Positivity Rate" means the percentage of people who test positive for COVID-19 of those overall, who have been tested in a defined group in a defined period of time.¶
- (15) "Quarantine" means separation and restriction of the movement of people who have been exposed to a contagious disease, including COVID-19, to see if they become infected with the contagious disease. ¶
- (16) "Resident" is defined as an individual who has been admitted or moved in and is receiving room, board, care and services on a 24-hour basis in a Facility.¶
- (17) "Residential Care Facility" means an entity licensed under rules contained in Oregon Administrative Rule chapter 411, division 054.¶
- (18) "Routine Testing" means regular, proactive testing of a defined population such as Facility Staff and Associated Staff to identify the presence of the COVID-19 virus in symptomatic and asymptomatic individuals. ¶
- (19) "Suspect COVID-19" refers to a person with a new onset of symptoms consistent with COVID-19, including fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste, sore throat, nausea or vomiting, or diarrhea, without a more likely alternative diagnosis.¶
- (20) "Testing" refers to a testing process to detect SARS-CoV-2 by a laboratory certified by the US Clinical Laboratory Improvement Amendments program (CLIA) and that meets Authority (OHA) and Department testing

criteria.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

ADOPT: 411-060-0010

SUSPEND: Temporary 411-060-0010 from APD 34-2020

RULE SUMMARY: Created to outline responsibilities for use of quarantine, screening, and testing for COVID-19 prior to admitting or readmitting residents into the facility. The rule has been updated to except residents who have recovered from COVID-19 within 90 days of admission and are asymptomatic from quarantine requirements, provide clarification that negative tests do not supplant quarantine requirements, and add a requirement that facilities must follow OHA COVID-19 clinical guidelines.

CHANGES TO RULE:

411-060-0010

Admission and Readmission Testing

(1) A Facility shall implement quarantine measures for newly admitted or readmitted Residents for a period of 14 days, except residents who have recovered from COVID-19 within 90 days of admission or readmission and are asymptomatic. Quarantine measures can include placement of Resident in a private room, or cohorted area and use of personal protective equipment for Resident care as prescribed by the Authority, and monitoring for signs and symptoms associated with COVID-19 at least daily. ¶

(2) A Facility shall conduct risk-based COVID-19 screenings of all Residents prior to admission or re-admission, based on OHA guidance for identifying people with symptoms consistent with having the COVID-19 virus and/or with having known contacts with a person(s) with COVID-19 or Suspect COVID-19. Negative tests obtained during the quarantine period do not supplant quarantine requirements in section (1) of this rule. ¶

(3) A Facility may not admit or readmit a Resident that presents with any COVID like symptoms and/or has had known contacts with a person(s) with COVID-19, as determined by the risk-based screening described in section (2) of this rule, regardless of symptom severity, unless Testing has been administered to the Resident and test results have been received by the Facility prior to admission. Testing should be performed no more than three days prior to the proposed admission date. Negative test results from pre-admission testing are in supplement to, and do not supplant, quarantine requirements in section (2) of this rule. ¶

(4) A Facility shall obtain written approval from the Department prior to admitting Residents known to have COVID-19. ¶

(5) A Facility shall follow OHA COVID-19 clinical guidelines as published on the OHA website.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

SUSPEND: 411-060-0020

SUSPEND: Temporary 411-060-0020 from APD 34-2020

RULE SUMMARY: This rule has been suspended since initial testing has concluded.

