TENNESSEE COMPTROLLER OF THE TREASURY

OFFICE OF RESEARCH AND EDUCATION ACCOUNTABILITY

TEMPORARY STAFFING IN LONG-TERM CARE FACILITIES IN TENNESSEE

EXECUTIVE SUMMARY

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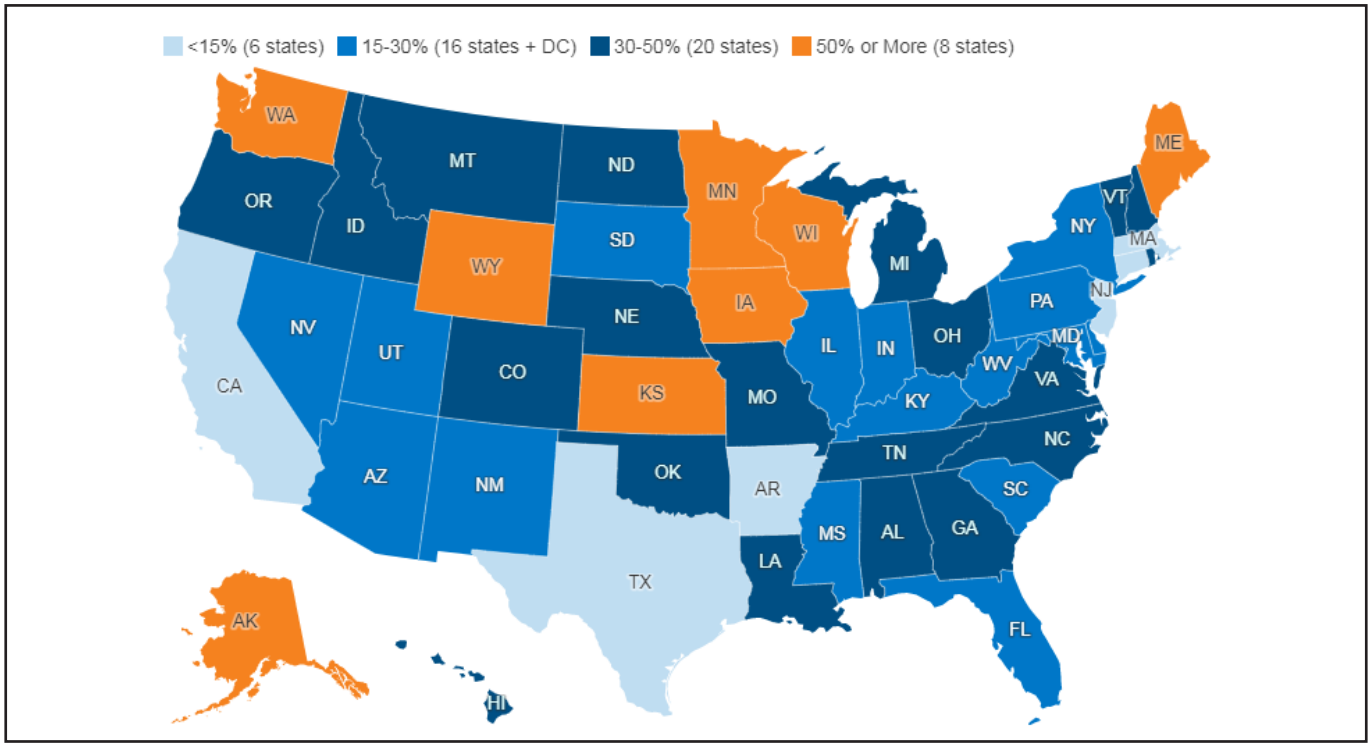
Executive Summary

Staff shortages have existed for decades in long-term care facilities, but the effects of the pandemic significantly worsened shortages beginning in 2020. To alleviate the shortages, many nursing facilities and some assisted care living facilities across the country contracted with healthcare staffing agencies to hire temporary nursing staff (licensed nurses and nurse aides) at reportedly high costs. Exhibit 1 depicts states' reported nursing facilities staffing shortages, showing Tennessee in the 30-50 percent range.

Exhibit 1: Share of nursing facilities reporting staffing shortages, by state as of March 20, 2022



Source: Kaiser Family Foundation analysis of CMS COVID-19 Nursing Home Data, as of the week ending March 20, 2022.

To determine the potential effects on state costs, the legislature passed a law requiring a study of long-term care facilities' use of temporary staffing agencies.

The Tennessee General Assembly passed Senate Bill 2463/HB 2347 in 2022, which became Public Chapter 1118 (2022). The law requires the Comptroller of the Treasury to coordinate a study with the Division of TennCare and the Department of Health examining the use of temporary staff provided by healthcare staffing agencies in long-term care facilities. For purposes of the study, the facilities considered are nursing home facilities and assisted care living facilities. The study was to examine:

- the costs paid by nursing homes for temporary staff provided by healthcare staffing agencies and what effect those costs have on the TennCare program;
- the impact that increases in charges for temporary healthcare staffing has on assisted care living facilities; and
- practices that would improve the quality of long-term care facility resident care while reducing costs to the TennCare program.

The Comptroller's Office of Research and Education Accountability (OREA) completed the study on behalf of the COT. As required, this report is being delivered to the Speaker of the Senate, the Speaker of the House, and the legislative librarian by January 1, 2023.

