

Virginia Department of Social Services
Division of Licensing-Adult Programs

**Guidance for Assessing Civil Penalties Against
Assisted Living Facilities**

Revised: July 28, 2017

I. History

Legislation enacted by the 2005 General Assembly (§63-2 1709.2) required the Board of Social Services (Board) to approve criteria for the Department of Social Services, through the Division of Licensing Programs (division) to levy fiscal sanctions in response to violations by Assisted Living Facilities (ALF). The law:

- A. Increased the aggregate amount of a \$500 civil penalty per inspection to \$10,000 with the aggregate amount not exceeding \$10,000 within a 24 month period; and
- B. Required the Board to approve criteria for the imposition of civil penalties based on the following factors:
 - Severity- degree of harm or injury suffered or likely to be suffered;
 - Pervasiveness- the number of regulations found violated in one or more parts of the standards;
 - Duration- the length of time that a key health, safety or welfare standard had been violated, and,
 - Degree of risk to health, safety or welfare of residents- the likelihood that a violation will result in harm or injury, and the degree of severity if it does.

Note: The 4th bullet listed above, “Degree of risk to health, safety or welfare of residents,” is operationally conceptualized as a product of the first three factors, i.e., severity, pervasiveness, and duration)

On July 1, 2017, a new law went into effect that allowed the imposition of civil penalties up to \$10,000 with the aggregate amount not exceeding \$10,000 within a twelve month period.

II. Construction of the Civil Penalty Worksheet

A civil penalty worksheet was developed, using a point system, as the tool to determine the amount of the penalty assessed against an ALF. It is based on the framework underlying the division’s risk assessment model that establishes progressive points to convey the degree of likelihood and severity of harm presented from violations of regulatory requirements (see Risk Assessment and Adverse Enforcement Guidance Manual, October 24, 2007, posted on: http://www.dss.virginia.gov/files/division/licensing/alf/intro_page/current_providers/guidance_procedures/all_other/risk_assess_manual.pdf).

The point system has ten progressive ranges from 0 to 118 points, with each range corresponding with a certain dollar amount from \$0 to \$10,000. The points are assessed from five sections of the worksheet that include the factors mandated by Code referenced above. The sections are:

- Section I. Reminders when citing standards
- Section II. Scorecards to determine (1) the likelihood of harm occurring and its severity if it does occur, and (2) pervasiveness of violations
- Section III. Risk assessment
- Section IV. Calculation of points
- Section V. Civil penalty

III. Procedures for Completing the Civil Penalty Worksheet

Section I: Reminders when citing standards. This section serves to remind staff of certain “Do’s and Don’ts” that can impact the degree of risk assessed, that ultimately impacts the amount of the civil penalty. Among these reminders, staff must avoid what is referred as “piling on.” This occurs when more than one standard is cited for the same violation, though having the same focus or intent. For example, the following two standards have the same intent:

- 22 VAC 40-72-50.B.3. The licensee shall protect the physical and mental well-being of residents, and
- 22 VAC 40-72-450.A. The facility shall assume general responsibility for the health, safety and well-being of the residents.

Piling on is clearly seen when the violation narrative, i.e., the description of what happened, is essentially identical for more than one violation.

Another reminder is that staffs need to cite the standard that has the most direct bearing or relatedness to what was done or not done that resulted in the violation. For example, in a situation where the facility failed to have a system in place for supervising in order to prevent a elopement of a resident with serious cognitive impairments, the following standard should be cited:

- 22 VAC 40-72-450.D. The facility shall provide supervision of resident schedules, care and activities, including attention to specialized needs, such as prevention of falls and wandering off the premises.

The following standard should not be cited since it is too general:

- 22 VAC 40-72-450.A. The facility shall assume general responsibility for the health, safety and well-being of the residents.

However, if 450.D does not fit the circumstances, then 450.A can be cited.

Section II. Scorecards to determine (1) the likelihood of harm occurring and its severity, if it does occur; and (2) pervasiveness of violations. These two factors will contribute to the number of points assessed to determine the amount of the civil penalty.

For the factor related to likelihood/severity of harm, the staff will record the risk rating assessed for each violation in the appropriate cell denoted as A1-3, B1-3, and C1-3. For example, if three C3s were assessed for three violations, each will be placed in the first three cells for row C1-3.

C 1-3	C3	C3	C3
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Use an additional sheet if there are more violations than cells provided.

