

**Virginia Department of Social Services  
Division of Licensing Programs**

**ADVERSE ENFORCEMENT ACTION  
REVIEW COMMITTEE**

**GUIDANCE FOR DETERMINING CIVIL  
PENALTIES BASED ON ASSESSED RISK FROM  
VIOLATIONS IN ASSISTED LIVING FACILITIES**

Revised: December 8, 2008

# Guidance for Determining Civil Penalties Based on Assessed Risks from Violations in Assisted Living Facilities

## I. Introduction

Legislation enacted by the 2005 General Assembly (§63-2 1709.2) requires the Board to approve criteria the department will use to levy fiscal sanctions in response to violations by Assisted Living Facilities (ALF). The new law:

- Increases the current maximum fine from \$500 per inspection to \$10,000 within a 24 month period and
- Requires the State Board of Social Services to approve criteria for imposition and amounts, in ranges, based on:
  - Severity,
  - Pervasiveness,
  - Duration, and,
  - Degree of risk to health, safety or welfare of residents.

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 3 factors, i.e., severity, pervasiveness, and duration)

## II. Integration and Implementation

The decision-making criteria do not exist in isolation. Instead, they tend to exacerbate one another. For example, the longer a violation persists (duration) or is repeated, the more likely it is that an adverse event will result (occurrence) and cause a certain level of harm (severity). And, if violations are widespread (pervasiveness), then the risk is heightened because this pattern suggests that management control is weak and unlikely to detect and correct violations effectively.

Neither does the fiscal penalty enforcement tool exist in isolation. There are other intermediate sanctions that can be used alone or in combination with fiscal penalties, such as probation, reduced capacity, mandated training, or an interim manager.

Forcible closure options are also available decision options that must be considered when the overall risks warrant, e.g., revocation, denial of initial or renewal application, or suspension. A critical decision-point will be to determine when violations are serious enough to warrant a \$10,000 fine yet not serious enough to move the case to forcible closure.

Moreover the decision to issue a sanction is part of a decision-sequence and, in the case of determining the amount of a civil penalty, both series of decisions are

using some of the same concepts. During an inspection, staff must do a risk assessment of each violation cited from a prescribed list of key standards considered to have the greatest impact on health, safety and rights. The assessment of risk presented by a violation(s) is made according to the assessor's professional estimation. In addition to the use of the assessor's own professional experiences, this estimation may be supported by information gathered from other sources, e.g., research, field experts, colleagues, supervisor, home office staff, etc.

Achieving fair and consistent decision-making, which are prime values for both regulators and licensees, is challenging in the regulation of human care because of the multiplicity of variables. The primary method most regulatory agencies use is called Institutional Decision-making, which simply means establishing processes for serial and concurrent reviews by peers and supervisors to bring a wider span of expertise, perspectives, and experience to bear on the task of improving the quality and consistency of decisions.

The department proposes to continue to use this method as the foundation for implementation of the ALF fine structure, but staff will also pilot and refine a point-system that will be used by the decision-making group to reach and test consensus about assigning the amount of a fine within set ranges. In time, the information system can be enhanced to help weight and profile violations to allow the proposed point-system to become a stronger tool for structuring and supporting professional judgment.

A. Composition of the Adverse Enforcement Civil Penalty Committee

The process for assigning fines requires establishing an ALF Adverse Enforcement Review Committee. The voting quorum requires at least 3 members, one of whom needs to be a licensing inspector. The committee is comprised of the following members:

- Adverse Enforcement Consultant
- Adult Programs Medical Consultant
- Adult Programs Mental Health Consultant
- 2 Licensing Inspectors (serving on a rotating basis and not involved in the case)

Note: In addition to the 5 voting members, the committee is supported by the adverse enforcement program support technician, the operations manager (ex-officio member), a senior licensing inspector (ex-officio member), and a rotating licensing administrator (ex-officio member).