To learn to what extent Tennessee long-term care facilities used healthcare staffing agencies during the pandemic, OREA analysts surveyed nursing facilities and assisted care living facilities to determine the number of facilities that had contracted with agencies and the extent of their spending for temporary agency staff from 2019 (the year before the pandemic), 2020, 2021, and the first half of 2022. Exhibit 2 shows the number of facilities surveyed and the response rates, with the number of facilities that contracted with agencies and reported their spending on staffing agencies.

Exhibit 2: OREA survey responses

	Nursing facilities		Assisted care living facilities	
	Number	Percent	Number	Percent
Total surveyed	307		297	
Total responses	289	94%	119	40%
Contracted with staffing agencies	186 of 289	64%	53 of 119	45%
Reported expenditures for temporary staff	167 of 186	90%	32 of 53	60%

Note: Some facilities did not complete all survey questions.
Source: OREA survey of nursing facilities and assisted care living facilities in Tennessee, 2022.

Tennessee's long-term care facilities' use of temporary staffing agencies increased each year of the pandemic along with the expenditures facilities incurred for staffing costs.

Staffing shortages in nursing homes and assisted care living facilities across the country worsened during COVID. Facilities in many states, including Tennessee, contracted with healthcare staffing agencies to supply temporary workers, including nurses and certified nursing assistants.

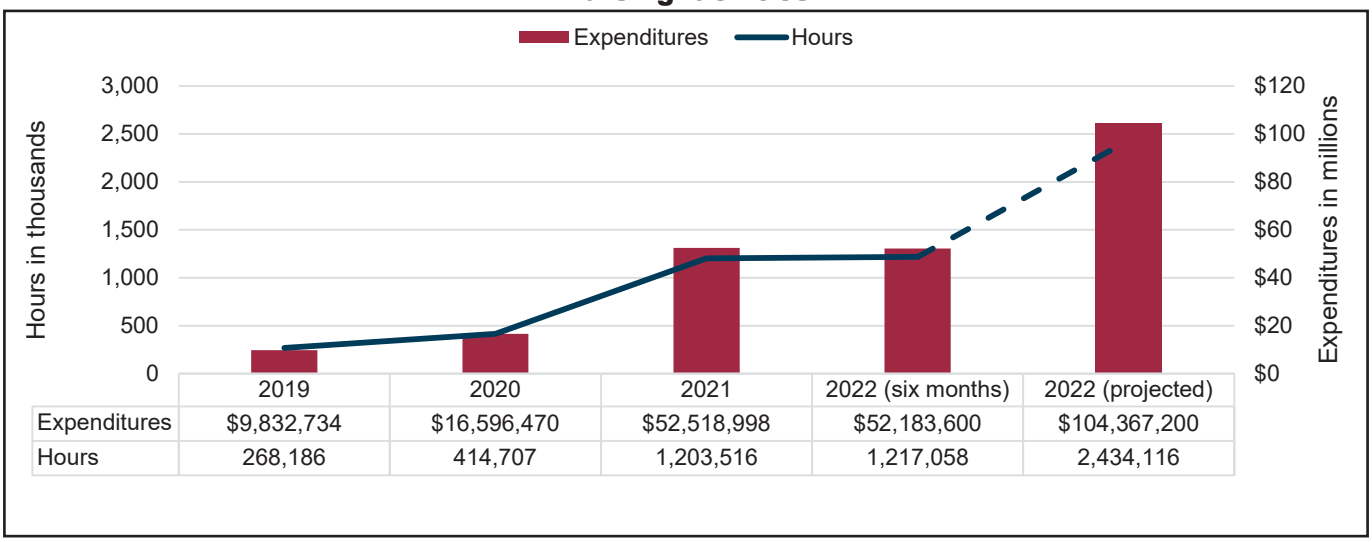
Based on survey responses, OREA found that 64 percent of nursing facilities contracted with staffing agencies. Of these, most reported how much they spent for temporary staff during 2019 (before the pandemic), 2020, 2021, and part of 2022. Of the assisted care living facilities that responded to the survey, 45 percent contracted with agencies and 60 percent provided expenditures for temporary staff.

Spending by nursing facilities on healthcare staffing agencies increased each year between 2019 and the first half of 2022, with expenditures and hours in the first half of 2022 exceeding those in all of 2021.

In 2019, nursing facilities reported spending about $9.8 million for healthcare staffing agencies. This rose to $16.6 million in 2020, and more than doubled, reaching $52.5 million, in 2021. In the first half of 2022, nursing facilities' spending for agencies was nearly equal to the amount spent for all of 2021, at $52.2 million. If spending levels remain the same for the second half of 2022, nursing facilities will have expended $104.4 million for temporary staff in 2022. While the use of healthcare staffing agencies in assisted care living facilities was less than for nursing facilities, both experienced the same upward trend as the pandemic progressed.

