

## CHALLENGES FOR NURSING HOMES

Nursing home owners are significantly challenged to remain in compliance with federal and state regulations regarding resident care, admission and reimbursement. They must make certain they are in compliance with federal and state regulations. In particular, the Nursing Home Reform Act (the "NHRA"), which was passed in 1987, requires nursing homes to be diligent in protecting their residents from abuse, neglect and what the state or federal officials deem to be inadequate care. The objective of the NHRA is to ensure residents of nursing homes receive quality care at all times in order to achieve and maintain their "highest practicable" physical, mental and psychosocial wellbeing.

Nursing homes are subject to a certification process, which includes unannounced surveys such as resident interviews at irregular intervals at least once every 15 months. The state authorities may also conduct more targeted surveys or investigations in response to complaints against nursing homes. If a survey or investigation reveals that a nursing home is out of compliance, the nursing home may be subject to penalties or other actions depending upon whether a deficiency subjects a resident to immediate jeopardy. The penalties or sanctions may also be different depending upon whether the deficiency that has been discovered is an isolated incident or part of a pattern or a widespread practice.

The remedies that may be imposed for noncompliance with the NHRA include:

- State monitoring;
- Civil monetary penalties;
- Payment denials for current residents and new Medicare or Medicaid admissions;
- Directed in-service training of staff; or
- Corrective action plans.

Compliance with the NHRA presents many challenges for nursing homes including the admission process, care planning, accommodating resident preferences, Medicare and Medicaid distinctions, reimbursement practices, and transfer/discharge procedures.

- **Admission Process.** Some nursing homes may attempt to convince family members into taking financial responsibility for the resident's care as a condition of admission by asking a family member to sign as a "responsible party" in order to obtain a guarantee of payment if the resident is not able to make the payment. The nursing home must be transparent with family members because federal law prohibits a nursing home from requiring a family member to take on the financial burden of care.<sup>1</sup>



- **Care Planning.** The NHRA permits nursing home residents and family members to dictate the type and level of care the resident is to receive. Residents and families play a significant role in developing a care plan, and nursing home staff must make reasonable adjustments to honor patients' preferences. A baseline care plan must be developed within 48 hours of a resident's admission and include the minimum healthcare information necessary to properly care for the resident.<sup>2</sup> Also, the nursing home must conduct a comprehensive assessment of the resident which must generally be completed within 14 days of the admission and thereafter, a quarterly health assessment as well as ongoing, regular assessments to address changes in health status and to adjust the care plan as needed.<sup>3</sup> Within seven days of the initial comprehensive assessment, the nursing home must develop and implement a comprehensive care plan.<sup>4</sup>

It is important that the care plan be specific to each resident's needs and the nursing home should be employing the care plan to ensure that the proper environment is created in which residents and family members or resident representatives feel comfortable making suggestions about the appropriate care. The care plan should be in writing and the nursing home must follow through with the plan, and it is important that the nursing home implement a care plan review program that includes internal care plan audits and reviews at specific times. Residents are now more educated as to the level of care required which increases the burden of the nursing home to comply.

- **Resident Preferences.** The NHRA requires nursing homes to make reasonable adjustments to their practices to meet resident needs and preferences.<sup>5</sup> However, this does not mean that residents have carte blanche for deciding which rules apply to them and which they choose to change. It is acceptable for nursing homes to require families and residents to explain why the benefit from a proposed change is worth whatever inconvenience or expense may be involved. Nursing homes should not discourage comments and requests from residents and their families and should not suggest to residents that they do not have the resources to accommodate requests.

For example, if the standard wake-up time is 6 a.m., but a resident chooses to sleep in, the nursing home must accommodate that request. Also, residents have a right to receive visitors at the time of his or her choosing, and in a manner that does not impose on the rights of another resident,<sup>6</sup> so if a resident chooses to have a visitor in the middle of the night, she may do so; however, the nursing home can suggest that the visit take place in an area to avoid disturbing other residents.