B. Process: Submission of *Sanction Recommendation Memorandum*

1. Responsibilities of the Licensing Office:

a) The field licensing office will submit a case in the form of a sanction recommendation to the adverse enforcement program tech who will record and forward the case to the adverse enforcement consultant. Along with providing all relevant information on the *Sanction Recommendation Memorandum* form, the licensing office will list all key health, safety, and human rights standards that support the civil penalty on the table of the form (use an addendum table if needed). Each violation must be accompanied with the assigned level of risk.

b) The licensing office will use the civil penalty determination guidance and worksheet (see attachment) to recommend a civil penalty amount. All sections must be completed except for the section, "*Adjustment to Risk Levels Assigned to Violations.*"

2. Responsibilities of the Adverse Enforcement Consultant and the Committee:

a) The review Committee meets bi-weekly or as needed and may perform its work by teleconferencing.

b) The adverse enforcement consultant will gather all relevant documentation and prepare a case document for review by the committee.

c) The program tech will send a copy of the case(s) to all committee members, including the ex- officio members.

d) Committee members will have all necessary documents for review for each case at least seven (7) working days prior to the date of the actual review.

e) The committee will review all submitted documentation pertaining to the case, to include the licensing office's assessment of risks. By consensus, the committee will either approve the assessments and recommendations as submitted or will recommend changes to the director of licensing

f) Following the decisions reached by the adverse enforcement review committee regarding a civil penalty amount, a worksheet will be completed by the adverse enforcement consultant, in behalf of the committee, and sent to the licensing office to inform the licensing office of the committee's decisions and rationales.

g) If the licensing administrator who submits the sanction letter is not in agreement with the decisions made by the committee, the adverse enforcement consultant will request that the licensing administrator state, in writing, areas of disagreement and submit the document to the adverse enforcement consultant. The adverse enforcement consultant will submit this document along with the sanction recommendation to the Director of Licensing.

h) The licensing director makes the final determination on what to recommend to the Commissioner.

i) An appeal, including the proposed consent agreement that may serve as the basis for reducing the fine, follows the normal APA processes.

### **III. Procedures for Completing the Civil Penalty Worksheet**

Section I: This section requires a review of all relevant violations listed in the *Sanction Recommendation Memorandum*, attached addendum (if applicable), and the attached violation notice(s) supporting the recommendation for a sanction prior to completing Section I. A&B. The violations may stem from an inspection completed, in whole, on one day or, in parts, over several days. The violations may also stem from findings revealed from a complaint investigation that may have been initiated during the inspection. For each rating assigned to Section I. A, B, C, and D, a rationale regarding how or why the decision for that rating was reached must be given.

A. Determine the overall likelihood that the violations will result in harm based on the available knowledge of the propensity for those violations to result in 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 result in 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 not the extent that any particular standard has been repeatedly violated, rather it is the extent that violations are spread across different operations within the facility, e.g., administration and administrative services; admission, retention, and discharge; buildings and grounds, etc. The key patterns of pervasiveness are isolated (1 or more violations in only 1 operation), scattered (3 or fewer violations in each of 2 or more operations), and widespread (4 or more violations in each of 2 or more operations).

D. Determine the longest duration among the standards violated. The aim is to determine the longest time that at least one key health, safety, and human rights standard has been in a continuous, non-continuous, or intermittent state of noncompliance. The lengths of time for durations are short (the conditions that caused the violation existed for a day or less), intermediate (conditions that caused the violation persisted for 2 days to 2 weeks), long (the conditions that caused the violation persisted for more than 2 weeks).

Section II: This section pertains to the actual assignment of civil penalty points that will be used to help determine the civil penalty amount to recommend.