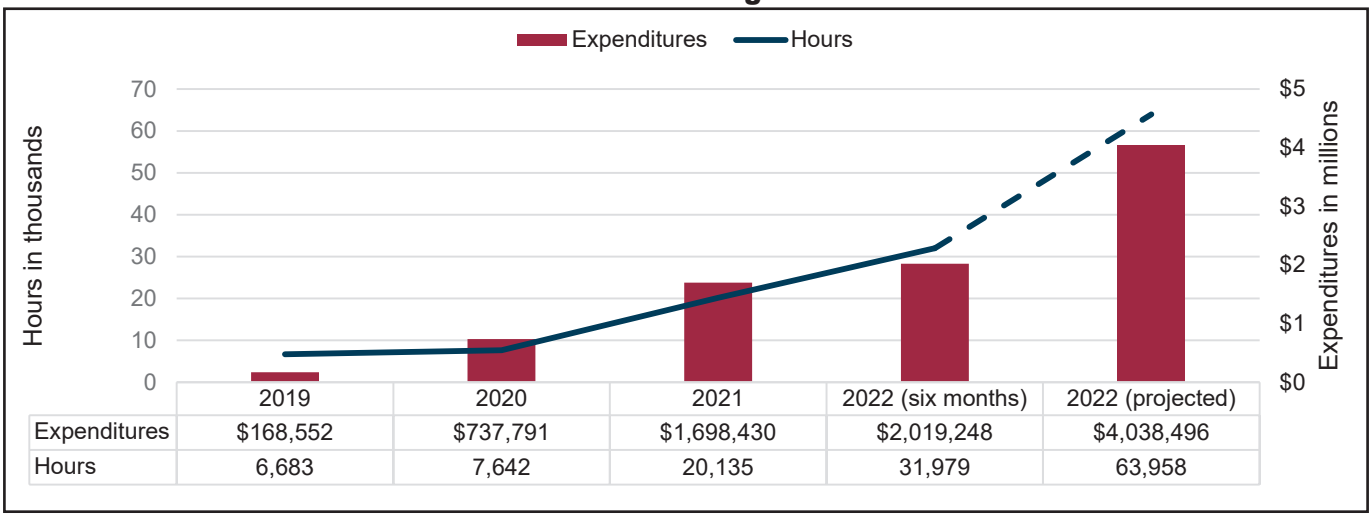
Exhibit 3: The use of temporary health care staff by long-term care facilities increased as the pandemic progressed

Nursing facilities



	2019	2020	2021	2022 (six months)	2022 (projected)
Expenditures	$9,832,734	$16,596,470	$52,518,998	$52,183,600	$104,367,200
Hours	268,186	414,707	1,203,516	1,217,058	2,434,116

Assisted care living facilities



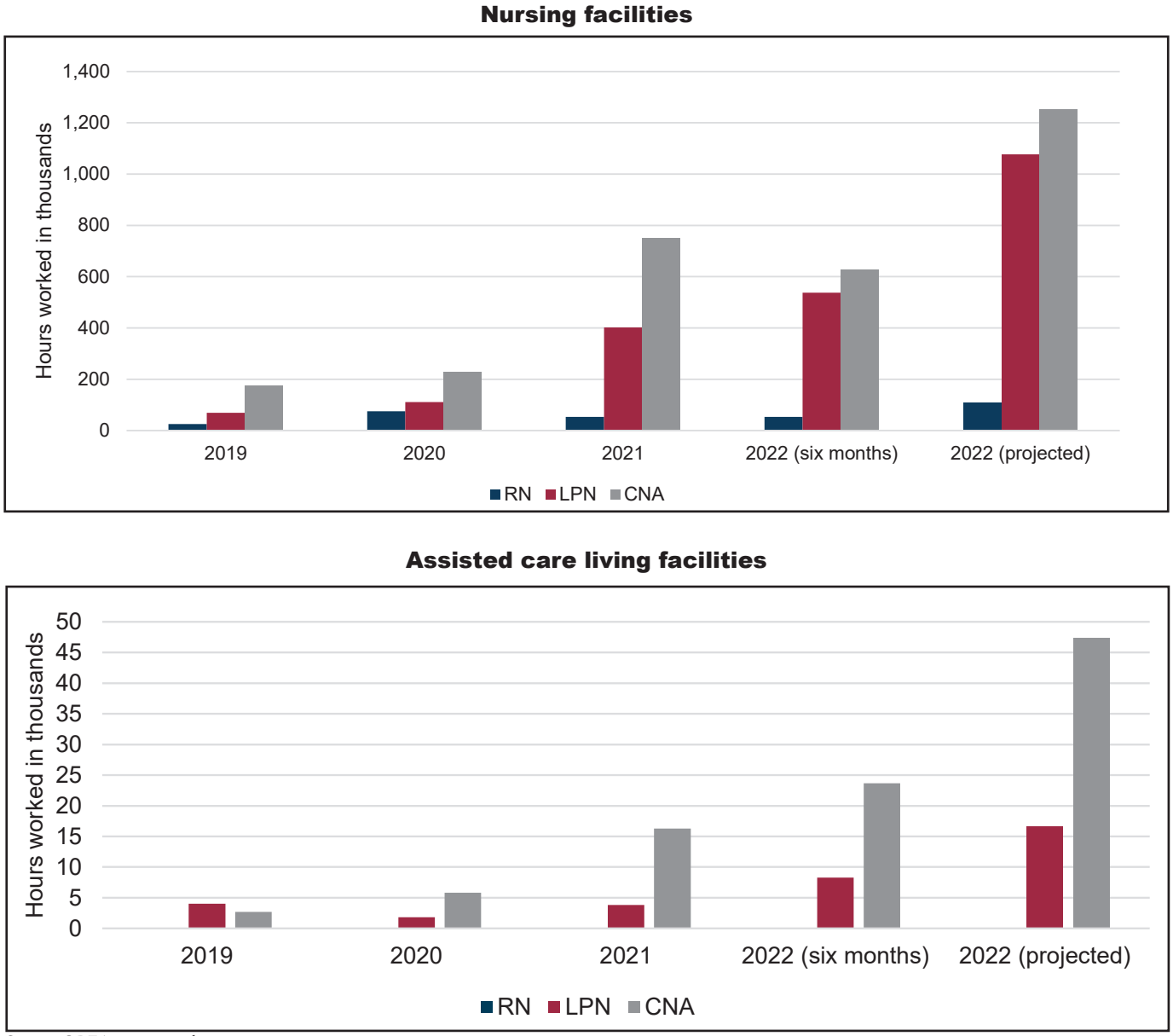
	2019	2020	2021	2022 (six months)	2022 (projected)
Expenditures	$168,552	$737,791	$1,698,430	$2,019,248	$4,038,496
Hours	6,683	7,642	20,135	31,979	63,958

