Item: Consideration of Finding of Emergency and Possible Action to adopt Finding of Emergency and Initiate Emergency Rulemaking for Proposed Amendments to CCR, Title 16, §1399.365, to Address Immediate Public Health and Safety Concerns.

Item Summary:

The Board will consider making a Finding of Emergency relating to the implementation of CCR, Title 16, section 1399.365 and making a motion to authorize staff to initiate the emergency rulemaking process pursuant to Government Code §11346.1. Emergency regulations are proposed to address immediate public health and safety concerns regarding LVNs' ability to practice respiratory care tasks and services identified by the Board in home health and home and community-based settings. Approval will allow staff to prepare the emergency rulemaking package and submit the amended regulation to the Office of Administrative Law under the emergency rulemaking process, expediting implementation.

Board Action:

1. President calls the agenda item and it is presented by or as directed by the President
2. President requests motion on Finding of Emergency
3. President may request if there is a second to the motion, if not already made.
4. Board member discussion/edits (if applicable).
5. Inquire for public comment / further Board discussion as applicable.
6. Repeat motion and vote: 1) aye, in favor, 2) no, not in favor, or 3) abstain
7. President requests motion for the Board to approve the proposed regulatory text to amend section 1399.365 as presented [or as amended during the meeting], direct staff to submit the text to the Director of the Department of Consumer Affairs and to the Business, Consumer Services, and Housing Agency for review, and if no adverse comments are received, authorize the Executive Officer to take all steps necessary to initiate an emergency rulemaking process.

   - any other appropriate motion.
8. President may request if there is a second to the motion, if not already made.
9. Board member discussion/edits (if applicable).
10. Inquire for public comment / further Board discussion as applicable.

Background

Legislative Framework and Statutory Authority

In 2022, Senate Bill 1436 (Chapter 624, Statutes of 2022) amended the Vocational Nursing Practice Act to clarify that Licensed Vocational Nurses (LVNs) are not independently authorized to perform respiratory care services, and to authorize the Respiratory Care Board (RCB) to identify limited "basic respiratory tasks and services" that LVNs may perform under specified conditions. To implement this directive, the RCB adopted California Code of Regulations, Title 16, section 1399.365, effective October 1, 2025, defining the basic respiratory care tasks and services that LVNs may perform.

Following adoption, stakeholders expressed concern regarding whether section 1399.365 applied to LVNs working in home health and home and community-based settings that are exempt under Business and Professions Code (B&PC) section 3765, subdivisions (i) and (j). These provisions, as amended by Senate Bill 1451 (Chapter 481, Statutes of 2024), expressly authorize LVNs employed by licensed home health agencies or working in designated home and community-based settings to perform additional respiratory care services identified by the Board, provided specified training and competency requirements are met.

Rationale for Amendment

To address the concerns, the proposed amendment to section 1399.365 adds subdivision (d), clarifying that the regulation does not apply to LVNs working in any of the exempt settings listed, and under the conditions specified, in B&PC section 3765, subdivisions (i) and (j). This proposed amendment reinforces the RCB's intent that section 1399.365 governs only non-exempt settings.

Due to the immediate need to clarify the regulation to prevent potential disruptions in patient care, the Board will consider making a Finding of Emergency relating to section 1399.365 and may make a motion to authorize staff to initiate the emergency rulemaking process pursuant to Government Code section 11346.1. Emergency regulations may be necessary to protect consumers and address urgent public health and safety concerns related to LVNs' performance of respiratory care tasks and services identified by the Board in home health and home and community-based settings. Approval will allow staff to prepare the emergency rulemaking package and submit the amended regulation to the Office of Administrative Law under the emergency rulemaking process, expediting implementation.

This amendment is urgently needed to ensure that LVNs, employers, and regulatory partners clearly understand the distinct frameworks governing LVNs' performance of respiratory tasks and services identified by the Board in home health and home and community-based settings versus basic respiratory tasks and services in non-exempt healthcare settings. Adoption of this amendment will provide immediate regulatory clarity, prevent misapplication of the regulation, and further the RCB's mission to protect consumers and promote safe, high-quality respiratory care in California.

RCB Mandate & Mission

The RCB's highest priority is protection of the public from the unauthorized or unqualified practice of respiratory care and from unprofessional conduct by licensees, as required under B&PC sections 3701 and 3710.1. The RCB fulfills this mandate by licensing qualified practitioners, enforcing the provisions of the Respiratory Care Practice Act (B&PC sections 3700–3779), and advancing public awareness, education, and access to safe, high-quality respiratory care services in alignment with its 2023 Strategic Plan.

Legal References

Vocational Nurse Practice Act
B&PC § 2860

(a) This chapter confers no authority to practice medicine or surgery, to provide respiratory care services and treatment, or to undertake the prevention, treatment, or cure of disease, pain, injury, deformity, or mental or physical condition in violation of any provision of law.
(b) Notwithstanding subdivision (a), a licensed vocational nurse who has received training and who demonstrates competency satisfactory to their employer may, when directed by a physician and surgeon, perform respiratory tasks and services expressly identified by the Respiratory Care Board of California pursuant to subdivision (a) of Section 3702.5.

(Amended by Stats. 2022, Ch. 624, Sec. 1. (SB 1436) Effective January 1, 2023.)

