



COLORADO

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

**2018 Sunset Review:
The Regulation of Home Care and Placement
Agencies**

October 15, 2018



CO L O R A D O

**Department of
Regulatory Agencies**

Executive Director's Office

October 15, 2018

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- Submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the regulation of home care and placement agencies. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2019 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 27.5 of Title 25, C.R.S. The report also discusses the effectiveness of the Department of Public Health and Environment staff in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Marguerite Salazar
Executive Director





COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research &
Regulatory Reform

2018 Sunset Review The Regulation of Home Care and Placement Agencies

SUMMARY

What is regulated?

Home care agencies that provide healthcare services and personal care services to individuals in their homes are required to be licensed. Home care placement agencies (placement agencies) that refer independent contractors to provide healthcare and personal care services to individuals in their homes are required to be registered.

Why is it regulated?

The licensure of home care agencies and registration of placement agencies protects the health, safety and welfare of individuals who utilize their services.

Who is regulated?

Home care agencies are required to obtain a license from the Colorado Department of Public Health and Environment (CDPHE) prior to providing skilled and/or personal services care to consumers. In fiscal year 16-17, there were 882 licensed home care agencies. Placement agencies must secure a registration from CDPHE before providing referrals to consumers for either skilled or personal care healthcare services. In fiscal year 16-17, there were nine registered placement agencies.

How is it regulated?

Before granting a license to home care agencies or a registration to placement agencies, Health Facilities and Emergency Services Division (Division) staff within CDPHE evaluate an applicant's fitness to conduct and maintain a home care or placement agency. Part of the evaluation for Division staff includes a survey (inspection). A survey is a comprehensive review of the operating procedures of the home care or placement agency, which includes a review of such things as compliance with existing state rules, the creation of proper care plans for consumers and the existence of complaint logs.

What does it cost?

In fiscal year 16-17, the total expenditures to oversee the regulation of home care and placement agencies were \$1.02 million, and there were 19.7 full-time equivalent employees associated with the program.

What disciplinary activity is there?

In fiscal year 16-17, the Division imposed a conditional license on one home care agency to require that it complied with certain standards for providing healthcare services to consumers. Also, the same home care agency was fined \$10,000 because the Division determined, after an investigation, that customers of the home care agency were in immediate jeopardy.

KEY RECOMMENDATIONS

Continue the regulation of home care and placement agencies for 11 years, until 2030.

Home care agencies provide both skilled and personal care services to consumers, while placement agencies provide referrals to independent contractors to provide healthcare services to consumers. The Division protects the public from home care agencies and placement agencies that jeopardize their clients' health. It has the authority to suspend, revoke, deny, or refuse to renew licenses or registrations. It also has the authority to impose intermediate restrictions or conditions on a licensee in order to bring it up to the standards established by the Board of Health. Therefore, the General Assembly should continue the regulation of home care and placement agencies for 11 years, until 2030.

Repeal the maximum civil fines that can be imposed.

Currently, section 25-27.5-108(2)(b)(I)(E), Colorado Revised Statutes, authorizes the Division to impose intermediate restrictions or conditions on home care or placement agencies that may include paying a civil fine, which cannot exceed \$10,000 per calendar year. Civil fines are an important regulatory tool to ensure compliance with existing requirements in the statute or applicable rules. Limiting the amount of fines on a licensee or registrant may compromise consumer protection. For example, if a home care agency reaches its civil fine limit, it may choose to relax regulatory standards because it cannot be fined any more money in a calendar year. The General Assembly should remove the civil fine limit.

METHODOLOGY

As part of this review, COPRRR staff attended Home Care Advisory Committee meetings, interviewed Division staff, stakeholders, officials with state and national professional associations, and reviewed Colorado statutes and rules, as well as the laws of other states.

MAJOR CONTACTS MADE DURING THIS REVIEW

AAC Specialists, LLC
Colorado Department of Public Health and Environment
Complete Home Health Care
Dignity Home Health of Colorado
Dynamic Dimensions
Elderlink Home Care, Inc.
Home Care Advisory Committee
Home Care Association of Colorado
Mountain Valley Developmental Services
People Care Health Services
Personal Assistance Services of Colorado
STEP UP Physical Therapy, PLLC

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:
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Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

¹ Criteria may be found at § 24-34-104, C.R.S.

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
 - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: www.dora.colorado.gov/opr.

The regulation of home care and placement agencies as enumerated in Article 27.5 of Title 25, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2019, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the regulating program pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation should be continued and to evaluate the performance of the Colorado Department of Public Health and Environment (CDPHE) staff. During this review, CDPHE staff must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, COPRRR staff attended Home Care Advisory Committee meetings; interviewed stakeholders and officials with state and national professional associations; and reviewed Colorado statutes and rules, as well as the laws of other states.

Profile of the Profession

Home care is becoming an increasingly viable and attractive alternative to facility-based long-term care (nursing homes and assisted living); home care is expected to grow in popularity as baby boomers age.