Source: OREA survey results, 2022.
Notes: (1) The projection for the entirety of 2022 assumes the same amount of expenditures and hours worked for the final half of 2022.
(2) 167 nursing facilities reported expenditures and hours worked for the years shown. The survey covered the first half of 2022 (January to July).
(3) 32 assisted care living facilities supplied expenditures and hours worked for the years shown.

Nursing facilities and assisted care living facilities contracted with staffing agencies most often for certified nursing assistants (CNAs) followed by licensed practical nurses (LPNs). Contracting for registered nurses (RNs) was less frequent.

Exhibit 4 breaks out information for RNs, LPNs, and LPNs, showing the number of hours each category of employee worked in facilities just prior to and through the pandemic to mid-2022. Tennessee made efforts to increase the number of certified nursing assistants (CNAs) during the pandemic and continues to work toward this goal. The Health Facilities Commission is expanding CNA testing options for those who worked during the pandemic as Temporary Nurse Aides in nursing facilities, including providing short-term mass testing sites at universities and permitting the use of virtual testing in the long term.

Exhibit 4: Both nursing facilities and assisted care living facilities contracted with staffing agencies most often for CNAs followed by LPNs



Source: OREA survey results, 2022.
Notes: (1) The survey covered the first half of 2022 (January to July). The projection for the entirety of 2022 shown in both charts assumes the same amount of hours worked for the final half of 2022.
(2) Nursing facilities – 167 nursing facilities supplied hours worked for the years shown.
(3) Assisted care living facilities – 32 assisted care living facilities supplied hours worked for the years shown.

How nursing facilities and assisted care living facilities are reimbursed through TennCare

TennCare reimburses nursing homes for Medicaid patients based on a formula that includes actual staffing costs that occurred in previous years. Current reimbursement in FY 2022 is based on FY 2019 costs plus adjustments for inflation. Nursing homes will not be reimbursed based on the costs incurred during the spike in staffing costs during the pandemic until the rates are redetermined in 2024 based on 2022 costs. Reimbursements may not fully cover the expenditures that nursing facilities made to healthcare staffing agencies during 2020, 2021, and 2022.

TennCare, the state's managed care Medicaid program, does not directly reimburse nursing facilities or assisted care living facilities. TennCare revenues, which combine about 66 percent federal and 34 percent state dollars, for Medicaid patients flow through the state's three managed care organizations (MCOs) to nursing facilities

and assisted care living facilities. Nursing facilities submit patient claims for payment typically on a weekly or bi-weekly basis while assisted care living facilities submit claims monthly. A considerably larger share of TennCare dollars goes to nursing facilities, which have a much larger population of Medicaid patients than do assisted care living facilities.

Exhibit 5: TennCare projected and reported expenditures for long-term care facilities with Medicaid patients

	Nursing facilities	Assisted care living facilities
SFY 2023 projected expenditures	$1,023,190,175	N/A
SFY 2022 projected expenditures	$996,786,850	N/A
SFY 2021 actual expenditures	$953,863,000	$12,184,973

Note: Actual expenditures reflect payments made by MCOs to nursing facilities. TennCare projects expenditures based on expenditure data to date.
Sources: Stephen Smith, Director, Division of TennCare, memos to The Speakers of the General Assembly, Jan. 24, 2022, and June 20, 2022.

Nursing facility reimbursements are based on costs in previous years.

Each Tennessee nursing facility that participates in Medicaid is required to submit a cost report to the Medicaid/TennCare section of the Comptroller's Division of State Audit annually, which audits the reports for each facility. Cost reports contain the expenditures that nursing facilities report having paid for the fiscal year. Under the Medicaid reimbursement system, every three years TennCare uses cost report expenditure data to establish rates for nursing facilities. Medicaid rates are rebased every three years using new cost report data. In the intervening years, rates are adjusted by an inflationary factor.

