



SHORTS

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News for the North Carolina LTC Community

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Finding and Fixing Your Own Noncompliance Avoiding Citations After House Bill 667

For Assisted Living Communities



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During the 2016 Legislative Session, the N.C. Assisted Living Association (NCALA) was instrumental in bringing about passage of House Bill 667 which modified existing law on assisted living (AL) surveys, citations and sanctions. The Poyner Spruill Health Law Team, in our role as General Counsel for NCALA, was honored to play a part in the drafting and passage of HB 667.

This statute contained a number of positive changes for North Carolina's assisted living community. Perhaps the most important revision—and one whose importance cannot be overstated—was a change to the old “past corrected” language formerly found in N.C. General Statute 131D-34.

Prior to passage of HB 667, the law authorized surveyors to cite noncompliance with applicable statutes or regulations governing AL communities even where the provider had already found and fixed the problem at the time of the survey. Such self-discovered violations, if found and fixed by the provider, were still cited as deficiencies by surveyors from the Adult Care Licensure Section (ACLS) or county DSS inspectors, but in those cases where surveyors agreed that the provider really found and fixed the problem before survey – and had maintained compliance – the ACLS was directed to consider that self-correction in deciding whether to impose a money penalty against the AL Community for the noncompliance.

To qualify for this discretionary consideration by ACLS, the following elements had to be demonstrated:

- The violation was not previously identified by the Department; or
- Violation was discovered by the facility and was self-reported; and
- The provider had fully corrected the violation and maintained compliance regarding that issue.

However, even if a provider could demonstrate all those factors, ACLS still cited the violation and still had the discretion to impose a penalty. In other words, the provider's self-correction was just one factor in the decision of ACLS on whether to impose a penalty. And that violation still had the potential to negatively impact a Community's Star Rating and public reputation.

Under HB 667, that all changed. Now, under current law, where a provider self-discovers a violation and fully implements a plan of correction, the violation may not be cited at all as noncompliance. That means it's not a Type A1 nor a Type A2 nor a Type B. It cannot be cited at all. And, there can be no resulting penalty and no impact on an AL Community's Star Rating.

This aspect of HB 667 presents a huge opportunity for providers, and it's entirely consistent with the purpose of citing violations and imposing sanctions – to incentivize providers to find and fix their own issues and noncompliance.

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Sounds great, right? Indeed, it is. But, taking full advantage of this opportunity means that providers have to be on top of their game – meaning on top of their operations, their staff and their continuous quality improvement programs. In short, you can't fix something you don't know about so ensuring that staff report to Community leadership all untoward issues, undesirable outcomes and even suspicions that something has gone amiss is critical so providers have the opportunity to examine the situation, determine whether noncompliance occurred, and then implement required corrective measures, both to improve care and to avoid citations.

How do you prove self-correction under HB 667? The law says that noncompliance is not a citable violation if:

1. The violation is discovered by the facility (that is, found by you, not by surveyors);
2. The Department (through the ACLS) determines that the violation was abated immediately;
3. The violation was corrected prior to inspection by the Department;
4. The Department determines that reasonable preventative measures were in place prior to the violation; and
5. The Department determines that, subsequent to the violation, the facility implemented corrective measures to achieve and maintain compliance.

After the passage of HB 667, we met with the leadership of NCALA and the ACLS to plan for a series of webinars in which ACLS leadership graciously participated. We discussed this revised concept of “past corrected” noncompliance and, in particular, element number 5, above.

Our concern was the following hypothetical scenario: An unintended event occurs that is or may rise to the level of noncompliance. The AL Community immediately spots the issue, conducts a root cause analysis, identifies the causes, and determines that it had in place at the time of the event reasonable preventive measures designed to avoid it, but something went

wrong – staff failed to follow otherwise robust policies, human error or some other cause not linked to a policy or systems failure. The Community also implements additional training and/or other measures designed to ensure the problem doesn't reoccur.

However, the event involved a resident injury requiring more than first-aid treatment and so it was reportable to the County. That means the County inspectors will likely be in the Community within hours or days of the event. In such a situation, not enough time will have passed between the untoward event and the Community's development and implementation of correcting measures for surveyors to review those measures and say “yes, those worked.”

After discussing this with ACLS leadership, they concurred that the “past corrected” language of HB 667 was written in a prospective manner, meaning it looks forward, not just backwards at history. As such, ACLS leadership agreed with us that in a situation like our hypothetical one, when surveyors from the State or County are in an AL Community only hours or days after an untoward event evaluating a Community's response, they will look at the measures implemented by the Community that are designed to achieve and maintain compliance by looking forward from the time of the unintended event and the time when the Community implemented measures to achieve and maintain compliance, and will ask “does it appear that the measures implemented by the Community will both achieve and maintain compliance?” In other words, since not enough time may have passed from the negative event and the start of the Community's corrective measures to test whether they worked, the surveyors in those situations will examine those corrective measures by evaluating whether they are designed to work and appear sufficient to achieve and maintain compliance. Of course, providers must be able to demonstrate that no further noncompliance involving the same issue has occurred since implementation of its corrective plans.