- Each risk rating assigned to a violation by the licensing inspector shall be affirmed or adjusted by the civil penalty review committee. If adjusted, the revised assessment(s), along with the rationale, shall be documented on page 4 of the worksheet, and will be forwarded to the licensing office. The licensing inspector assigned to the case shall make the changes to the risk level rating(s) recorded in DOLPHIN.
  - Ensure that a single act, omission, or incident not result in the imposition of multiple civil penalties even though such act, omission, or incident may violate more than one statute or regulation (refer to §63-2 1709.2. B.4). An act, omission, or incident shall equate to a single violation of a standard. This, therefore, shall mean that no sanction recommendation shall include more than one dollar amount. For instance, while standard 50.B.4 (*The licensee shall protect the physical health and mental well-being of residents*) and Code 63.2-1808A.10 (*Is free from mental, emotional, physical, sexual, and economic abuse and exploitation...*) could both be cited in a situation where a staff abused a resident, only one can be used in determining a civil penalty amount since the violations are not discreetly different from one another. All violations cited as incidents and factored into the resulting civil penalty amount must be individually different from each other.
- A. Determine the overall risk that should be assigned to the facility, as a whole, and circle the appropriate rating and corresponding points, i.e., between A-1 (equivalent to 2 pts) and C-3 (equivalent to 18 pts).
1. Ensure that the overall risk level assigned to a case is not lower than the highest risk level assigned to any one of the standards violated. In other words, if there are 5 violations with a risk rating of B-3, C-2, B-1, B-2, and A-3, respectively, the overall risk level assigned to the facility, as a whole, must be at least C-2.
  2. The overall risk level can be assessed higher than the individual ratings, as noted in A.1 above, if it has been determined that the aggregate risks from all violations have raised the dangerousness

presented by the facility. Therefore, using the 5 ratings in A.1, if the assessor(s) determines that the degree of risk for harm is greater than C-2, then the overall rating would then be C-3.

- B. Determine the number of multiple incidents that have been assessed a risk rating of C-3.
  - 1. To be counted, the multiple incidents or cited standards must be discreetly different from one another.
  - 2. Circle the appropriate number of points based on the count.
- C. Determine the pervasiveness of the violated standards and circle the appropriate number of points.
- D. Determine the longest duration among the violated standards and circle the appropriate number of points.
- E. Add the number of points from Section II. 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 A and B of Section I 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 III: 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 II. Both the points and dollar amounts reflect progressive ranges.

- 1. When points fall between the lower and upper end of a particular range, e.g. between 19-21 where the dollar range is \$501-\$550, attempt to determine the midpoint of the point range (20 in this case) to see if the assessed points fall below the midpoint, exactly at the midpoint, or above the midpoint.

2. Based on where the points fall, the dollar amount should align proportionally. For example, if the number of points calculated was 20, i.e., midpoint, then the civil penalty amount should be \$525, i.e., midpoint (Step 1:  $550-501=49$ ; Step 2:  $49/2=24.5$  where 2 is the difference in the point range 19-21; Step 3:  $501+24.5= 525.5$  or 525 rounded off).

3. A rationale must be provided on page 4 of the worksheet to support the civil penalty amount being recommended. The rationale must take into account the seriousness of aggregate risks presented from one or more incidents. It is **very important** to attempt to use any available and reliable research, expert opinions, professional consultations, etc. to support the findings that led to the case decision.

# WORKSHEET TO ASSESS CIVIL PENALTIES AGAINST ASSISTED LIVING FACILITIES

Facility Name and Address:

File Number:

Date submitted:

Region:

Licensing Administrator:

Licensing Inspector:

## Important Reminders When Citing Standards

- A. 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 addressing appropriately; or
  - 3) the licensee is personally or directly culpable for causing harm such as by fraudulent conduct, deception, abuse, etc.
- B. Avoid "piling on." Standards that are cited must be distinct in terms of the specific intent or focus on how the consumer is being served and/or protected. For example:

*The licensee shall protect the physical and mental well-being of residents.*

And

*The assisted living facility shall have staff adequate in knowledge, skills, and abilities and 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.*