For the factor related to pervasiveness, for each part of the standards, e.g., Part I. General Provisions, and Part II. Administration and Administrative Services, the staff will observe the standard’s reference number, and will record a check mark in the applicable cell to indicate that this standard falls within this part or section of the regulations. For example, for 22 VAC 40-72-**40**, 22 VAC 40-72-**50**, 22 VAC 40-72-**100**, 22

VAC 40-72-140, and 22 VAC 40-72-150, a check mark will be placed the cells below based on each falling within that respective part of the regulations.

Part I 10-40	√				
Part II 50-150	√	√	√	√	

Again, use an additional sheet if there are more violations than cells provided.

Section III. Risk assessment.

- A. Determine the overall likelihood that the violations will result in harm based on the available knowledge of the propensity for those violations to cause harm. The degrees of likelihood of occurrence are low (A), medium (B), and high (C).

- B. Determine the overall likelihood that, if harm does occur, it will be of a severity, based on the available knowledge of the propensity for those violations to cause harm of a certain degree. The degrees of likelihood of severity are moderate (1), serious (2), and extreme (3).

- C. Determine the pervasiveness of the standards violated. Pervasiveness is the number of violations observed within each part or section of the standards. There are three distinct patterns within which the violated standards may fall:
 - Isolated- means one or more violations in only one part of the standards,
 - Scattered- means three or fewer violations in each of at least two parts of the standards, and
 - Widespread- means four or more violations in each of at least two parts of the standards.

- D. Determine the longest duration for any the key health, safety, and well-being standard violated to have existed. The duration can be a continuous or intermittent state of noncompliance. The lengths of time for durations are:
 - Short- means the conditions that caused the violation existed for a day or less,
 - Intermediate- means the conditions that caused the violation persisted for two days to two weeks, and
 - Long– means the conditions that caused the violation persisted for more than two weeks.

Section IV. Calculation of points. This section is used for recording the actual assessment of civil penalty points from the sections above. The tabulated points will be used to determine the amount of the civil penalty to recommend. If there are multiple inspections being considered, such as when the sanction is based on a denial or revocation, then the same procedure will apply for each of the subsections below.

- A. Determine the overall risk that should be assessed. This can be determined in one of two ways:
 1. The overall risk rating can be determined by identifying the highest risk rating assessed among all risk ratings assessed for violated standards. For example, if

there are five violations with the respective risk ratings of B3, C2, B2, B3, and C2, the overall risk rating is C2, or

2. The overall risk rating can be determined by deciding that the individually assessed risk ratings can have a cumulative or aggregate impact when considered collectively on increasing the likelihood that harm or injury may occur with a certain degree of severity. For example, using the risk ratings above, i.e., B3, C2, C2, B3, and B3, staff may determine that the cumulative impact from the violations on exposing a person to harm or injury warrant an overall risk rating of C3 even though a C3 was not a risk rating assessed for any of the violated standards.

B. Determine whether a special penalty needs to be assessed due to very egregious circumstances found. A special penalty is assessed based on multiple C3s assessed for violated standards, or based on a failure to protect the physical and/or mental well-being of a person in care that contributed to the death of a person. If a death occurred, the special penalty is automatically assessed 64 points, and there will not be a need to factor in multiple C3s.

C. Determine the pervasiveness of the violated standards. Use the recommended scorecard on page 2 of the civil penalty worksheet.

D. Determine the key health, safety, and well-being standard that has the longest existing in duration among the violated standards.

E. Add the number of points assessed from Section IV, A, B, C, and D, and enter in the space provided on the worksheet.

F. Avoid assessing a large civil penalty for violations that carry an assessed risk rating of B-1 or below even when the violations assessed with risk ratings in this range may be scattered or widespread, and may have existed for an extended period of time.

1. Whenever there is a combination of 18 or more points added from pervasiveness and duration, when the overall assessment of the likelihood of occurrence of harm and the likelihood of severity of harm (determined from Section IV.A of the worksheet) **does not exceed** "Medium Likelihood of Occurrence" (B) of "Moderate Severity of Harm" (1), subtract 18 points from the total number of points.

2. Enter the adjusted total, if applicable, in the space provided in F on the worksheet, otherwise leave blank.

Section V. Determine the amount of the civil penalty by finding the civil penalty amount that corresponds to the total number of points assessed following the completion of Section IV. Both the points and dollar amounts reflect progressive ranges.

When points fall between the lower and upper end of a particular range, e.g. between 28-30 where the dollar range is \$750-\$800, use the midpoint of the point range, i.e., 29, which equates to \$775.