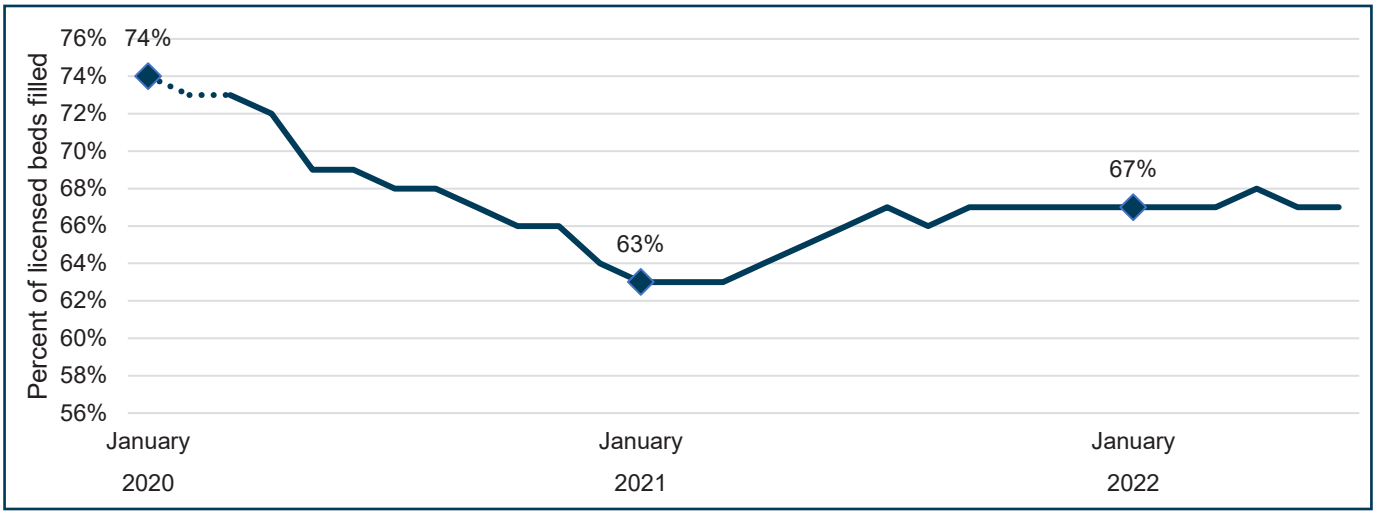
TennCare determines the Medicaid rates at which nursing facilities are reimbursed using a complex case-mix rate setting process, consisting of several components and adjustments. Components are direct care, administrative and operating, capital, cost-based (i.e., the portion of the per diem attributable to real estate taxes related to nursing facility services, and nursing facility provider assessment costs), and quality incentive. A semiannual adjustment to the Medicaid rates is made for patient acuity (i.e., the level of care that each Medicaid patient requires) and the quality component is updated annually. (See the full report for an explanation of the Quality Improvement in Long Term Services and Supports (QuILTSS) initiative.)

Per a recently promulgated TennCare rule amendment, starting in FY 2023-24 the direct care component will be updated annually with new cost report data. In the information provided to the Joint Government Operations Committee for the hearing on the new rule, TennCare stated that it did not anticipate the rule to have an effect on state government revenues and expenditures. The Tennessee Health Care Association (THCA) believes that implementation of the new rule means that cost reports that nursing facilities submit to State Audit will reflect nursing facilities' additional costs for direct care expenses closer to when they occur, but adds that facilities will receive reimbursements only to the extent that the General Assembly appropriates funding for this purpose. Reimbursements may not fully cover the expenditures that nursing facilities made to healthcare staffing agencies during 2020, 2021, and 2022.

TennCare does not foresee that the increases in nursing facility expenses for staffing agencies during the pandemic will materially affect the state's overall costs.

TennCare officials point to what they believe may be a continuing trend: a decline in the number of nursing facility patients. (See Exhibit 5.)

Exhibit 6: Nursing facility occupancy rates declined early in the pandemic and then rose again in 2021, though remaining below pre-pandemic levels



Source: Tennessee Health Care Association.

Nursing home occupancy has shifted over the years with the increase of home and community-based options for those who qualify. In 2010, Tennessee nursing home occupancy rates were at 87 percent. In 2012, TennCare changed the criteria for qualifying for nursing homes, increasing the medical criteria for individuals to qualify. With that change, the occupancy level of nursing homes began decreasing as the number of seniors receiving home and community-based services increased. However, research for a 2022 Comptroller report about long-term services and supports in Tennessee found that enrollment trends for home and community-based services have remained relatively steady since 2014 with little change.

On reports that nursing facilities annually submit to the Comptroller's Office, spending on healthcare staffing agency costs cannot be isolated from other staff spending.

Nursing facilities are required to annually report their allowable costs on two reports – the CMS Medicare Cost Report and the Medicaid Supplemental Cost Report. Both reports must be filed with the Comptroller's Division of State Audit on a specified due date. The supplemental cost report is audited by the Medicaid/TennCare section of the Division of State Audit. TennCare uses cost report expenditure data to establish reimbursement rates for nursing facilities. Medicaid rates are rebased every three years using new cost report data. (Per a new TennCare rule adopted in 2022, the direct cost component of the case-mix rate setting process will be rebased annually beginning in 2024.) In the intervening years, rates are adjusted by an inflationary factor.

Although OREA was granted permission by State Audit to review the supplemental cost reports containing the amounts that nursing facilities spent for temporary staffing, it was not possible for OREA to isolate those amounts because nursing facilities typically incorporate them in total wages and salaries or in another cost component on their supplemental cost reports.

TennCare reimburses assisted care living facilities based on the number of Medicaid patients they serve.