Home care covers a wide range of services for individuals who require ongoing healthcare and assistance with the activities of daily living. When family and friends cannot provide adequate support, home care allows people to receive the care they need to remain in their homes.²

The individuals who receive home care may be elderly, disabled, terminally or chronically ill, or they may be recovering from surgery. While the majority of individuals receiving home care are over the age of 65, home care consumers may be any age, such as infants, who may need ventilators or other care in order to live at home.

Home care agencies deliver services through physicians, nurses, therapists, social workers, home health and personal care aides, and volunteers.³ Attendants of home care agencies are employees of those agencies.

Home care may include health-related skilled services such as injections, intravenous therapy, and wound care.

Home care may also include personal care services, such as bathing, dressing, eating, transferring, walking or mobility, toileting and continence care.⁴

Home care services may be paid for by an individual or family member, by long term care insurance, Medicare, Medicaid, the Veteran Aid and Attendance benefit, and other sources.⁵

Colorado licenses two types of home care agencies: Class A and Class B. Only Class A agencies may provide skilled home health services. Skilled home health services may include tasks such as wound care services, administering medications prescribed by a physician and physical therapy.

Class B licensees are authorized to provide personal care services, which generally include activities associated with daily living. Examples of personal care services include assisting with bathing, dressing, eating, toileting and continence care.

Importantly, Class A agencies are authorized to provide both skilled and personal care services, and Class B agencies are authorized to offer personal care services only.

² National Association for Home Care and Hospice. *What is Home Care?* Retrieved on August 14, 2018, from <https://www.nahc.org/about/faq/#110>

³ National Association for Home Care and Hospice. *Who Provides Home Care?* Retrieved on August 14, 2018, from <https://www.nahc.org/who-provides-home-care/>

⁴ § 25-27.5-102(6), C.R.S.

⁵ CarePathways. Home Care Payment Options. Retrieved September 29, 2018, from <https://www.carepathways.com/home-care-payment-options.cfm>

Colorado also registers home care placement agencies. The purpose of placement agencies is to provide referrals to consumers in need of a variety of types and levels of care that could be either skilled or personal care. Attendants providing services to consumers are employed by the consumer not the placement agency.

Legal Framework

History of Regulation

In 2008, the General Assembly passed Senate Bill 08-153 (SB 153), which required home care agencies to be licensed by the Health Facilities and Emergency Medical Services Division (Division) in the Colorado Department of Public Health and Environment (CDPHE) and charged the Colorado State Board of Health (Board of Health) with adopting rules for the licensing program.

The purpose of regulation was to address a growing concern regarding the provision of care by home care agencies, specifically improper patient care and criminal activity. Although individuals could be prosecuted for fraud or abuse of patients, privately-funded home health agencies could not be removed from the marketplace since they were not regulated, and serious problems were found in home care agencies that were certified as Medicare and Medicaid providers.

The bill required home care agencies to ensure that their employees were adequately trained and vetted.

In 2012, the General Assembly passed House Bill 12-1294, which impacted the regulation of all health facilities in Colorado. Specifically, it required the Board of Health to establish different requirements appropriate to the various types of home care agencies, such as those that are substantially funded through Medicare or Medicaid and Providers of All-Inclusive Care for the Elderly.

In 2013, the Colorado Office of Policy, Research and Regulatory Reform conducted a sunset review of the home care agencies statute. One salient recommendation in the report recommended strengthening the oversight of placement agencies by the Division. This recommendation was subsequently enacted by the General Assembly.

Legal Summary

Section 25-27-5-101, *et seq.*, Colorado Revised Statutes, provides regulatory oversight of licensed home care agencies (Class A and B) and registered home care placement agencies (placement agencies). Home care agencies that receive Medicare or Medicaid funding are required to comply with federal standards and undergo surveys established by the Centers for Medicare and Medicaid Services.

Licensing

Home care agencies are required to be licensed by the Division in order to provide skilled home health services and personal care services to consumers in their homes.⁶ The Board of Health is charged with adopting rules for licensing home care agencies.⁷

⁶ § 25-27.5-103(1), C.R.S.

⁷ § 25-27.5-104(1), C.R.S.

A home care agency is defined as,

any sole proprietorship, partnership, association, corporation, government or governmental subdivision or agency[], not-for-profit agency, or any other legal or commercial entity that manages and offers, directly or by contract, skilled home health services or personal care services to a home care consumer in the home care consumer's temporary or permanent home or place of residence. A residential facility that delivers skilled home health or personal care services which the facility is not licensed to provide shall either be licensed as a home care agency or require the skilled home health or personal care services to be delivered by a licensed home care agency.⁸

Skilled home health services are defined as,

health and medical services furnished to a home care consumer in the home care consumer's temporary or permanent home or place of residence that include wound care services; use of medical supplies including drugs and biologicals prescribed by a physician; in-home infusion services; nursing services; home health aide or certified nurse aide services that require the supervision of a licensed or certified healthcare professional acting within the scope of his or her license or certificate; occupational therapy; physical therapy; respiratory care services; dietetics and nutrition counseling services; medication administration; medical social services; and speech-language pathology services. "Skilled home health services" does not include the delivery of either durable medical equipment or medical supplies.⁹

Personal care services are defined as,

assistance with activities of daily living, including but not limited to bathing, dressing, eating, transferring, walking or mobility, toileting, and continence care. It also includes housekeeping, personal laundry, medication reminders, and companionship services furnished to a home care consumer in the home care consumer's temporary or permanent home or place of residence, and those normal daily routines that the home care consumer could perform for himself or herself were he or she physically capable, which are intended to enable that individual to remain safely and comfortably in the home care consumer's temporary or permanent home or place of residence.¹⁰

A Community Centered Board that provides case management services to persons with developmental disabilities that is directly providing home health or in-home personal care services to persons with developmental disabilities is required to obtain a license from the Division.¹¹

⁸ § 25-27.5-102(3)(a), C.R.S.

