

Growing Old Ain't for Wimps

Shorts on Long Term Care November 2010

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As the saying goes, growing old ain't for wimps, and caring for aging Americans also ain't for wimps these days, with the passage of health reform. The Patient Protection and Affordable Care Act (PPACA) passed earlier this year includes several nettlesome provisions for providers caring for elderly patients or residents, including:

- **The Elder Justice Act:** From reporting of "suspected crimes" to establishing various governmental advisory boards and councils, this section of PPACA establishes multiple new legal obligations for long-term facilities, but also establishes several new programs or grants to enhance long-term care with a focus on reducing abuse, neglect, and exploitation. The programs relate to various areas in long-term care, such as staffing, adult protective services, and research. Many of these provisions are effective now with little or no guidance from the government.
- **New Transparency Requirements:** PPACA mandates the revelation of significantly more invasive information about owners, managers, governing body members, and other "additional disclosable parties" of regulated facilities. A facility will have to certify that the information is accurate and current or face penalties. A standardized format for this information (along with some analysis of what information is needed) is due out by March 2012, but you must have this information (whatever it may be) available now if the government pays your facility a visit.
- **Fraud and Abuse Changes from the Escrow of Civil Monetary Penalties (CMPs) and New Grounds for Exclusion:** PPACA establishes various new grounds for exclusion and CMPs, as well as increased penalty thresholds for existing CMPs. The real kicker is that because of PPACA, CMS can collect a large CMP from you and keep that money in an escrow account until all appeals are exhausted. How's that for a drain on cash flow? PPACA permits a facility to reduce a CMP by 50% in some situations, but this reduction is for specific nonserious violations and is bogged down by many, many caveats and limitations. PPACA also provides for the independent informal dispute resolution of CMPs, another change that sounds good until you read all the restrictions and pitfalls associated with this process, including its "pay to play" provisions under which providers who elect to use this "independent" process must pay for the costs of conducting it.
- **Mandatory Compliance Programs:** If you haven't done so already, your facility will need to have a compliance and ethics program in place by March 2013. You can (hopefully) expect some amount of additional governmental guidance in the coming months. For now, CMS has issued a call for comments

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and suggestions on what should be required in SNF compliance programs and has awarded a federal contract to a group of researchers and industry experts to develop recommendations for SNF compliance and ethics programs.

These are just a few of the new governmental efforts focused on long-term care providers in health reform. While PPACA does include several workforce programs and grants that may actually benefit providers over the long haul, the law also contains many provisions that are punitive and burdensome (in terms of administration, staffing, and finances). The law also contains a plan to develop incentives for individuals to purchase long term care insurance, with somewhat limited per-day payment rates to facilities. Some have noted the irony of the Obama administration providing to the long term care industry another insurance-related product in legislation touted as curing abuses in the health insurance industry.

Ken Burgess of the Poyner Spruill health law team is serving on the Institute of Medicine Health Law Reform Fraud and Abuse task force charged with making recommendations to the N.C. Department of Health and Human Services about changes in state law, regulations and/or policies required to comply with various aspects of the reform legislation's fraud and abuse provisions. Currently, the task force is identifying all relevant fraud and abuse provisions in the reform legislation, determining which of these provisions require corresponding state laws or regulations, and determining whether North Carolina already has compliant statutes, regulations or policies and, if not, what changes need to be made. We'll keep you posted on the work of the IOM task force.

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