## I. Risk Assessment

- A. Overall likelihood/probability of Occurrence of Harm (determined by evaluating all violations and the aggregated influences that the overall likelihood that harm will occur will be one of the following degrees, refer to the Risk Matrix):

High (C) \_\_\_\_\_

Medium (B) \_\_\_\_\_

Low (A) \_\_\_\_\_

Rationale:

B. Likelihood/Probability of Severity (determined by evaluating the level of knowledge, skills, and abilities that might be required to address the potential or actual harm which, if harm does occur, the severity of the most egregious harm will be one of the following degrees, refer to the Risk Matrix):

- Extreme (3) \_\_\_\_\_
- Serious (2) \_\_\_\_\_
- Moderate (1) \_\_\_\_\_

Rationale:

C. Pervasiveness (determined by evaluating the pattern of violations in 1 or more operations. An operation is, e.g., Part I: General Provisions; Part II: Administration and Administrative Services; Part III: Personnel, etc.):

- Isolated (1 or more violations in only 1 operation) \_\_\_\_\_
- Scattered (3 or fewer violations in each of 2 or more operations) \_\_\_\_\_
- Widespread (4 or more violations in each of 2 or more operations) \_\_\_\_\_

Rationale:

D. Duration (determined by evaluating the longest length of time that at least 1 key health and safety standard has been in a continuous, non-continuous, or intermittent state of noncompliance):

- Short (the conditions that caused the violation existed for a day or less) \_\_\_\_\_
- Intermediate (conditions that caused the violation persisted for 2 days to 2 weeks) \_\_\_\_\_
- Long (the conditions that caused the violation persisted for more than 2 weeks) \_\_\_\_\_

Rationale:

## II. Points Assignment

A. Overall Likelihood of Occurrence and Severity of Harm (determined from the evaluations made in A and B of Section I, "Risk Assessment"). **The overall risk level cannot be lower than the highest risk level assigned to an individual standard violated.** Select 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

\* 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-3's (determined by counting the individual violations assessed at a risk assessment rating of "C-3") Select appropriate points:

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

C. Pervasiveness (Select one)

Isolated	1
Scattered	9
Widespread	18

D. Duration (Select one)

Short	1
Intermediate	9
Long	18

E. Total Points \_\_\_\_\_

F. Adjustments to Point Assessment

For any combination of 18 or more points added for duration and pervasiveness, when the overall assessment of likelihood of occurrence of harm and likelihood of severity of harm (determined from A and B of Section I, Risk Assessment) **does not exceed** "Medium Likelihood of Occurrence" (B) of "Moderate Severity of Harm" (1), subtract 18 points from the total number of points and enter on the line below.

Total Points After Adjustment (only if "F" applies) \_\_\_\_\_

**III. Civil Penalty Range**

<b>Points</b>	<b>Lo</b>	<b>Mid</b>	<b>Hi</b>
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 - 100	82 - 84 (\$7,500-\$8,000)	85 - 87 (\$8,000-\$8,500)	88-100 (\$8,500-\$10,000)

Note: The dollar amount between two consecutive ranges (the upper amount for the preceding range, e.g. \$8,000-**\$8,500** and the lower amount for the following range, e.g., **\$8,500**-\$10,000) is the same since the point difference between the two ranges is 1, i.e., 87 and 88. Therefore, it does not matter which range is selected provided that the point total falls in one of the two ranges.

**From this Section Forward, the Form is Completed by the Civil Penalty Committee Chair**

Changes to Cited Violations, Assigned Risk Levels, and/or Other Information

Changes to Cited Standards and/or Other Information	Original Risk Level (if applicable)	Adjusted Risk Level (if applicable)	Rationale for Changes

Points (From II.F., above) \_\_\_\_\_

Civil Penalty Range: \_\_\_\_\_

Civil Penalty Amount Determined: \_\_\_\_\_

Rationale for Sanction:

Date Reviewed and Action Taken by Committee: \_\_\_\_\_

Committee Members Present for Decision:

Name

Title

Office

Name	Title	Office