⁹ § 25-27.5-102(7), C.R.S.

¹⁰ § 25-27.5-102(6), C.R.S.

¹¹ § 25-27.5-103(1.5), C.R.S.

A home care agency does not include:¹²

- An organization that provides only housekeeping services;
- A community and rural health network that furnishes home visits for the purpose of public health monitoring and disease tracking;
- An individual who is not employed by or affiliated with a home care agency and who acts alone, without employees or contractors;
- An outpatient rehabilitation agency or comprehensive outpatient rehabilitation facility certified pursuant to Title XVIII or XIX of the Social Security Act;
- A consumer-directed attendant program administered by the Colorado Department of Health Care Policy and Financing (HCPF);
- A licensed dialysis center that provides in-home dialysis services, supplies, and equipment;
- A home care placement agency; or
- Services provided by a qualified early intervention service provider and overseen jointly by the Colorado Department of Education and the Colorado Department of Human Services.

As a health facility, a home care agency must apply for a license annually.¹³

In order to license a home care agency, the Division is charged with determining an applicant's fitness to conduct and maintain a home care agency.¹⁴ By rule, the Division may determine fitness through a number of different measures including, but not limited to, review of the applicant's policies and procedures, physical inspection of the entity, credentials of staff, and interviews with staff. The Division may conduct unscheduled or unannounced surveys (which may also be referred to as inspections) for a number of reasons such as routine compliance inspection, reasonable cause to question the applicant's fitness to conduct or maintain a home care agency, and a complaint alleging noncompliance with licensing requirements.¹⁵

Each home care agency owner, applicant, or licensee must submit a set of fingerprints to the Division and undergo a state and national criminal history record check. A home care agency license may not be issued or renewed if an owner, applicant, or licensee has been convicted of a felony or misdemeanor involving moral turpitude or conduct that could pose a risk to the health, safety, or welfare of consumers.¹⁶

Provisional licenses are available for two consecutive 90-day periods upon successful completion of the criminal history record check.¹⁷

By rule, a provisional license is available if the home care agency is temporarily unable to comply with all of the licensing standards and provides proof that it is making attempts to comply. The Division will not issue a provisional license if the operation of the home care agency will adversely affect the health, safety, and welfare of the home care clients. The Division will also issue a provisional license, if requested by Colorado

¹² § 25-27.5-102(3)(b), C.R.S.

¹³ §§ 25-3-102(1)(a) and 25-3-101(1), C.R.S.

¹⁴ § 25-3-102(1)(c), C.R.S.

¹⁵ 6 C.C.R. 1011-1 §§ 2.8.1 and 2.11.4. Standards for Hospitals and Health Facilities Rules.

¹⁶ §§ 25-27.5-106(3)(a) and 25-27.5-108(3), C.R.S.

¹⁷ § 25-27.5-106(6), C.R.S.

Department of Health Care Policy and Financing, to a home care agency that has applied for Medicaid certification.¹⁸

Home care agencies are also required to maintain and provide evidence of liability insurance coverage, or a surety bond in lieu of liability insurance.¹⁹ The Board of Health requires agencies that provide skilled home health services to have liability insurance coverage of at least \$500,000 per occurrence and \$3 million for all occurrences in a year, and it requires agencies that only provide personal care, homemaker, and companion services to maintain liability insurance coverage of at least \$100,000 per occurrence and \$300,000 for all occurrences in a year.²⁰

Anyone operating a home care agency without a license is guilty of a misdemeanor, punishable by not less than \$50 and not more than \$500, and may be assessed a civil fine of up to \$10,000.²¹

Placement agencies, on the other hand, provide referrals for home care attendants, for a fee, and do not employ or contract with home care attendants.²² Prior to providing referrals, placement agencies are required to obtain a registration from the Division.²³ The Division must maintain a list of placement agencies and make the list accessible to the public.²⁴

Placement agencies must provide a written disclosure statement to consumers, which includes the following:²⁵

- Placement agencies are not the employer of any provider they refer to consumers; and
- Placement agencies do not direct, control, schedule or train any provider they refer.

Home care agencies and placement agencies are required to conduct a criminal history record check not more than 90 days prior to employing or placing any home care attendant.²⁶

Disciplinary Actions

The Division may deny, suspend, revoke, or refuse to renew a license or registration that is out of compliance with the requirements of the Act or applicable rules.²⁷

¹⁸ 6 CCR 1011-1 § 5.3. Home Care Agencies Rules.

¹⁹ § 25-27.5-104(1)(h), C.R.S.

²⁰ 6 CCR 1011-1 § 5.2(B). Home Care Agencies Rules.