CHANGES TO RULE:

411-060-0020

Initial Testing Requirements

- (1) The State of Oregon will provide testing services for all initial testing of all Residents, Facility Staff and Associated Staff for all Facilities in Oregon.¶¶
- (2) Facilities are required to cooperate with the State Testing Provider in performing the initial testing, unless they choose to use their own Contracted Testing Provider, subject to the reimbursement provisions contained in OAR 411-060-0060.¶¶
- (3) Each Facility is required to communicate the testing and reporting requirements to those Associated Staffing Providers who provide Associated Staff for their Facility.¶¶
- (4) For a Facility or Associated Staffing Provider electing to use its own Contracted Testing Provider, the Facility or Associated Staffing Provider must demonstrate that the Contracted Testing Provider uses testing practices as defined in OAR 411-060-0005, and gathers and reports to the Facility or Associated Staffing Provider all data necessary to meet the reporting requirements described in OAR 411-060-0050.¶¶
- (5) Except as provided in this rule, all initial testing must be completed between the period June 1, 2020 and September 30, 2020, or as agreed upon by the State of Oregon and the State Testing Provider(s).¶¶
- (6) Asymptomatic Residents, Facility Staff and Associated Staff that can be documented by the Facility as having been tested on or after June 1, 2020 do not need to be re-tested prior to September 30, 2020 to meet the initial testing requirements.¶¶
- (7) Symptomatic Residents, Facility Staff and Associated Staff shall be tested pursuant to OAR 411-060-0030(1).¶¶
- (8) The Department may prioritize certain Facilities and begin testing earlier or later in the testing period identified in section (6) of this rule, based on factors which may include, but are not limited to, the type or location of the Facility.¶¶
- (9) A Resident or a Resident's legal representative may refuse a COVID-19 test pursuant to the consent process described in OAR 411-060-0040. A Facility may not impose any negative consequences on a Resident who refuses testing, but may implement appropriate infection control practices as necessary to protect the health and safety of other Residents in the Facility, including but not limited to isolation or quarantine strategies for symptomatic Residents and the use of personal protective equipment during Resident care.¶¶
- (10) Initial testing of all Facility Staff and Associated Staff is mandatory, except for those who provide medical justification for declining testing from a licensed health care provider. If Facility Staff or Associated Staff refuses testing that is required under this rule, the Facility or Associated Staffing Provider is required to address a refusal as a personnel matter with the individual employee. Personnel consequences for refusals to test shall be consistent with requirements under federal and state employment laws and collective bargaining agreements, if applicable.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

ADOPT: 411-060-0025

SUSPEND: Temporary 411-060-0025 from APD 34-2020

RULE SUMMARY: Created to ensure that facilities and associated staffing providers adopt trauma informed approaches to testing and that all communications, testing-related support services, and mental health services are delivered in a linguistically and culturally appropriate manner. This rule has been updated to specifically ensure that Medicaid-enrolled members who require the use of certified health care interpreters shall be afforded that opportunity.

CHANGES TO RULE:

411-060-0025

Ensuring Trauma-Informed and Culturally Responsive Testing

(1) Facilities and Associated Staffing Providers must adopt trauma-informed approaches to testing in accordance with Department guidance and professional standards of practice. Such approaches must account for the experiences and preferences of the person being tested to eliminate or mitigate triggers that may cause re-traumatization of the resident.

(2) Facilities and Associated Staffing Providers must ensure that all communications and testing-related support services for Residents, Facility Staff, and Associated Staff, such as mediation, decision-making support, and mental health services, are delivered in a linguistically and culturally appropriate manner and are in accordance with Department guidance and professional standards of practice. Medicaid enrolled members who require the use of certified health care interpreters shall be afforded that opportunity consistent with relevant OARs.

Statutory/Other Authority: ORS 441.612, 443.450

Statutes/Other Implemented: ORS 441.612, 443.450

ADOPT: 411-060-0027

RULE SUMMARY: This rule was created to ensure that all facility staff and associated staff are routinely tested for the presence of SARS-CoV-2 RNA.

CHANGES TO RULE:

411-060-0027

Routine Staff Testing Requirements

Every Assisted Living Facility and Residential Care Facility shall:[¶]

(1) Ensure that all Facility Staff and Associated Staff are tested routinely for COVID-19 on an interval that considers the published county positivity rate, the availability of testing resources and at the frequency outlined in the Department guidance. Nursing Facilities will follow the standards set forth in the interim rules issued by the US Centers for Medicare and Medicaid Services (CMS) in 85 Federal Register 54820 (September 2, 2020).