Respiratory Care Practice Act
B&PC § 3702.5
Except for the board, a state agency may not define or interpret the practice of respiratory care for those licensed pursuant to this chapter, or develop standardized procedures or protocols pursuant to this chapter, unless authorized by this chapter or specifically required by state or federal statute. The board may adopt regulations to further define, interpret, or identify all of the following:

(a) Basic respiratory tasks and services that do not require a respiratory assessment and only require manual, technical skills, or data collection.
(b) Intermediate respiratory tasks, services, and procedures that require formal respiratory education and training.
(c) Advanced respiratory tasks, services, and procedures that require supplemental education, training, or additional credentialing consistent with national standards, as applicable.

(Added by Stats. 2018, Ch. 180, Sec. 1. (SB 1003) Effective January 1, 2019.)

B&PC § 3765
This act does not prohibit any of the following activities:

(a) ....
    (i) The performance, by a vocational nurse licensed by the Board of Vocational Nursing and Psychiatric Technicians of the State of California who is

employed by a home health agency licensed by the State Department of Public Health, of respiratory tasks and services identified by the board, if the licensed vocational nurse complies with the following:

(1) Before January 1, 2028, the licensed vocational nurse has completed patient-specific training satisfactory to their employer.

(2) On or after January 1, 2028, the licensed vocational nurse has completed patient-specific training by the employer in accordance with guidelines that shall be promulgated by the board no later than January 1, 2028, in collaboration with the Board of Vocational Nursing and Psychiatric Technicians of the State of California.

(j) The performance of respiratory care services identified by the board by a licensed vocational nurse who satisfies the requirements in paragraph (1) in the settings listed in paragraph (2).

(1)

(A) The licensed vocational nurse is licensed pursuant to Chapter 6.5 (commencing with Section 2840).

(B) The licensed vocational nurse has completed patient-specific training satisfactory to their employer.

(C) The licensed vocational nurse holds a current and valid certification of competency for each respiratory task to be performed from the California Association of Medical Product Suppliers, the California Society for Respiratory Care, or another organization identified by the board.

(2) A licensed vocational nurse may perform the respiratory care services identified by the board pursuant to this subdivision in the following settings:

(A) At a congregate living health facility licensed by the State Department of Public Health that is designated as six beds or fewer.

(B) At an intermediate care facility licensed by the State Department of Public Health that is designated as six beds or fewer.

(C) At an adult day health care center licensed by the State Department of Public Health.

(D) As an employee of a home health agency licensed by the State Department of Public Health or an individual nurse provider working in a residential home.

(E) At a pediatric day health and respite care facility licensed by the State Department of Public Health.

(F) At a small family home licensed by the State Department of Social Services that is designated as six beds or fewer.

(G) As a private duty nurse as part of daily transportation and activities outside a patient's residence or family respite for home- and community-based patients.

(3) This subdivision is operative on January 1, 2028.

(Amended by Stats. 2024, Ch. 481, Sec. 13. (SB 1451) Effective January 1, 2025.)

California Code of Regulations
Title 16. Professional and Vocational Regulations
Division 13.6. Respiratory Care Board
Article 6. Scope of Practice

PROPOSED AMENDMENTS CONCERNING BASIC RESPIRATORY TASKS AND SERVICES

Legend:

- Added text is indicated with an underline

AMEND SECTION 1399.365
§ 1399.365. Basic Respiratory Tasks and Services

(a) For purposes of this section, "assessment" means making an analysis or judgment and making recommendations concerning the management, diagnosis, treatment, or care of a patient or as a means to perform any task in regard to the care of a patient. Assessment as used in this section is beyond documenting observations, and gathering and reporting data to a licensed respiratory care practitioner, registered nurse, or physician.

(b) For purposes of subdivision (a) of section 3702.5 of the B&P, basic respiratory tasks and services do not require a respiratory assessment and include the following:
  (1) Patient data collection.
  (2) Application and monitoring of a pulse oximeter.
  (3) Medication administration by aerosol that does not require manipulation of an invasive or non-invasive mechanical ventilator.
  (4) Heat moisture exchanger (HME) and oxygen tank replacement for patients who are using non-invasive mechanical ventilation.
  (5) Hygiene care including replacement of tracheostomy ties and gauze and cleaning of the stoma sites.
  (6) Use of a manual resuscitation device and other cardio-pulmonary resuscitation technical skills (basic life support level) in the event of an emergency.
  (7) Documentation of care provided, which includes data retrieved from performing a breath count or transcribing data from an invasive or non-invasive ventilator interface.
  (8) Observing and gathering data from chest auscultation, palpation, and percussion.

(c) For purposes of subdivision (a) of section 3702.5 of the B&P, basic respiratory tasks and services do not include the following:
  (1) Manipulation of an invasive or non-invasive ventilator.
  (2) Assessment or evaluation of observed and gathered data from chest auscultation, palpation, and percussion.
  (3) Pre-treatment or post-treatment assessment.
  (4) Use of medical gas mixtures other than oxygen.
  (5) Preoxygenation, or endotracheal or nasal suctioning.

(6) Initial setup, change out, or replacement of a breathing circuit or adjustment of oxygen liter flow or oxygen concentration.
(7) Tracheal suctioning, cuff inflation/deflation, use or removal of an external speaking valve, or removal and replacement of the tracheostomy tube or inner cannula.

(d) This section does not apply to licensed vocational nurses performing respiratory care services identified by the Board while working in any of the exempt settings listed, and under the conditions specified, in Business and Professions Code section 3765, subdivisions (i) and (j).