Some assisted care living facilities in Tennessee provide services to Medicaid-eligible individuals who qualify for home and community-based services. In FY 2020-21, 96 assisted care living facilities provided Medicaid services to individuals. TennCare reimburses these facilities on a monthly basis, based on the number of Medicaid-eligible patients served. For 2022, the monthly amount that TennCare reimbursed assisted care living facilities for each Medicaid patient was $1,305. In July 2022, for assisted care living facilities that agreed to pass increases to the direct care workforce, this amount was increased to $1,426.84 per month. The increase was paid for through federal funds from the American Rescue Plan Act (ARPA), which enhanced funding provided to states through the Federal Medical Assistance Percentage (FMAP) rate during the public health emergency declaration. The FMAP is used to reimburse states for the federal share of most Medicaid expenditures. In response to the economic impact of the pandemic, federal law provides a 6.2 percentage point increase to the FMAP rate for all states, beginning January 1, 2020, and ending on the last day of the calendar quarter in which the PHE period ends. This increase was also supported by a legislative appropriation to cover the state increases caused by the increased federal funding.

Policy options

The following are policy options the General Assembly may wish to consider in addressing the increased use of healthcare staffing agencies and staffing shortages at long-term care facilities.

1. The General Assembly could, as some other states have done, require healthcare staffing agencies to register with the state and submit specified information about agency operations. In addition, the state's price gouging law could be expanded to include direct care services provided by healthcare staffing agencies.

Over the course of the pandemic, Tennessee and many (if not all) states experienced an upward trend in long-term care facilities seeking to fill substantial direct care staffing shortages with temporary workers from healthcare staffing agencies. As discussed in more detail in the full report, other states' recently adopted laws are based on a concern that healthcare staffing agencies have charged nursing facilities excessively high rates for the temporary staff needed during the pandemic.

The new laws passed in other states generally focus on gathering operational and financial information from the staffing agencies and stop short of imposing maximum rates that the agencies could charge long-term care facilities. However, some of the laws include the possibility of developing such rates once sufficient data is collected and required studies are completed to make more informed decisions about the extent to which such agencies should be regulated.

Based on other states' laws, the General Assembly could choose among several options:

Require healthcare staffing agencies to register with the state as a condition of operation. Beyond registration, healthcare staffing agencies could be required to:

- ***Annually submit specified information about agency operations.*** This could include, for example:
  - ownership of the agency;
  - a detailed list of the average amount charged each quarter of the reporting period to a

healthcare facility for each category of healthcare worker providing services to the facility;
    - a detailed list of the average amount paid during each quarter of the reporting period to healthcare workers for their services for each category of healthcare worker providing services;
    - an annual cost report including the agency's itemized revenues and costs, the average number of nursing personnel the agency employs, and/or the average fees the agency charges by type of nursing personnel and healthcare facility.
- ***Pay an annual registration fee to cover the administrative costs of any required submission of information to the state.***
- ***Enter into a written agreement with each long-term care facility to which an agency provides nursing personnel.*** Such agreements could contain assurances that nursing personnel have appropriate credentials.
- ***Submit all contracts between an agency and the healthcare facilities with which it contracts,*** including copies of all invoices to long-term care facilities, to a specified state entity.
- ***Submit quarterly reports*** regarding amounts charged to long-term care facilities.

Add direct care services provided by healthcare staffing agencies to the state's price gouging law.

Most states, including Tennessee, have some type of price gouging law, which generally comes into play during a government-declared states of emergency. In 2022, Kentucky revised its price gouging statute to include federal declaration of a public health emergency, such as the pandemic. Kentucky also added "direct care staff services provided by a health care service agency as defined in Section 1 of this Act" to the list of goods and services subject to the law's provisions. Under Kentucky's new law, direct care staff services provided by a healthcare staffing agency will be subject to this prohibition:

> No person shall sell, rent, or offer to sell or rent, regardless of whether an actual sale or rental occurs, a good or service listed in this paragraph or any repair or reconstruction service for a price which is grossly in excess of the price prior to the declaration and unrelated to any increased cost to the seller.

Kentucky's price gouging statute already had in place reasons that a price would not violate the statute. For example, if the additional cost imposed by a supplier of a good or service is related to an additional cost for labor, it would not be subject to the price gouging statute. Nor would it be subject to the statute if the higher price was 10 percent or less above the price prior to the declaration. Whether a violation occurs, the statute says, is a question of law. Any court considering such a question is to "consider all relevant circumstances, including prices prevailing in the locality at that time."

Tennessee's price gouging law (TCA 47-18-5101 et seq.) was passed in 2002 following the September 11, 2001, terrorist attacks and acknowledges that some businesses in Tennessee engaged in price gouging following that event. The price gouging law is designed to come into play when the governor declares an abnormal economic disruption. Among the goods and services listed in the law for which a person is prohibited from excessively charging a higher price is the sale of medical supplies, but the law does not refer to any kind of healthcare services or staffing agencies. The law states that a price increase is not grossly excessive if the increase was directly attributable to, among other items, "additional costs for labor, services, or materials used to provide the goods and services, including costs of replacement inventory, additional costs to transport goods or services, and additional labor shortages. A complainant may bring a civil action, but the law prohibits any criminal penalty from being imposed for a violation.

2. TennCare could require nursing facilities to enter expenditures for healthcare staffing agencies in a specific part of the annual cost report submitted to the COT.

