

HEALTH LAW ALERT

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► From the Editor's Corner



Gregory J. Naclerio, Esq.

The Office of Inspector General supplementary compliance guidance now considers quality of care as a Fraud and Abuse Risk. While you are encouraged to read the entire Guidance, this Alert highlights this new OIG concern. Your Compliance Program should be updated to address this new risk to your Nursing Home. Call either one of us if we can be of assistance.



Alexander G. Bateman, Esq.

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Office of Inspector General: Quality of Care is Now Job One

It took the Medicare Office of Inspector General eight years and one month to supplement its original 2000 guidance to Skilled Nursing Facilities (SNF's) – and supplement it did. While the new guidance continues to make SNF compliance plans "voluntary," the OIG's position that a compliance program demonstrates a nursing facility's "...commitment to honest and responsible corporate conduct" makes it highly recommended that your facility have an up-to-date, effective compliance plan in place. After the 2000 guidance plan was issued, many SNF's developed compliance plans, some of which have collected eight years of dust on the administrator's bookcase.

However, with this apparent new interest in SNF's by governmental prosecutors, it would be prudent for old compliance plans to be renewed and updated without delay. In its section on Fraud and Abuse Risk Areas, the supplemental guidance also put SNF's on notice that, going forward, quality of care will be a major issue. This is significant because it is the first time quality of care has been deemed a fraud/abuse risk. The OIG's position, simply stated, is that Medicare/Medicaid pays a SNF to provide quality care to beneficiaries; if the SNF does not provide quality care and then bills Medicare/Medicaid, it has technically filed a false claim. A federal false claim can then be commenced against the SNF seeking treble damages plus penalties of \$5,000 to \$10,000 per claim. Clearly, the OIG means business.

Since the 1998 Chester Care case, the OIG has always taken the position that failure to provide quality of care constitutes a false claim. However, this is the first time that the industry has been placed squarely on notice that "failure of care on a systemic and widespread basis" can constitute the basis for a false claim suit, the imposition of civil monetary penalties and other false claim violation consequences.

To avoid problems in this area, the OIG suggests SNF's look carefully at:

- Maintaining sufficient staffing levels
- Developing comprehensive care plans
- Appropriately using psychotropic medications
- Properly managing medications, and
- Ensuring resident safety.

The OIG's pronouncements, coupled with the New York State Medicaid Fraud Control Unit's practice of placing video cameras in residents' rooms, should cause any SNF to seriously consider re-examining and potentially re-vamping its compliance program. It is also imperative that the SNF be able to demonstrate that its compliance program is being actively implemented.

The supplemental guidance also addressed issues such as:

- Proper reporting of resident case-mix data
- Under/over utilization of patient services

Lastly, the Supplemental Guidance addresses Anti-Kickback, Stark Law and HIPAA issues.

Nevertheless, the blockbuster news is that the OIG (and we believe) the State of New York are going to use their power to make sure quality of care is the number one focus for the rest of 2008 and 2009. Don't say you haven't been warned!

RMF
RUSKIN MOSCOU FALTISCHEK P.C.

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East Tower, 15th Floor
1425 RexCorp Plaza, Uniondale, NY 11556-1425
New York City ▾ Uniondale
516.663.6600 ▾ www.rmfcpc.com

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