Nursing Facilities will also follow any guidance issued by CMS related to these rules.[¶]

(2) If a Facility is unable to comply with the required testing interval due to lack of access to molecular testing services that can reliably process tests within 48 hours or lack of access to antigen tests, the Facility may request an exception and alternate testing schedule from the Department.[¶]

(3) Conduct testing in a manner that is consistent with current standards of practice for conducting COVID-19 tests as defined in OHA clinical guidance.[¶]

(4) For each instance of Facility Staff and Associated Staff testing, document or obtain copies of documentation that testing was completed and the results of each test.[¶]

(5) Upon the identification of an individual specified in this paragraph with symptoms consistent with COVID-19, or who tests positive for COVID-19, take actions to prevent the transmission of COVID-19.[¶]

(6) Have procedures for addressing Facility Staff and Associated Staff who refuse testing or are unable to be tested. Serial testing of all Facility Staff and Associated Staff is mandatory, except for those Facility Staff and Associated Staff who provide medical justification for declining testing from a licensed health care provider. If any Facility Staff or Associated Staff refuses testing that is required under this rule, the Facility or Associated Staffing Provider is required to address a refusal as a personnel matter with the individual employee. Personnel consequences for refusals to test shall be consistent with requirements under federal and state employment laws and collective bargaining agreements, if applicable.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

SUSPEND: 411-060-0028

SUSPEND: Temporary 411-060-0028 from APD 34-2020

RULE SUMMARY: This rule has been suspended since initial testing has concluded.

CHANGES TO RULE:

~~411-060-0028~~

~~Testing Associated Staff~~

~~(1) A Facility shall require all Associated Staffing Providers to arrange for initial testing of Associated Staff.¶~~

~~(2) A Facility shall require all Associated Staffing Providers and Contracted Testing Providers to submit test results to the Facility no later than 24 hours after receiving the test results.¶~~

~~(3) Initial testing of all Associated Staff is mandatory, except for those Associated Staff who provide medical justification for declining testing from a licensed health care provider. If Associated Staff refuses testing that is required under this rule, the Associated Staffing Provider is required to address a refusal as a personnel matter with the individual employee. Personnel consequences for refusals to test shall be consistent with requirements under federal and state employment laws and collective bargaining agreements, if applicable.~~

~~Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991~~

~~Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991~~

ADOPT: 411-060-0030

SUSPEND: Temporary 411-060-0030 from APD 34-2020

RULE SUMMARY: Created to inform facilities of the requirement to implement COVID-19 testing of all residents, facility staff and associated staff within 72 hours of the identification of a new case of COVID-19 in the facility. The effective date has been updated to November 1, 2020 and changes the word "implement" to "coordinate or complete specimen collection."

CHANGES TO RULE:

411-060-0030

Outbreak Prevention Testing

Effective November 1, 2020, a Facility must coordinate or complete specimen collection for COVID-19 testing of all Residents, Facility Staff and Associated Staff within 72 hours of identification of a new case of COVID-19 in either a Resident, Facility Staff or Associated Staff.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

ADOPT: 411-060-0040

SUSPEND: Temporary 411-060-0040 from APD 34-2020

RULE SUMMARY: Created to require facilities to obtain consent from a resident or their representative and from facility staff prior to COVID-19 testing. The rule title and text have been updated to improve clarity and readability.

