Making a Difference

Baker Donelson Long Term Care Newsletter

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What will surveyors be looking for on their next visit to your nursing home? *What you need to know*

By Christy Tosh Crider, Shareholder, 615.726.5608, ccrider@bakerdonelson.com

Last month, Lewis Morris, Chief Counsel to the Inspector General, testified before a subcommittee of the U.S. House of Representatives on the topic: "In the Hands of Strangers: Are Nursing Home Safeguards Working?" We can learn valuable lessons about what the OIG will be focusing on in the upcoming year from this testimony. Here are some key issues for which your nursing home should keep a lookout.

Nursing Home Screening of Employees

Chief Counsel Morris found that nursing homes currently depend on a patchwork of data sources to identify persons posing possible threats of elder abuse in nursing homes. All nursing homes should screen their staff and prospective staff against the OIG's List of Excluded Individuals and Entities. Screening staff against the LEIE helps ensure that a nursing home does not employ an excluded person and that it does not bill federal health care programs for any excluded persons' work. Additionally, Morris advised that nursing facilities should screen prospective nurse aides and other non-licensed care staff through the use of state nurse aide registries. Federal regulations prohibit facilities from employing individuals who have been found guilty of certain offenses or who have had findings entered into the registry for abuse, neglect or mistreatment of residents or misappropriation of their property. Each state is required to establish and maintain a registry of nurse aides and should include this information.

In a July 2005 report, the OIG found that although most facilities check their nurse aide registries prior to employing an individual, they do not routinely check the registries in other states, thereby potentially jeopardizing the safety of their residents. Additionally, while most states require criminal background checks, the scope of these checks varies widely. Although some of the nursing facilities sampled conducted more comprehensive checks than required by their state laws, about half of the background checks performed were too limited in scope, for example, limited to one state. To reduce the potential risk, the OIG has recommended that the Centers for Medicare & Medicaid Services seek legislative authority to create a national nurse aide registry and to consider developing a federal requirement for comprehensive criminal background checks.

Lesson Learned: We can expect the Feds to place more focused scrutiny on criminal background checks and to perhaps expand national requirements. Therefore, take a look at your internal background checks and ask how you can make them better.

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Recent Long Term Care Successes

Christy Crider gave the keynote speeches — "Charting Gone Bad" and "Investigations: When Something Goes Very, Very Wrong" — at two recent long term care chain annual meetings.

In March, **Christy Crider** performed in-service training on charting for a nursing staff.

Davis Frye conducted an April employment seminar in Jackson, Mississippi for health care providers, with a number of long term care facilities represented.

In April, Christy Crider conducted refresher training for three nursing homes on arbitration, with **Sonya Smith** assisting with the review.

Christy Crider drafted arbitration agreements for nursing homes in four states for a new client in April, with **Carrie McCutcheon** assisting with the research.

In April, Christy Crider argued two cases before the Tennessee Court of Appeals on arbitration agreements in nursing home admission contracts.

What will surveyors be looking for on their next visit to your nursing home? *What you need to know,* *continued*

Prosecuting Providers of Substandard Care

In 2007 alone, the OIG worked 534 cases jointly with state Medicaid fraud control units to prosecute nursing homes on criminal and civil fraud theories alleging that (1) medically unnecessary services were provided and (2) improper care was given. During 2007, OIG settled cases of two nursing home chains resulting in quality of care Corporate Integrity Agreements covering all of the facilities within those chains. One case resulted in a $1.25 million settlement and the other case resulted in a $2.5 million settlement. In yet a third prosecution, the corporate defendants were convicted and fined and entered into a false claims act settlement of $1.2 million where the primary owner was convicted of a false statement misdemeanor offense and sentenced to two months incarceration. Additionally, the CEO was sentenced to 18 months of incarceration. Most disturbing, in 2002, a Pennsylvania nursing home was ordered to pay a $490,000 fine and the owner/operator was sentenced to five years in prison for falsifying medical records to conceal the nursing home deficiencies.

Lesson Learned: Poor surveys can lead to more than state and federal fines. They can also lead to civil and criminal prosecutions and imprisonment under the Federal False Claims Act.

Establishing Accountability/Corporate Structures

Morris further testified that in investigating and resolving cases which are false claims cases, law enforcement officers often struggle to determine who in the organization's management should be held responsible for the poor care. The OIG identified a growing trend toward corporate restructuring. The techniques identified as being used included: (1) creating a holding corporation to own the entire chain of nursing homes; (2) creating limited liability companies to manage the operations of the individual home; (3) creating LLCs for the real estate holdings (the facility and the grounds), usually referred to as a Real Estate Investment Trust; and (4) creating an affiliated corporation to lease all the properties from the REITs and then sublease those properties to the facility's specific entity which operates the individual homes. The OIG encountered nursing home facilities that had as many as 17 LLCs that played a role in the operation of the facility. It is Chief Counsel Morris' opinion that such complex structures dilute accountability, greatly complicate law enforcement investigations, and delay implementation of essential corrective actions. The testimony did not include a provision as to what the OIG expected to do to solve this perceived problem.

Lesson Learned: Take a look at the corporate structure of your nursing home and ask whether it is unnecessarily complicated. In order to be defensible, it should be a logical and defensible structure correctly reflecting the individuals who actually operate the nursing home.

Encouraging Adoption of Voluntary Compliance Programs

The OIG frequently provides guidance to health care providers regarding how to establish compliance programs. These suggestions are referred to as Compliance Program Guidances. The OIG originally published a CPG for nursing home facilities in 2000. Since that time, the OIG perceives that there have been significant changes in the way nursing homes deliver services and therefore in April 2008, OIG published draft Supplemental Compliance Program Guidance for nursing facilities. The OIG is currently soliciting public comments on this draft. The draft addresses major Medicare and Medicaid fraud and abuse risk areas, including quality of care, accurate claims submission, and kick-backs. The Supplemental CPG focuses particular attention on inadequate staffing, poor care plan development, inappropriate use of psychotropic medications, lack of proper medication management, and resident neglect and abuse.