According to TennCare, such a change to the cost report could be made. OREA analysts were unable to isolate expenditures for salaries and wages for contract personnel using the Medicaid Supplemental Cost Report submitted annually by nursing facilities to the TennCare/Medicaid Audit division in the Comptroller's Office. Facilities reported on the OREA survey that they accounted for these expenditures in various places on the cost reports: some included them with the salary and wage expenses for the nursing department, some as a consulting expense, and others used various expense lines. If nursing facilities' need for and use of healthcare staffing agencies continues in the future, this change would provide a means to track those actual costs.

3. The General Assembly could consider continuing the support that nursing facilities have received during the federal public health emergency declaration until 2024, when the next rebasing for reimbursement rates is scheduled to occur.

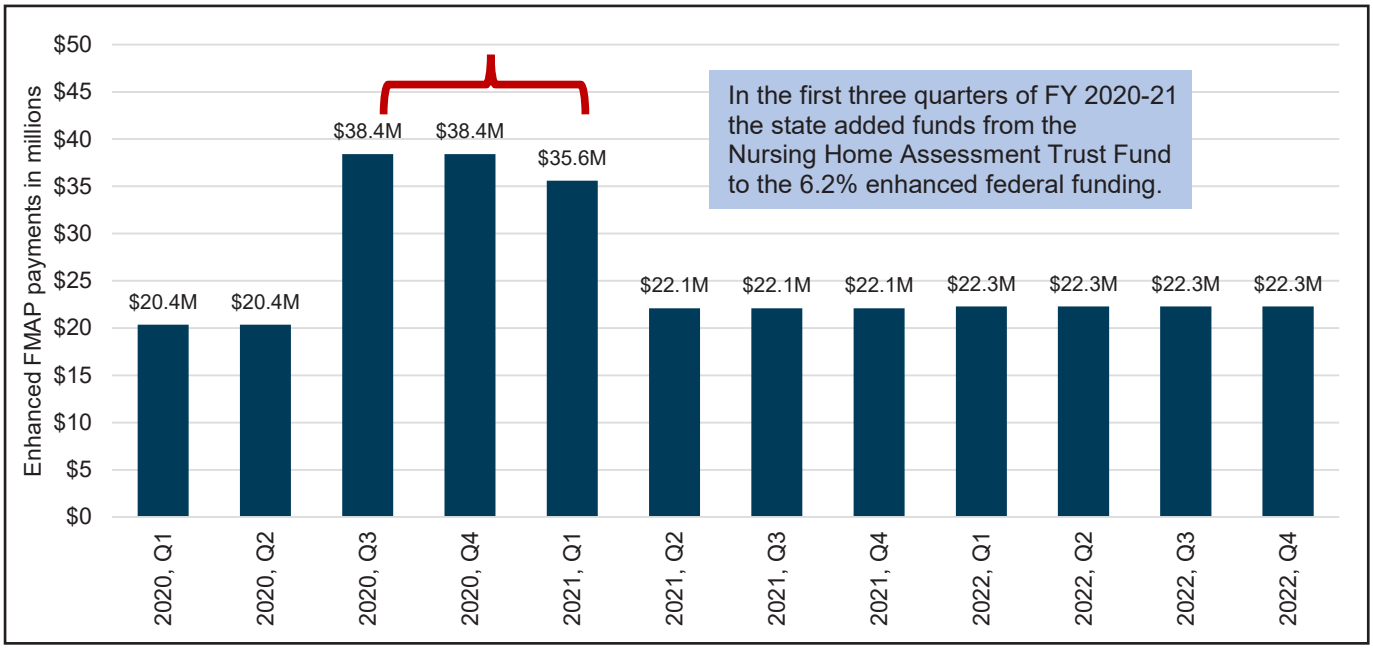
TennCare does not foresee that the increases in nursing facility costs for staffing agencies will materially affect the state's overall costs, and cites what they believe may be a continuing trend: the decrease in the number of nursing facility patients. However, nursing facilities say the unexpected spike in staffing costs during the pandemic, which may continue in the second half of 2022, has affected their operational stability. Although nursing facilities have received federal assistance during the pandemic, this will end once the federal government declares the public health emergency (PHE) at an end.

Nursing facilities, among other healthcare providers, have received additional federal funds to mitigate the financial effects of the pandemic in the short term. The Federal Medical Assistance Percentage (FMAP) is used to reimburse states for the federal share of most Medicaid expenditures. In response to the economic impact of the pandemic, federal law provides a 6.2 percentage point increase to the FMAP rate for all states, beginning January 1, 2020, and ending on the last day of the calendar quarter in which the federally declared public health emergency (PHE) period ends.

Tennessee began receiving enhanced FMAP funding for distribution to nursing facilities in the first quarter of 2020. In total, the state has received $308.6 million for distribution to nursing facilities from 2020 through the end of 2022. (See Exhibit 22.) This funding is distributed to nursing facilities not in rate adjustments but in quarterly payments. The amount per quarter has been about $22.4 million, except for the first three quarters of 2021, when funds were added from the Tennessee Nursing Home Assessment Trust Fund to augment the enhanced FMAP quarterly payment. This additional funding is tied to the federal declaration of a PHE, which is still in effect as of October 21, 2022. Tennessee is assured that it will receive the enhanced funding through the end of 2022, but the future of the FMAP payments is unclear. There is some speculation that the PHE may be declared at an end in the first part of 2023. Once the federal government declares the PHE at an end, these additional funds for nursing facilities will cease.