CHANGES TO RULE:

411-060-0040

Consent for Testing

(1) A Facility must obtain consent from a Resident, or their representative, and Facility Staff prior to COVID-19 testing. The Facility shall develop a protocol to obtain consent from Residents and a separate protocol to obtain consent from Facility Staff.¶

(2) Prior to obtaining consent pursuant to section (1) of this section, a Facility shall provide communication to a Resident or their representative, and the Resident family as applicable, regarding upcoming testing. Where possible and feasible, the Facility shall provide this communication at least one week prior to obtaining consent from the Resident. ¶

(3) Facilities must ensure that Associated Staffing Providers obtain consent from Associated Staff prior to COVID-19 testing. The Facility shall develop a protocol to document consent for any Associated Staff.¶

(4) Prior to obtaining consent pursuant to section (3) of this section, an Associated Staffing Provider shall provide communication to Associated Staff regarding upcoming testing. Where possible and feasible, the Associated Staffing Provider shall provide this communication at least one week prior to obtaining consent from the Associated Staff.

Statutory/Other Authority: ORS 441.612, 443.450

Statutes/Other Implemented: ORS 441.612, 443.450

ADOPT: 411-060-0050

SUSPEND: Temporary 411-060-0050 from APD 34-2020

RULE SUMMARY: The updated filing deletes language relating to initial testing and directs facilities to follow the reporting requirements contained in OARs 333-018-0000 thru 333-018-0145.

CHANGES TO RULE:

411-060-0050

Reporting

All Facilities with Clinical Laboratory Improvement Amendments (CLIA) waivers must follow the reporting requirements contained in OARs 333-018-0000 thru 333-018-0145. This includes the requirements contained in OAR 333-018-0011 for reporting race, ethnicity, language and disability data.

Statutory/Other Authority: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

Statutes/Other Implemented: ORS 441.025, 441.055, 441.615, 441.630, 441.637, 441.650, 443.400-443.455, 443.991

SUSPEND: 411-060-0060

SUSPEND: Temporary 411-060-0060 from APD 34-2020

RULE SUMMARY: This rule is being suspended since initial testing has concluded.

CHANGES TO RULE:

~~411-060-0060~~

~~Reimbursement for Initial Testing for Residents, Facility Staff and Associated Staff~~

- ~~(1) The Department shall cover expenses associated with initial testing.¶¶~~
- ~~(2) For Facilities and Associated Staffing Providers that use a Contracted Testing Provider for initial testing, the Department will reimburse Facility and Associated Staffing Provider up to the Contracted Testing Rate, for Direct Testing Expenditures.¶¶~~
- ~~(3) REQUEST FOR REIMBURSEMENT. A Facility or Associated Staffing Provider that chooses to use a Contracted Testing Provider under 411-060-0020 for Initial Testing must file a request for reimbursement of Direct Testing Expenditures with the Department that meets the following standards in order to be eligible for payment.¶¶~~
- ~~(a) A request for reimbursement must:¶¶~~
- ~~(A) Be submitted on a form provided by the Department.¶¶~~
- ~~(B) Include only Direct Testing Expenditures incurred for initial testing for Residents for COVID-19.¶¶~~
- ~~(C) Include only true and accurate information.¶¶~~
- ~~(b) If a Facility or Associated Staffing Provider knowingly, or with reason to know, files a request for reimbursement containing false information, the Department shall refer the Facility to the Oregon Department of Justice and may take other enforcement action related to the Facility's license.¶¶~~
- ~~(4) Failure to provide required documentation as described in section (3) of this rule, shall result in a denial of reimbursement.¶¶~~
- ~~(5) Reimbursement payments from the Department under this rule are separate and distinct from the Department's bundled rates for Medicaid services.¶¶~~
- ~~(6) These rules do not require a facility to submit a claim for reimbursement with an insurer or other third-party payor, but if this claim is submitted, reimbursements will not be made for expenses that have been paid for by insurers of other third-party payors.¶¶~~
- ~~(7) All written requests for reimbursement are subject to audit at the discretion of the Department. The Facility shall be notified in writing of any identified overpayment and of any adjustments to the request for reimbursement. Payment of any amounts due to the Department must be made within 60 business days of the date of notification to the Facility.~~

~~Statutory/Other Authority: ORS 410.070~~

~~Statutes/Other Implemented: ORS 410.070~~