This may seem like a subtle issue. It's not. If the Department interpreted HB 667 to require a historical period of actual experience by a provider after it implemented corrective measures to qualify as “past corrected”

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FMLA

Family Medical Leave Act

Federal Tax Reform Adds Tax Credit for Paid FMLA Leave

By: Kevin Ceglowski

The federal tax reform, signed into law on December 22, 2017, added a potential tax credit for employers who provide paid family and medical leave to their employees. Here are the details:

An “eligible employer” may claim a general business credit of 12.5% of wages paid to a qualifying employee on FMLA leave, plus 0.25% of wages (up to a total credit of 25%) for each % point by which FMLA pay exceeds 50% of the employee’s normal pay. (Creates tax credit range of 12.5%-25%). According to the IRS Tax Reform Tax Tip 2018-69, published on May 4, 2018, an employer must reduce its deduction for wages or salaries paid or incurred by the amount determined as a credit. Any wages taken into account in determining any other general business credit may not be used toward this credit.

- An “eligible employer” is one with a FMLA policy that: (a) allows all qualifying, full-time employees at least two weeks of annual paid family and medical leave; (b) allows part-time employees paid leave on a *pro rata* basis; and (c) provides leave pay of at least 50% of an employee’s normal pay.
- Vacation leave, personal leave and other medical or sick leave is not considered family and medical leave, and leave paid by a state or local government, or required under state or local law, is not eligible for this tax credit.
- Without further guidance, it is unclear whether paid time off, available for another purpose that can also be used concurrently with FMLA to make the FMLA period paid, entitles an employer to this tax credit.
- A “qualifying employee” is an employee who has been employed by an employer for at least one year, and whose compensation in the prior year did not exceed 60% of the compensation threshold for highly compensated employees (this threshold was \$120,000 for 2017). So, an employee must have earned \$72,000 (\$120,000 x 60%) or less in 2017 to entitle the employer to this tax credit for paid FMLA leave provided to that employee in 2018.

The paid FMLA leave terms must be provided to employees in a written policy. An employer may decline this credit and instead deduct the amount of paid leave. The employer may not deduct any wages for which it instead claims the credit; it must elect one or the other. This tax credit will only be available in 2018 and 2019, unless Congress extends it. The IRS has issued an FAQ page on the tax credit, and future IRS regulations may further clarify the requirements for and scope of the credit. The FAQ page says, “the credit is generally effective for wages paid in taxable years of the employer beginning after December 31, 2017, and it is not available for wages paid in taxable years beginning after December 31, 2019.”

Whether it makes sense for an employer to implement a new policy or modify an existing policy to take advantage of this tax credit depends on careful analysis of expected FMLA usage by the company’s employees in the coming year and consideration of the unknowns remaining until the IRS issues regulations. The IRS expects additional information will be provided that will address, for example, when the written policy must be in place, how paid “family and medical leave” relates to an employer’s other paid leave, how to determine whether an employee has been employed for “one year or more,” the impact of state and local leave requirements, and whether members of a controlled group of corporations and businesses under common control are treated as a single taxpayer in determining the credit. In the meantime, employers interested in creating policies that qualify for the tax credit should consult counsel to collaborate on the appropriate language for such policies.



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Tax Reform Curbs Fringe Benefits

By: Hannah Munn and Kelsey Mayo

The Tax Cuts and Jobs Act was signed into law on December 22, 2017. The Act modifies the tax consequences of certain employer-provided fringe benefits, including those related to transportation, moving, meals, entertainment and employee awards. The Act also has some surprising implications for nonprofit entities that provide certain fringe benefits to employees. To avoid potential penalties and surprising tax consequences, companies should take action now to assess their benefit arrangements and their accounting systems.

The Act's changes impacting fringe benefits include the following:

1. QUALIFIED TRANSPORTATION BENEFITS

Takeaway: Effective for amounts paid or incurred after December 31, 2017, employers may no longer take a deduction for most qualified transportation fringe benefits. Special rules apply to reimbursements provided for bicycle commuting expenses.

Before the Act, employers could take a deduction for the expense of providing certain qualified transportation fringe benefits to their employees. Such benefits included: (1) transportation in a commuter highway vehicle, if in connection with travel between the employee's residence and place of employment; (2) any transit pass; and (3) any qualified parking, if provided on or near the business premises of the employer or on or near a location from which the employee commutes to work. The Act completely eliminates the ability of an employer to take a deduction under Code section 274 for these benefits—unless such benefits are necessary for ensuring the safety of the employee. Employees, however, may continue to exclude the value of these benefits from taxable income under Code section 132(f). The IRS recently clarified that if an employee uses salary deferrals to pay for these benefits on a pre-tax basis, the employer cannot deduct the salary deferrals on its tax return.

Interestingly, the Act did not fully remove the employer deduction for qualified bicycle commuting reimbursements. It did, however, suspend the ability of the employee to exclude up to \$20 per month in bicycle commuting reimbursements from income under Code section 132(f). Until January 1, 2026, employers may still deduct reimbursements for expenses relating to bicycle purchase, improvements, repair, and storage—so long as the bicycle is regularly used for travel between the employee's residence and place of employment. Also until January 1, 2026, employees must now include these reimbursements in income.