²¹ §§ 25-27.5-103(1)(a) and (b), C.R.S.

²² § 25-27.5-102(5), C.R.S.

²³ § 25-27.5-103(2)(a)(I), C.R.S.

²⁴ § 25-27.5-103(2)(a)(I), C.R.S.

²⁵ §§ 25-27.5-104(1)(c)(I-II), (d), (e) and (f), and 25-27.5-108(I), C.R.S.

²⁶ § 25-27.5-107, C.R.S.

²⁷ §§ 25-27.5-108(1) and (2)(a), C.R.S.

The Division may also impose intermediate restrictions or conditions on a licensee or registrant such as:²⁸

- Retaining a consultant to address corrective measures,
- Monitoring,
- Requiring additional training of staff,
- Complying with a written plan to correct a violation, and
- Fining up to \$10,000 for all violations.

Any civil fines the Division collects from home care agencies or placement agencies must be credited to the cash fund for home care agencies to be used to pay for expenses related to:²⁹

- Monitoring home care agencies,
- Educating licensees,
- Educating home care consumers and their families,
- Providing technical assistance to home care agencies to comply with changes in state or federal law,
- Transitioning consumers to other home care agencies in case of a revocation, and
- Maintaining the operation of a home care agency pending the correction of a violation.

Board of Health and Home Care Advisory Committee

The Board of Health is required to establish rules for minimum standards of operation for home care agencies and placement agencies. The Board of Health has established different standards depending on the type of home care services provided (i.e., Class A and Class B agencies), as required by statute.³⁰

These rules include:³¹

- Inspection of home care agencies by the Division,
- Minimum qualifications for an administrator and staff of a home care agency,
- Requirements for disclosures to consumers,
- Intermediate enforcement remedies,
- A requirement for home care agencies to submit a form detailing measures to be taken to correct deficiencies found during inspections, and
- Fees.

As directed by statute, the Board of Health requires home care agencies to report certain occurrences including:³²

- The death of a patient arising from an unexplained cause or suspicious circumstances;

²⁸ § 25-27.5-108(2)(b)(I), C.R.S.

²⁹ § 25-27.5-108(2)(b)(V), C.R.S.

³⁰ § 25-27.5-104(1), C.R.S.

³¹ §§ 25-27.5-104(1)(a), (b), (c), (d), (e), and (g), C.R.S.

³² §§ 25-27.5-104(1)(f) and 25-1-124(2), C.R.S.

-
- Serious injuries to a patient;
 - Physical, sexual, or verbal abuse of a patient;
 - Neglect of a patient;
 - Misappropriation of a patient's property; and
 - Diversion of drugs intended for a patient.

The Board of Health also requires, as directed by statute, the administrator and staff of a home care agency to be of good, moral, and responsible character.³³

The Home Care Advisory Committee (Advisory Committee) was established to make recommendations to the Board of Health and to the Division regarding home care licensing rules and the implementation of a licensure program.³⁴

The members of the Advisory Committee are appointed by the Executive Director of CDPHE; the Committee must, at a minimum, consist of:³⁵

- Representatives from Class A agencies,
- Representatives from Class B agencies,
- Members of the disabled community who are home care consumers,
- Seniors or representatives of seniors who are home care consumers,
- Providers of Medicaid services,
- Providers of in-home support services, and
- Representatives of HCPF and the Colorado Department of Human Services.

Advisory Committee members serve at the pleasure of the Executive Director of CDPHE without compensation.³⁶

³³ § 25-27.5-104(1)(b), C.R.S.

³⁴ § 25-27.5-104(3), C.R.S.

³⁵ § 25-27.5-104(3), C.R.S.

³⁶ § 25-27.5-104(3), C.R.S.

Program Description and Administration

The Health Facilities and Emergency Medical Services Division (Division) in the Colorado Department of Public Health and Environment (CDPHE) regulates licensed home care agencies and registered home care placement agencies (placement agencies).

The Colorado State Board of Health (Board of Health) is vested with the authority to adopt rules for home care agencies and placement agencies. The Board of Health sets the minimum standards for the operation of home care agencies and placement agencies.

The Division licenses two types of home care agencies:

- Class A agencies provide skilled healthcare services (e.g., medication administration, injections, intravenous therapy, and wound care), personal care services (e.g., getting in and out of bed, walking or mobility, bathing, using the toilet, and dressing), and other services such as homemaker and companion services.
- Class B agencies provide personal care services and other services such as homemaker and companion services. However, they are not licensed to provide skilled healthcare services.

The Division also requires placement agencies to secure a registration prior to providing referrals to consumers. Placement agencies provide referrals for a variety of types and levels of care that could be either skilled or personal care.

The members of the Home Care Advisory Committee (Advisory Committee) are appointed by the Executive Director of CDPHE and make recommendations to the Board of Health and the Division regarding the rules and the implementation of the home care licensure and placement agencies programs. The composition of the Advisory Committee must include:³⁷

- Representatives from skilled and personal services home care agencies,
- Members of the disabled community who are home care consumers,
- Seniors or representatives of seniors who are home care consumers,
- Providers of Medicaid services,
- Providers of in-home support services, and
- Representatives of the Departments of Health Care Policy and Financing and Human Services.