Civil Penalty Worksheet for Assisted Living Facilities

Facility Name and Address:

File Number:

Licensing Administrator:

Region:

Licensing Inspector:

Date Completing Worksheet:

Section I. Reminders when citing standards

A. Risk Rating Primer on Severity Scale:

1. If the lowest level of nonsupervisory staff can remedy an issue, a severity rating of “1” is appropriate.
2. If a supervisory staff, or a director, administrator, teacher, licensed health care professional, government or law enforcement official is necessary, but does not involve, e.g., extensive medical intervention, emergency room care, hospitalization, death, or a criminal act not involving a possible felony charge, a severity rating of “2” is appropriate.
3. If extensive medical intervention is necessary, emergency room care, hospitalization, or if a death occurred, or there was a criminal act involved possibly resulting in a felony, a “3” risk rating is appropriate.

B. Avoid “piling on.” Standards cited in the violation notice must be closely related in content to the described conduct of the licensee.

Not specific enough in most cases: “The licensee shall protect the physical and mental well-being of residents.”

More specific and a stronger citation: “The assisted living facility shall have staff adequate in knowledge, skills, and abilities and in sufficient in numbers to provide services to attain and maintain the physical, mental and psychosocial well-being of each resident as determined by resident assessments and individualized service plans, and to assure compliance with this chapter.”

C. Avoid citing general standards such as 50.A and 50.B unless:

1. A more relevant or specific licensure requirement does not exist; or
2. There are one or more egregious, systemic or widespread violations throughout the facility that the licensee should have been aware of and addressed; or
3. The licensee is personally or directly culpable for causing harm such as by fraudulent conduct, deceit, abuse, or similar conduct.

Section II. Scorecards to determine (1) the likelihood of harm occurring and its severity if it does occur, and (2) pervasiveness of violations

1. To determine the likelihood/severity for each violation, enter the risk rating in the cell that it aligns with on the first scorecard below. The violation with the highest likelihood assessment of harm occurring, i.e., A, B, or C, and with the highest assessment of the severity if harm does occur, i.e., 1, 2, or 3, will be recorded in Section III Risk Assessment, A and B. For example, if three C3s were assessed for three violations, each will be placed in the first three cells for C1-3. Use an additional sheet if there are more violations than cells provided.

2. To determine pervasiveness of violations, for each violation, place a check mark in the applicable cell of the second scorecard that corresponds to each part or section of the regulations. This scorecard is used to determine “pervasiveness.” The number of checkmarks in each part of the regulation will be recorded in Section III Risk Assessment, C. Again, use an additional sheet if there are more violations than cells provided.

Scorecard 1 (Likelihood/Severity):

A 1-3																			
B 1-3																			
C 1-3																			

Scorecard 2 (Pervasiveness):

Part I 10-40																			
Part II 50-150																			
Part III 160-310																			
Part IV 320-330																			
Part V 340-420																			
Part VI 430-710																			
Part VII 720-830																			
Part VIII 840-920																			
Part IX 930-970																			
Part X 990-1160																			

(See the attached licensure report for details of violations)

Section III. Risk assessment

A. **Likelihood of Harm.** The first assessment is the likelihood/probability that harm will occur. Review all risk assessment ratings for violations cited and based on the likelihood scale from the risk matrix, select the highest likelihood assessment given to at least one violation:

- High (C) _____
- Medium (B) _____
- Low (A) _____

B. **Severity of Harm.** The next assessment involves determining the severity of harm that did or could occur. Review all risk assessment ratings for violations cited and based on the severity scale from the risk matrix, select the highest severity assessment given to at least one violation:

- Extreme (3) _____
- Serious (2) _____
- Moderate (1) _____

C. **Pervasiveness.** To make the assessment of pervasiveness, use scorecard 2 above.

- Isolated (1 or more violations in only 1 part of the standards) _____
- Scattered (3 or fewer violations in each of at least 2 part of the standards) _____
- Widespread (4 or more violations in each of at least 2 parts of the standards) _____

D. **Duration.** To make the assessment of duration, determine the longest length of time that at least one key health and safety standard has been in, e.g., a continuous or intermittent state of noncompliance):

- Short (the conditions causing the violation existed for a day or less) _____
- Intermediate (conditions causing the violation persisted for 2 days to 2 weeks) _____
- Long (the conditions causing the violation persisted for more than 2 weeks) _____

Section IV. Calculation of points

A. The overall likelihood of occurrence and severity of harm are determined from the evaluation made in Section III Risk Assessment, A and B. The risk level cannot be lower than the highest risk level assigned to an individual violation cited.

