

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2032/5dn  
DAK:kmg:pg

December 1, 2003

To Representative Pettis:

1. Note that in s. 50.03 (5) (a), stats., I referred to specific federal law, rather than “federal certification laws related to the operation of a residential or health care facility in this state.” Neither “residential facility” nor “health care facility” is defined in Wisconsin statutes and unless that is done I think it is clearer to refer to the specific citations to the federal law.
2. In s. 50.04 (4) (d) 1. b., I changed “3 years” to 36 months; in s. 990.01 (49), stats., “year” is defined for use throughout the statutes as a calendar year, and I assumed that you wanted to avoid that interpretation. Note also that in s. 50.04 (4) (d) 1. b. I drafted two or more rather than three or more, class “B” violations or situations that constituted a direct threat or actual harm; the DHFS language gave either as an option, but indicated that two would be consistent with the federal “double G” concept; the DHFS language did not elaborate on what a “double G” concept is, however.
3. The DHFS proposed language to amend s. 50.04 (4) (d) 2., stats., refers to a “violation ... that formed the basis for departmental action under subd. 1.” Section 50.04 (4) (d) 1. is the standard for suspensions; DHFS is precluded from acting until the time period in s. 50.04 (4) (d) 2. is satisfied; I removed the language “that formed the basis for action by the department under subd. 1.” Also, it was unclear from the instructions whether it was intended that the last sentence of s. 50.04 (4) (d) 2., stats., remain or be repealed. I retained it.
4. Section 50.04 (5) (a) 5m., stats., has, in the past, served as a type of initial applicability provision. When enacted, it served as a two-year reach-back for consideration in imposing initial triple forfeitures under s. 50.04 (5) (a) 5. In examining the file for this draft, I note that this subdivision was amended, under LRB-2032/1, to add penalty assessments to the triple forfeitures. In LRB-2032/2, it was amended to permit DHFS to consider, for purposes of applying triple forfeitures and penalty assessments, any notice of violation issued by DHFS after December 7, 1985. Do you intend that consideration of past violations reach back that far? It seems now to be in direct conflict with the three-year consideration under s. 50.04 (5) (a) 5., stats. I recommend that the provision be repealed and that a nonstatutory initial applicability provision be created that applies consideration of the triple forfeitures and penalty assessments under s. 50.04 (5) (a) 5., stats., to class “A” violations by nursing homes

that received notices of class “A” violations within 36 months [or less, depending on your choice] before the act’s effective date. I also recommend that this initial applicability provision exempt from the new forfeiture and penalty assessment amounts a nursing home that has already had triple forfeitures imposed within the 36 months [or whatever period you choose above], so that you do not create a retroactive enhanced penalty that could be an ex post facto law in violation of Article 1, Section 10, of the U.S. Constitution and Article 1, Section 12, of the Wisconsin Constitution (a statute defining or creating or enhancing a penalty may not be applied retroactively).

5. This redraft changes the term “contested action” in the first sentence of s. 50.04 (5) (e), stats. Is “contested action” now the appropriate term in the last sentence?

6. It was unclear whether you intended that the last two sentences of s. 50.04 (6) (a), stats., remain or be repealed. I retained them.

7. Please note that I also added an initial applicability provision for the changed standards for issuance of conditional licenses under s. 50.04 (6) (a), suspension of admissions under ss. 50.01 (1k), (1nd), and (1ng) and 50.04 (4) (d) 1. a. and b. and (d) 2., and suspension or revocation of licensure under section 50.03 (5) (a). Please review.

Please let me know if I may assist you further with this bill.

Debora A. Kennedy  
Managing Attorney  
Phone: (608) 266-0137  
E-mail: [debora.kennedy@legis.state.wi.us](mailto:debora.kennedy@legis.state.wi.us)