The Advisory Committee meets monthly to discuss rule changes and issues with the home care agency licensing program.

³⁷ § 25-27.5-104(3), C.R.S.

Table 1 shows the Division’s expenditures and the full-time equivalent (FTE) employees associated with the program in the past five fiscal years.

**Table 1
Agency Fiscal Information**

Fiscal Year	Total Program Expenditures				FTE
	General Fund State	Cash Fund State	Medicaid Federal	Medicare Federal	
12-13	N/A	\$1,180,599	N/A	N/A	12.6
13-14	N/A	\$1,222,382	N/A	N/A	13.1
14-15	\$0	\$1,222,170	\$256,222	\$326,800	19.6
15-16	\$11,970	\$1,014,980	\$351,162	\$361,087	19.2
16-17	\$46,930	\$1,105,555	\$432,156	\$333,453	19.7

Data for Medicaid and Medicare funding in fiscal years 12-13 and 13-14 were unavailable because the Division did not track this information. Beginning in fiscal year 14-15, the Division implemented a process to capture information related to the federal Medicaid and Medicare expenditures.

Table 2 includes the licensing fees for Class A and Class B agencies in fiscal year 16-17.

**Table 2
Licensing Fees
Fiscal Year 16-17**

Fee Type	Class A Fee	Class B Fee
Initial	\$3,000	\$2,200
Renewal*	\$1,550	\$1,325
Late Fee	\$1,550	\$1,325
Branch	\$200	\$200
Workstation	\$50	\$50
Conditional	\$1,500	\$1,500
Provisional	\$450	\$330
Additional Inspections	100% of initial or renewal fee	100% of initial or renewal fee
Name Change	\$75	\$75
Address Change	\$75	\$75

*Renewal fees are based on the annual admissions for the previous year: for admissions between 50 and 99, add an additional \$100 to the renewal fee listed in the Table 2; and for admissions above 100, add \$200 to the renewal fee listed in the Table 2.

Additionally, each home care agency that provides Medicare or Medicaid services receives a \$100 discount from its renewal fee.

Licensing fees are imposed by the Division to cover the cost of regulating home care agencies and the workload resulting from the above activities. Placement agencies are required to register with the Division, and are required to pay an \$870 registration fee annually.

Licensing and Registration

Colorado requires home care agencies to obtain a license in order to provide healthcare and personal care services in the home; home care placement agencies must secure a registration.

In order to apply for a license, an organization or individual must send the Division a letter of intent. Once received, the Division mails the licensing application. Then the applicant must complete the following steps:

- Submit an application,
- Submit evidence of liability insurance or a surety bond, and
- Submit evidence of workers' compensation insurance.

The Division reviews an application and performs a criminal history record check on the applicant. Once the application is complete, staff performs an initial licensing survey of the home care agency.

If the Division finds the home care agency does not meet the minimum standards established by the Board of Health, the applicant is provided notice and time to make corrections. When the Division finds the home care agency is in compliance with the minimum standards, then a license is granted.

The Division may grant a provisional license if a home care agency cannot comply with all the standards as long as it provides proof that it is working toward compliance. It may also provide a provisional license if one is requested by the Colorado Department of Health Care Policy and Financing for a home care agency that has applied for Medicaid certification. The Division will not issue a provisional license to a home care agency until the criminal history record check is complete or if the health, safety, or welfare of its clients is at risk.

Home care licenses are valid for one year.

Table 3 shows the licensing activity for home care agencies during the fiscal years indicated.

Table 3
Licensed Home Care Agencies

Fiscal Year	Class A	Class B	Total Licenses
12-13	236	403	639
13-14	309	381	690
14-15	338	398	736
15-16	394	411	805
16-17	453	429	882

As Table 3 indicates, the number of Class A and B licenses has increased in each of the past five fiscal years. The reason, at least in part, can be attributed to the increase in the elderly population.

In order to serve as a placement agency in Colorado, an applicant must complete an application for registration, provide proof of general liability insurance, which requires a minimum of \$100,000 per occurrence and \$300,000 aggregate, and complete written disclosure documentation that is required to be given to consumers. The disclosure statement, among other things, informs the consumer that the placement agency is not the employer of any provider it refers to the consumer.

Table 4 highlights the total number of registered placement agencies in the past three fiscal years. Prior to fiscal year 15-16, placement agencies were not registered by the Division.

**Table 4
Registered Placement Agencies**

Fiscal Year	Number of Initial Registration Applications Received	Number of Applications in Review Process from Prior Fiscal Year	Number of Applications Abandoned or Withdrawn	Number of Closures	Total Registrations Completed During Fiscal Year	Registrations at the End of the Fiscal Year
14-15	2	2	0	0	0	2
15-16	10	5	5	2	2	8
16-17	1	0	0	6	6	9

Although the total number of registered placement agencies is relatively small, Table 4 shows an increase in the overall numbers in the past three fiscal years.