OREA analysts estimate that the state costs to continue the amount of FMAP funding to nursing facilities for FY 2023-24 would be $33 million with federal costs estimated at $63 million for a total of $96 million. If this additional funding were to be included in reimbursement rates rather than as quarterly payments, the overall current average rate would increase from $236.34 to $253.73, which is a 7.36 percent increase. (See Exhibit 23.)

Exhibit 7: Enhanced federal funding for Tennessee nursing facilities during the pandemic health emergency with additional state reserve funds added during the first three quarters of FY 2021



Note: The enhanced FMAP funding is distributed to Tennessee nursing facilities in quarterly payments and not in rate adjustments. The graph reflects the additional funding added from the Tennessee Nursing Home Assessment Trust Fund in fiscal year 2021 (i.e., the third and fourth quarters of 2020 and the first quarter of 2021). The Nursing Home Assessment Trust Fund was created by the General Assembly in Public Chapter 859 in 2014. Nursing facilities pay an annual assessment fee that is deposited into the fund, which earns interest and maintains a reserve. Collected assessment funds are used to secure federal matching funds available through the state Medicaid plan. TCA 71-5-1002.
Source: Tennessee Health Care Association, email, Oct. 21, 2022.

Exhibit 8: Estimate of state and federal costs to replace enhanced FMAP funding for nursing facilities

	FY 2023-24 estimate	FY 2023-24 FMAP split
State	$32,971,400	34.515%
Federal	$62,556,200	65.485%
Total	$95,527,600	100%

Note: OREA used the most current FMAP quarterly payment, $22.3 million, to determine the annual payment amount of $89.2 million. The estimate assumes a 4.7 percent increase based on the prior trend in previous quarterly payments.
Source: OREA analysis.

The pandemic exposed weaknesses in long-term care facilities' financial ability to staff adequately to ensure quality patient care amidst a public health emergency and a fluctuating workforce. In the OREA survey, facilities indicated that direct care staff shortages continue in 2022 and have been exacerbated by other economic pressures, including inflation and competitive offers from healthcare staff staffing agencies and industries not related to healthcare.

In 2022, some state legislatures passed laws to continue increased Medicaid funding for nursing facilities after the PHE is declared at an end.

- Illinois approved a $700 million increase, inclusive of federal and state matching funds, to nursing home funding, which took effect July 1, 2022. The increased funding is tied to improving staffing levels for CNAs and quality of care, and nursing homes must meet certain criteria to receive the increased funding. The quality of care funds are tied to nursing facilities' CMS star ratings for long-term care staffing. Additional CNA funding is tied to the tenure, promotion, and training of CNAs employed by nursing homes.

- Florida's Fiscal Year 2022-23 approved state budget includes a 7.8 percent increase in Medicaid reimbursement rates for nursing homes, amounting to $293 million in additional funding. The budget also includes a $15 per hour minimum wage for health care employees working for Medicaid providers. The appropriations bill requires the state's Medicaid agency to enter into a supplemental wage agreement with each provider to include the minimum wage requirement to ensure compliance and allows employees to bring civil actions against employers for not meeting the requirement.
- Pennsylvania approved a Medicaid annualized rate reimbursement increase of 17.5 percent for the state's nursing homes, effective July 1, 2023. The law also requires Medicaid-approved nursing facilities to spend at least 70 percent of their total costs on resident care and resident related care. The law also includes the state's ARPA payments to nursing facilities at about $131 million and to assisted care living facilities at about $27 million.

4. The General Assembly could consider continuing the support that assisted care living facilities are receiving through the American Rescue Plan Act of 2021 for pandemic relief.

Assisted care living facilities in Tennessee are part of Tennessee's continuum of home and community-based services network, which helps delay required nursing services for elderly and disabled individuals. Providing nursing services to individuals costs more in state funding than providing home and community-based services. Few residents of assisted care living facilities receive Medicaid services, and TennCare is prevented from expending Medicaid funding on any non-Medicaid services, such as room and board, in these facilities. To pay for care, residents generally must use long-term care insurance or personal funds.

Survey respondents for both nursing facilities and assisted care living facilities identified many of the same staffing barriers: healthcare agencies cost more than some facilities could afford, there were not enough CNAs in their region to hire, non-healthcare industries as well as other healthcare facilities were paying higher wages, and high staff turnover.

In late fall 2022, assisted care living facilities will be receiving funds through the federal American Rescue Plan Act of 2021, which provided state governments with federal funding to support staffing in long-term care settings. Tennessee's Department of Health will administer this funding through a grant program called Healthcare Facility Staffing Assistance Grants. Facilities are required to apply for the grants. The funding allocation to assisted care living facilities from this grant totals $12.5 million for 335 facilities.

The General Assembly could consider providing state-funded grants equal to the ARPA federal grants through fiscal year 2023-24 for assisted care living facilities. The state funds necessary to provide an equal, annualized amount for the facilities would total $12.5 million, an amount equal to the ARPA funds they will receive in FY2022-23. The funding would allow assisted care living facilities additional time to stabilize their funding structures to cover the costs spent during the pandemic for additional staffing.

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