- **Medicare.** Nursing home residents and family members may think Medicare is a comprehensive health insurance program that allows for limited reimbursement for nursing home care. In reality, payment depends on a link to hospital care and is limited to situations in which residents enter the nursing home within 30 days after a hospital stay of at least three nights. Medicare will not pay for custodial care such as administrative tasks associated with medication, and reimbursement only applies when the resident needs skilled nursing or rehabilitation services. If the nursing home decides it will not bill Medicare for the resident's care, it must give the resident written notice. However, residents are not bound by these decisions and have the right to insist that the facility submit a bill to Medicare.<sup>7</sup>
- **Medicaid.** While nursing homes rely on Medicaid reimbursement for a significant portion of their revenues, Medicaid tends to pay lower rates than do private payers or Medicare. This dynamic places an additional burden on the nursing home to provide the same level of care regardless of the method and amount of payment received. Federal law prohibits discrimination based on Medicaid status as outlined in the NHRA. Nursing homes "must establish and maintain identical policies and practices regarding transfer, discharge and the provision of services under the State [Medicaid] plan for all individuals regardless of source of payment."<sup>8</sup>

Nursing homes should educate their staff about not discussing the difference in reimbursements from Medicaid, Medicare or private pay individuals with or in front of residents. The amount of reimbursement must not affect the type or quality of care provided, therefore, the distinction in payors is not relevant and only serves to confuse or upset the residents and their representatives. Further, if Medicare and/or Medicaid provides payment in full, the nursing home should not charge residents separately for other supplies or services.<sup>9</sup>

- **Transfers and Discharge.** Because the demand for nursing home beds can outnumber supply, facilities may try to evict residents they deem difficult. However, nursing homes must permit residents to remain and not transfer or discharge the resident unless:
  1. There is a failure to pay;
  2. A resident no longer needs nursing home care;
  3. A resident's needs cannot be met in a nursing home;
  4. A resident is endangering others' safety;
  5. A resident is endangering others' health; or
  6. The facility is going out of business.<sup>10</sup>

At least 30 days before a nursing home transfers or discharges a resident, it must notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. Also, when the nursing home transfers or discharges a resident under any of the above circumstances, it must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider. The notice must include, among other required information, a statement of appeal rights and the name, address and telephone number of the state's long-term care ombudsman.<sup>11</sup>

## MYTH VS. REALITY<sup>12</sup>

Myth	Reality
Medicaid does not pay for the service you want.	Medicaid residents are entitled to the same service as other residents.
Only staff can determine the care you receive.	Residents and family have the right to participate in developing a care plan.
Staff cannot accommodate individual schedules.	A nursing home must make reasonable adjustments to honor residents' needs and preferences.
You need to hire private help.	A nursing home must provide all necessary care.
Restraints are required to prevent the resident from wandering away.	Restraints cannot be used for the nursing home's convenience or as a form of discipline.
Family visiting hours are restricted.	Family members can visit at any time of day or night.
Therapy must be discontinued because the resident is not progressing.	Therapy may be appropriate even if resident is not progressing; Medicare may pay even without current progress.
You must pay any amount set by the nursing home for extra charges.	A nursing home may only require extra charges authorized in the admission agreement.
The nursing home has no available space for residents or family members to meet.	A nursing home must provide a private space for resident or family councils.

This outline is intended to provide an overview of the various challenges facing nursing homes. It is important to note that the applicable state and federal regulations change often and nursing homes must be vigilant about staying on top of new developments and ensuring compliance.

The Health Care Team at PLDO understands the challenges facing nursing home owners to remain in compliance with federal and state regulations regarding resident care, admission and reimbursement, and stays ahead of the curve on trends, resources and regulations. If you have questions or concerns, please contact Managing Partner Gary R. Pannone at 401-824-5100 or email [gpannone@pldolaw.com](mailto:gpannone@pldolaw.com).

#### Footnotes

<sup>1</sup> 42 CFR § 483.15(a)(3).

<sup>2</sup> 42 CFR § 483.21(a).

<sup>3</sup> 42 CFR § 483.20(b).

<sup>4</sup> 42 CFR § 483.21(b).

<sup>5</sup> 42 CFR § 483.10(e)(3).

<sup>6</sup> 42 CFR § 483.10(f)(4).

<sup>7</sup> E. Carlson, "Twenty Common Nursing Home Problems and the Laws to Resolve Them," *Clearinghouse Review Journal of Poverty Law and Policy*, Jan./Feb. 2006 39(9-10):519-33.

<sup>8</sup> 42 CFR § 483.15(b)(1).

<sup>9</sup> 42 CFR § 483.10(f)(11).

<sup>10</sup> 42 CFR § 483.15(c).

<sup>11</sup> *Id.*

<sup>12</sup> E. Carlson, "Twenty Common Nursing Home Problems and the Laws to Resolve Them," *Clearinghouse Review Journal of Poverty Law and Policy*, Jan./Feb. 2006 39(9-10):519-33.



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