Surveys

Before granting a license or registration, the Division evaluates an applicant’s fitness to conduct and maintain a home care and placement agency. Part of this evaluation is a survey (which may also be referred to as an inspection) of the agency. Surveys are a comprehensive review of the operating procedures of the home care and placement agency, which includes a review of things such as compliance with the existing statute and rules, the creation of proper care plans for consumers, and the existence of complaint logs.

Following an initial survey, the Division surveys each licensed home care agency and registered placement agency at least once every three years. Home care agencies that are deemed certified by Medicare and Medicaid and maintain an approved accreditation by the Community Health Accreditation Partner, Accreditation Commission for Home Health Care or the Joint Commission Accreditation for Home Care are currently surveyed by the Division less frequently—only 10 percent of these agencies are surveyed each year. Home care agencies may also undergo a survey when a complaint is filed.

Table 5 shows the number of surveys of home care agencies over the fiscal years indicated.

Table 5
Class A and Class B Agency Surveys

Fiscal Year	Initial Surveys	Renewal Surveys
12-13	74	518
13-14	69	514
14-15	77	571
15-16	71	613
16-17	62	614
Total	353	2,830

As Table 5 delineates, the total number of surveys completed by Division staff increased in each of the past five fiscal years. The increase is attributed to the increase in the total number of home health care agencies licensed in Colorado.

Table 6 shows the total number of surveys completed by the Division concerning placement agencies in fiscal years 15-16 through 16-17.

Table 6
Placement Agency Surveys

Fiscal Year	Initial Surveys	Renewal Surveys
15-16	2	4
16-17	0	0
Total	2	4

The Division conducts surveys on a three-year cycle. As such, not all of the registered placement agencies have undergone a renewal survey.

Occurrence Reporting

Home care agencies are required to report certain events or “occurrences” to the Division by the next business day. Home care agencies report occurrences through an internet portal and may submit them any day of the week or time of day. The Division prepares a summary of all reported occurrences and makes them available to the public.

Any identifying information about specific individuals in occurrence reports is redacted from the reports released to the public.

Placement agencies are not required to report occurrences to the Division.

Table 7 includes the occurrence reports made by home care agencies over the fiscal years indicated.

Table 7
Occurrence Reports
Class A and Class B Agencies

Nature of Occurrences	FY 12-13	FY 13-14	FY 14-15	FY 15-16	FY 16-17
Abuse/Physical	12	11	14	15	22
Abuse/Sexual	3	1	6	7	3
Abuse/Verbal	5	7	3	4	5
Brain Injury	0	0	3	1	3
Deaths	5	4	10	3	6
Diverted Drugs	44	54	71	73	104
Equipment Malfunction	2	4	4	8	9
Misappropriation of Property	114	131	157	151	184
Missing Patient	4	1	2	0	0
Neglect	13	19	21	30	48
Total	202	232	291	292	384

In fiscal year 16-17, approximately 48 percent of reported occurrences concerned theft of client property. About 27 percent of occurrences concerned diversion of client drugs, and about 20 percent of occurrences concerned abuse and neglect of clients.

The Division does not necessarily open a complaint upon receiving an occurrence report. The initial responsibility for investigating an occurrence and taking appropriate corrective action lies with the home care agency. However, the Division does work with the home care agency to determine whether the home care agency is responding appropriately.

If the Division finds that a home care agency is not responding to an incident appropriately, then the Division will investigate the incident and may survey the home care agency. When the Division finds a problem with a home care agency that may put consumers at risk, the Division works with the home care agency to address the problem.

The Division also reviews occurrence reports during a survey and may also review them during a complaint investigation.

The Division requires occurrences to be reported to all other appropriate authorities, such as law enforcement and social services, when an allegation is made, not after a home care agency has investigated an incident.

Complaints/Disciplinary Actions

The Division receives and investigates complaints from any member of the public, including home care and placement agency clients and their family members, home care workers, other government agencies, and adult protective services. Family members are the most common source of complaints.

Table 8 illustrates the complaints filed against home care agencies over the five fiscal years indicated.

**Table 8
Complaints
Class A and Class B Agencies**

Nature of Complaints	FY 12-13	FY 13-14	FY 14-15	FY 15-16	FY 16-17
Abuse/Neglect	21	10	27	19	20
Administration/Personnel	17	19	13	16	26
Admission/Transfer/Discharge	39	36	58	28	76
Death	1	4	0	0	0
Falsification of Records	9	8	7	6	12
Quality of Care/Treatment	77	96	149	112	95
Theft (including diversion of drugs)	10	18	23	38	19
Unqualified Personnel	11	11	32	16	31
Total	185	202	309	235	279

About 43 percent of the complaints concern the quality of care or treatment being provided by home care agencies. About 17 percent of the complaints concern home care agencies that do not start services when they are supposed to or that do not give notice to a consumer that they are ending services, and 14 percent of the complaints concern unqualified personnel (e.g., home care workers who lack appropriate training or lay persons who are delegated tasks such as administering narcotics).

Table 9 details the total number of complaints against placement agencies in the past three fiscal years. Prior to fiscal year 15-16 placement agencies were not registered by the Division.