Circle or check one:

- High Likelihood of Occurrence of Extreme Injury C-3 = 18
- High Likelihood of Occurrence of Serious Injury C-2 = 16
- High Likelihood of Occurrence of Moderate Injury C-1 = 10
- Medium Likelihood of Occurrence of Extreme Injury B-3 = 14
- Medium Likelihood of Occurrence of Serious Injury B-2 = 12
- Medium Likelihood of Occurrence of Moderate Injury B-1 = 8
- Low Likelihood of Occurrence of Extreme Injury A-3 = 6
- Low Likelihood of Occurrence of Serious Injury A-2 = 4
- Low likelihood of Occurrence of Moderate Injury A-1 = 2

Note: A decision was made to reverse the assigned weights for risk levels B-2, B-3, and C-1. Although harm is considered imminent (or has happened) with an assessment of C-1, the opinion was that a B-2 and B-3 necessitated a higher weight because harm is not only likely to occur, but will either be of a serious to extreme level of severity.

B. Multiple Serious Findings of C-3s or a finding that a failure to protect the physical and/or mental well-being of a person in care contributed to the person's death. Count the individual violations assessed with a risk assessment rating of "C-3" and circle the appropriate number of points. If a death occurred, the assigned number of points is automatically 64; no additional points should be added from multiple C-3s:

Circle or check one:

7 or more C-3s or Death Occurred	64
4 - 6 C-3s	44
2 - 3 C-3s	24
0 - 1	0

C. Pervasiveness. Circle the appropriate points (only one number):

Circle or check one:

Isolated	1
Scattered	9
Widespread	18

D. Duration. Circle the appropriate points (only one number):

Circle or check one:

Short	1
Intermediate	9
Long	18

E. Total Points. Add up all the points from subparts A – D and enter them here: ____

F. Adjustments to Point Assessment.

1. Look at the points assigned in subpart C above, "Pervasiveness," and in subpart D above, "Duration. Are there a total of 18 or more points for the combined total number of points? If so, proceed to the next instruction.
2. Return to subparts A and B of Risk Assessment. If the overall likelihood of occurrence of harm and likelihood of severity of harm does not exceed "Medium Likelihood of Occurrence" (B) of "Moderate Severity of Harm" (1), subtract 18 points from the total number of points from E and enter the adjusted total below.

Total points after adjustment (only if "F" applies): _____

Section V. Civil penalty

The total number of points from subpart E or F (if applicable) is the number tracked in the "Total Points" column of the table below to determine the civil penalty.

The chart is a range. If the total number of points falls at the low end of the civil penalty range, the lower civil penalty will apply. Likewise, if the total number of points falls in the middle or high end of the civil penalty range, the number in the middle or high end of the range will be the correct civil penalty.

Circle the applicable civil penalty:

Total Points	Low Range	Medium Range	High Range
0 – 7	0 – 2 (\$0)	3 – 5 (\$0)	6 – 7 (\$0)
8 – 18	8 – 11 (\$100 - \$200)	12 – 15 (\$200-\$300)	16 – 18 (\$300-\$500)
19 - 27	19 – 21 (\$500 - \$550)	22 – 24 (\$550 - \$600)	25 – 27 (\$600 – \$750)
28 - 36	28 – 30 (\$750 - \$800)	31 – 33 (\$800 - \$900)	34 – 36 (\$900 - \$1000)
37 - 45	37 – 39 (\$1,000 - \$1,250)	40 – 42 (\$1,250 - \$1,500)	43 – 45 (\$1,500 - \$2,000)
46 - 54	46 – 48 (\$2,000 - \$2,250)	49 – 51 (\$2,250 - \$2,500)	52 – 54 (\$2,500 - \$3,000)
55 - 63	55 – 57 (\$3,000 - \$3,250)	58 – 60 (\$3,250 - \$3,500)	61 – 63 (\$3,500 - \$4,000)
64 - 72	64 – 66 (\$4,000 - \$4,250)	67 – 69 (\$4,250 - \$4,500)	70 – 72 (\$4,500 - \$5,000)
73 - 81	73 – 75 (5,000 - \$5,250)	76 – 78 (\$5,250 - \$5,500)	79 – 81 (\$5,500 - \$7,500)
82 - 118	82 – 84 (\$7,500 - \$8,000)	85 – 87 (\$8,000 - \$8,500)	88 – 118 (\$8,500-\$10,000)

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