Lesson Learned: Nursing homes should focus compliance efforts on the five topics the OIG has focused on in the Supplemental CPG and provide public comment on this draft.

Nursing homes should place increased scrutiny on these issues, since it is clear that the OIG will be placing increased scrutiny on them. Nursing homes provide a heroic and valuable service to our country and our communities. They deserve the best support possible from the federal government, both financially and otherwise.

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Surveys on Care Issues: Results Show Nursing Homes Should Redouble Quality Improvement Efforts

By Heidi Hoffecker, Shareholder, 423.209.4161, hhoffecker@bakerdonelson.com

For years, the long term care industry has been battered by allegations in lawsuits that its motive is "profits over people." Study after study has identified quality of care problems in nursing homes and as a result, the industry has become one of the most highly regulated in the nation.

According to a May 15, 2008 Government Accountability Office report, state nursing home survey inspectors frequently understate care problems in nursing homes by either failing to cite a deficiency or by citing a deficiency at too low a level. The GAO relied on data from the Centers for Medicare & Medicaid Services, the federal agency responsible for ensuring the effectiveness of state surveys. Federal surveyors monitor the state survey process through the use of either comparative surveys or observational surveys. A comparative survey is an independent survey conducted by a federal survey team within 30 days of the state survey. Afterwards, the state and federal surveys are compared. During observational surveys, federal surveyors accompany a state survey team to a facility to evaluate the team's on-site survey performance. From fiscal 2002 through 2007, CMS conducted 976 comparative surveys and 4,023 observational surveys.

For that period, 15 percent of comparative surveys nationwide identified state surveys that failed to cite at least one G through L deficiency. In nine states, the federal surveyors found missed serious deficiencies in 25 percent or more of the surveys. Tennessee's rate of missed serious deficiencies was 26.3 percent; in New Mexico, South Carolina, South Dakota and Wyoming, the rate of missed serious deficiencies was 33.3 percent. At the D through F tag level, missed deficiencies were greater than 40 percent in all but five states. On average, state surveys failed to identify 2.5 D through F level deficiencies per survey. And in both categories of missed deficiencies, those most frequently missed were quality of care standards.

In this most recent as well as previous reports, the GAO has identified factors that may contribute to survey inconsistency and understatement of deficiencies by state survey teams. Some of those factors include confusion about the definition of actual harm; predictability of surveys; inadequate quality assurance processes at the state level; and inexperienced state surveyors due to poor retention.

In addition, the GAO identified weaknesses in management and oversight in the CMS monitoring program. CMS requires federal surveyors to track missed deficiencies on comparative surveys, but does not effectively track the extent of understatement of serious deficiencies. The GAO also found that CMS headquarters was not effectively managing the federal monitoring survey database. For example, the GAO found that the database contained incomplete information, as results from some comparative surveys were not included in the database.

The GAO made the following four recommendations:

1. Require regional [CMS] offices to determine if there was understatement when state surveyors cite a deficiency at a lower scope and severity level than federal surveyors do and track this information in the federal monitoring survey database;
2. Establish quality controls to improve the accuracy and reliability of information entered into the federal monitoring survey database;
3. Routinely examine comparative survey data and hold regional offices accountable for implementing CMS guidance that is intended to ensure that comparative surveys more accurately

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capture the conditions at the time of the state survey;

4. Regularly analyze and compare federal comparative and observational survey results.

The report is the 18th GAO report since mid-1998 to focus on nursing home quality of care and oversight.

On the same day the most recent GAO report was issued, the nation's lawmakers considered regulatory changes to require disclosure of ownership information for nursing homes. The recommendation comes in the wake of concerns that private equity firm ownership of nursing homes leads to the bleeding of resources from the nursing homes, resulting in poor quality care. Rep. Bart Stupak (D-Mich.), chairman of the House Energy and Commerce Subcommittee on Oversight and Investigations, acknowledged that chain ownership could improve quality of care through sharing of resources across facilities, but said that "at the same time chains have the potential to hide common problems and obscure responsibility for inadequate care."

Interestingly, earlier in the month, CMS proposed a $770 million cut in Medicare payments to nursing homes for fiscal year 2009 to correct for an alleged erroneous increase resulting from a rule in 2005. The proposal was decried by the Alliance for Quality Nursing Home Care and the American Health Care Association, both of which are concerned that cuts will undermine nursing homes' ability to care for greater numbers of higher acuity patients.

The recent attention to nursing homes is nothing new. Since the enactment of the Nursing Home Reform Act of 1987, an entire industry has sprung up around regulation enforcement. And with millions of baby boomers nearing the age at which long term care becomes a necessity, the prospect of footing the bill has sent the legislature in overdrive.

The statistics are staggering: By 2030, over 70 million Americans (19.6% of the population) will be 65 or older, and Social Security, Medicare and Medicaid spending is projected to consume almost three quarters of federal revenue. One way to help solve the cost crisis is to reduce payments to nursing homes for allegedly substandard care rendered, and the GAO report can be seen as a call for surveyors to be much more stringent in their inspections.

Those in the nursing home industry can expect the scrutiny to continue and more governmental cost-saving measures to be enacted. Nursing homes, therefore, should redouble their efforts at quality improvement, focus on adequate training for caregivers, make sure staffing is appropriate for the acuity levels of their residents, and continue to work toward appropriate, meaningful and proper documentation.

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