**Table 9
Complaints
Placement Agencies**

Nature of Complaints	FY 15-16	FY 16-17	FY 17-18
Abuse/Neglect	0	0	0
Administration/Personnel	0	2	2
Admission/Transfer/Discharge	0	1	0
Death	0	0	0
Falsification of Records	0	0	0
Quality of Care/Treatment	0	0	2
Theft	0	0	0
Unqualified Personnel	0	0	2
Total	0	3	6

As highlighted in Table 9, there are very few complaints filed against placement agencies.

Table 10 includes all final agency actions taken against home care agencies over the period under review; registered placement agencies did not incur formal discipline from the Division.

**Table 10
Final Agency Actions**

Type of Action	FY 12-13	FY 13-14	FY 14-15	FY 15-16	FY 16-17
Revocation	0	0	0	1	0
Suspension	0	0	0	0	0
Conditional License	0	0	0	0	1
License Denied	1	0	0	0	0
Fine	0	0	0	0	1
Total	1	0	0	1	2

As indicated in Table 10, the number of formal disciplinary actions taken against home care agencies is minimal. In fiscal year 12-13, the Division denied a Class B home care agency license based on the applicant’s arrest record. Also, in fiscal year 15-16, the Division revoked a Class A home care agency license due to the owner’s felony theft charges.

Nevertheless, in fiscal year 16-17, the Division issued a conditional license to a home care agency and imposed a fine.

Table 11 shows the fines imposed by the Division against home care agencies in the past five fiscal years.

Table 11
Fines - Home Care Agencies

Fiscal Year	Number of Fines Imposed	Total Value of Fines Imposed
12-13	0	\$0
13-14	0	\$0
14-15	0	\$0
15-16	0	\$0
16-17	1	\$10,000

In fiscal year 16-17, one home care agency was fined by the Division. The fine was imposed because the Division determined, after an investigation, that customers of the home care agency were in immediate jeopardy. The Division found that some clients were not being properly taken care of and the potential for harm existed.

Collateral Consequences – Criminal Convictions

Section 24-34-104(6)(b)(IX), C.R.S., requires the Colorado Office of Policy, Research and Regulatory Reform to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or registrants based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

In the past five fiscal years, the Division revoked and denied two home care agency licenses for criminal history. In 2015, a Class A home care agency license was revoked due to the owner’s felony theft charges. Also, in 2012, an initial license for a Class B license was denied by the Division based on the applicant’s arrest record.

Analysis and Recommendations

Recommendation 1 – Continue the regulation of home care and placement agencies for 11 years, until 2030.

The laws that govern home care agencies are contained in Article 27.5 of Title 25, Colorado Revised Statutes (C.R.S.) (Act). The Colorado Department of Public Health and Environment (CDPHE) is vested with the authority to license home care agencies and to register home care placement agencies (placement agencies). The home care licensure and registration program is housed within the Health Facilities and Emergency Medical Services Division (Division) in CDPHE, and the Division handles the licensing, enforcement, surveys (which may also be referred to as inspections), and complaint investigations of home care agencies and placement agencies. The Colorado State Board of Health (Board of Health) promulgates rules for home care agencies and placement agencies.

Sunset reviews are guided by statutory criteria found in section 24-34-104, C.R.S., and the first criterion asks whether regulation is necessary to protect the health, safety and welfare of the public.

Today, more and more people are opting to receive long-term care at home rather than in a nursing home. All states have licensed nursing homes since the 1950s, but it was not until 2009 that Colorado started licensing home care agencies.

Whether an individual receives long-term care in a facility or at home, the risk of harm is the same. Problems in long-term care include substandard care, neglect, abuse, and exploitation, but when the client is receiving care at home, these problems are much more difficult to detect and prove. Often only the client and the home care worker are present during a home care visit, and a client may be so isolated that the only social contact may be through a home care worker. This puts the home care worker in a position of power that can easily be abused.

The majority of people who require home care are 65 or older, but home care recipients may be of any age. They may be terminally ill, convalescing at home after surgery or a serious illness, or they may have a physical, intellectual, or developmental disability. While some people who receive home care may be fairly sophisticated consumers, others may not be able to communicate or self-advocate.

If a home care agency provides substandard care, its clients' health may deteriorate so that they require emergency care or hospitalization, or in some cases they may die prematurely. In addition to substandard care, consumers are also at risk of neglect, abuse, and exploitation by home care workers and the agencies that employ them.

Since the potential for consumer harm exists, the Division licenses home care agencies, both Class A and Class B, and registers placement agencies. Class A agencies provide skilled healthcare services, such as medication administration, injections, intravenous therapy, and wound care. Class A agencies may also provide personal care services to consumers, such as getting in and out of bed, walking or mobility, bathing, using the toilet, and dressing and other services such as homemaker and companion services.

Class B agencies provide personal care services and other services such as homemaker and companion services. However, they are not licensed to provide skilled healthcare services.

Placement agencies provide referrals to consumers for a variety of types and levels of care that could be either skilled or personal care services.

Before Colorado required home care agencies to be licensed, the Division was performing surveys for Medicaid and Medicare. During this time, the Division found numerous cases of substandard care that resulted in death and permanent injury in home care agencies that were certified as Medicaid and Medicare providers. The Division also confirmed cases of certified agencies systematically diverting narcotics and other medication from clients and certified agencies covering up sexual abuse allegations.

The Division protects the public by determining whether an applicant is fit to conduct and maintain a home care agency. It evaluates fitness through a number of different measures including, but not limited to, a review of the applicant's policies and procedures, a physical inspection of the entity, a review of the credentials of staff, observation of care being provided, and interviews with staff and clients. The Division also determines fitness by conducting fingerprint-based criminal history record checks of owners, applicants, licensees or registration holders.

Similarly, home care agencies and placement agencies themselves are required to conduct a criminal history record check of their employees within 90 days prior to employment.³⁸ A criminal history record check of home care employees helps to reduce the risk of abuse and exploitation of vulnerable persons.

The Division protects the public by surveying home care agencies and placement agencies to ensure compliance with minimum standards of care, and it investigates home care agencies and placement agencies when it receives a complaint alleging noncompliance with licensing or registration standards.

The Division also protects the public from home care agencies and placement agencies that jeopardize their clients' health. It has the authority to suspend, revoke, deny, or refuse to renew licenses or registrations. It also has the authority to impose intermediate restrictions or conditions on a licensee in order to bring it up to the standards established by the Board of Health.

According to the Division, it has focused on bringing home care agencies and placement agencies up to the minimum standard of care rather than imposing punitive actions.

The home care and placement agency licensure and registration programs, as presently structured, appear to be fairly effective and efficient. Therefore, the General Assembly should continue the regulation of home care and placement agencies for 11 years, until 2030.

³⁸ § 25-27.5-107, C.R.S.

Recommendation 2 – Direct that all money collected through fines be credited to the state’s General Fund.

Section 25-27.5-108(2)(b)(IV), C.R.S., directs that all civil penalties collected for violations of the Act be credited to the Division’s cash fund. Fines collected should instead be credited to the state’s General Fund. There are two basic reasons that this change is necessary.

Typically, when a state agency is granted fining authority, funds generated by fines are credited to the state’s General Fund. This is done so that a state agency has no incentive to impose fines other than taking legitimate disciplinary action. When fines are credited to the state agency’s cash fund, there can be a perceived conflict of interest that the state agency is imposing fines in an attempt to increase its revenue. Although there is no reason to believe that the Division has acted improperly, this recommendation is important as a policy matter to prevent any such allegation that may arise concerning the imposition of fines.

For cash-funded agencies, any increase in revenue can require them to reduce fees. Fines are meant to be used for discipline, not to raise revenue.

As a result, the General Assembly should require fines collected for violations of the Act to be credited to the state’s General Fund. Doing so will serve to remove any appearance of impropriety concerning the collection of fines by the Division.

Recommendation 3 – Repeal the maximum civil fines that can be imposed.

Currently, section 25-27.5-108(2)(b)(I)(E), C.R.S., authorizes the Division to impose intermediate restrictions or conditions on home care agencies or placement agencies that may include paying a civil fine, which cannot exceed \$10,000 per calendar year for all violations.

Civil fines are an important regulatory tool to ensure compliance with existing requirements in the statute and applicable rules. Civil fines are included in various practice acts where the State of Colorado has regulatory oversight. It is often an effective regulatory tool to ensure that practitioners are in compliance with the requirements outlined in the statute and rules.

Limiting the amount of the fine the Division can impose on a licensee or registrant in a calendar year may compromise consumer protection. For example, if a home care agency reaches its civil fine limit, it may choose to relax regulatory standards because it cannot be fined any more money in the calendar year.

Therefore, the General Assembly should remove the civil fine limit highlighted in section 25-27.5-108(2)(b)(I)(E), C.R.S. Doing so will ensure that Division staff may utilize civil fining authority against home care agencies or placement agencies, if necessary, beyond

the current \$10,000 limit. This may serve as a deterrent for licensees and registrants who are not in compliance with existing regulatory standards.

Recommendation 4 – Amend the composition of the Home Care Advisory Committee to include representatives of placement agencies.

Section 25-27.5-104(3), C.R.S., creates the Home Care Advisory Committee (Advisory Committee). The Advisory Committee makes recommendations to CDPHE and the Board of Health concerning the rules promulgated related to the statute as well as implementation of the regulation of home care agencies.

The composition of the Advisory Committee must include:³⁹

- Representatives from skilled and personal services home care agencies,
- Members of the disabled community who are home care consumers,
- Seniors or representatives of seniors who are home care consumers,
- Providers of Medicaid services,
- Providers of in-home support services, and
- Representatives of the Departments of Health Care Policy and Financing and Human Services.

The aforementioned composition of the Advisory Committee does not include representatives of placement agencies. It is unclear why placement agency membership was not included in the statute. According to Division staff, although the statute does not specifically reference representation of placement agency personnel on the Advisory Committee, current practice has been to include members of the placement agency community to participate on the Advisory Committee.

In order to update the statute, the General Assembly should amend section 25-27.5-104(3), C.R.S., to include representatives of placement agencies to serve as members of the Advisory Committee. Doing so will codify current practice. This will continue to achieve the goal of the Advisory Committee, which is to include communities representing a broad spectrum of stakeholders.

³⁹ § 25-27.5-104(3), C.R.S.