2. QUALIFIED MOVING REIMBURSEMENTS

Takeaway: Effective for taxable years 2018 through 2025, moving expenses must now be included in an individual's taxable income, and may not be deducted.

Before the Act, an individual who moved for work could exclude or deduct related expenses from income. If the individual's employer paid or reimbursed the individual for moving expenses, that reimbursement could be excluded from income under Code section 132. If the individual's employer did not reimburse the individual, the individual could deduct most moving expenses from his or her taxable income under Code section 217.

Now, moving expenses are taxable—reimbursements are no longer excluded from taxable income and deductions are no longer permitted. This applies to all expenses for the packing and moving of personal effects, as well as for any travel and lodging expenses incurred during the move. Members of the Armed Forces, however, who are on active duty and who move pursuant to a military order and incident to a permanent change of station may still be able to exclude reimbursements or deduct expenses from their taxable income.

3. ENTERTAINMENT AND MEALS

Takeaway: Effective for amounts paid or incurred after December 31, 2017, employers may no longer deduct expenses for entertainment, and are limited in the amount they may deduct for meals.

Entertainment: The Act almost completely eliminates the employer deduction for entertainment that was previously permitted under Code section 274. This includes expenses incurred for activities related to entertainment, amusement or recreation, as well as for facilities used for such activities and dues or fees paid to social, athletic or sporting clubs or organizations. This applies even if the expense was directly related to business.

Meals: The Act retains the general rule that employers may not deduct more than 50% of the cost of a business meal. With some limited exceptions, the 50% limitation now also applies to meals provided on or near business premises (which, before the Act, were 100% deductible). Additionally, beginning January 2026, employer deductions for the expense of meals provided for the employer's convenience will be completely eliminated—including food or beverages (such as coffee and danishes) and employee cafeterias that were previously deductible as *de minimis* fringe benefits.



4. EMPLOYEE ACHIEVEMENT AWARDS

Takeaway: The Act clarifies taxation of employee achievement awards.

The value of prizes and awards received by an individual during a taxable year are generally included in income. As a general rule, though, employees may exclude the value of an award given by their employer—so long as: (1) the value of the award does not exceed the employer’s allowable deduction, and (2) the award fits within the definition of an “employee achievement award” provided in Code section 274(j).

The Act retains this general rule, and clarifies the definition of an “employee achievement award.” This term has always been understood to exclude cash. The Act explains that the term also generally excludes: cash equivalents, gift cards/gift coupons/gift certificates (unless the employee is allowed to pick from a pre-selected array of options in certain circumstances), vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities and other similar items. If an employee’s award falls into any of these categories, its value should be included in that employee’s taxable income for the year.

5. AN IMPORTANT HIGHLIGHT FOR NONPROFITS: CERTAIN FRINGE BENEFITS NOW INCLUDED IN UBTI

Takeaway: Nonprofits should take note—effective January 1, 2018, certain expenses are now included as unrelated business taxable income.

The Act states that expenses paid or incurred for the provision of qualified transportation fringe benefits, parking facilities, and on-premises athletic facilities for employees will now be included in the unrelated business taxable income (UBTI) of a nonprofit (provided Code section 274 does not permit a deduction for such benefits). Before the Act, these benefits could be provided tax-free.

From a policy standpoint, these new provisions are being billed as an attempt to create an equivalency with for-profit organizations. Before the Act, for-profit organizations had been allowed a deduction for these benefits. The Act removes the deduction for for-profits, and includes the value of such benefits in UBTI for nonprofits. The treatment of an expense as income may seem counterintuitive to many.

The IRS has confirmed that it will release guidelines to clarify application of these rules—including how depreciation may come into play. In the meantime, nonprofits should consult with corporate and tax counsel to assess any potential organizational impact.

WHAT NOW?

Employers should carefully review current arrangements that provide any of the above benefits to their employees. Employers may want to redesign and restructure these arrangements, so as to avoid any new negative tax consequences. Consultation with a tax or benefit attorney may be extremely beneficial—as many of the provisions have varying effective dates, planning now can help prevent unwelcome surprises later.



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Finding and Fixing Your Own Noncompliance

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under HB 667, that could have the effect of negating the intent of this part of HB 667 in all cases where surveyors are in a Community before a provider has sufficient time to demonstrate the effectiveness of its corrective measures.

We're now focusing much of our work for AL providers – and encouraging our clients to do the same – on identifying and responding promptly and comprehensively to instances of noncompliance, or even suspected noncompliance, and implementing robust responses. Those responses should include all the same elements you would implement via a plan of correction if a survey team cited violations during a survey.

The difference is you're doing them before the survey, after identifying your own potential problems. We strongly encourage our AL clients to focus on the following proactive steps:

1. With your Community leadership and staff, train, retrain and retrain some more on identifying and reporting situations in your Community that may be, or clearly are, inconsistent with your expectations, policies and/or applicable regulations.
2. Empower staff to report those situations without fear of negative consequences. After all, they're doing you a favor by giving you the chance to correct problems and avoid citations under HB 667.
3. Learn the elements required under HB 667 to avoid citations (recited in this article) and be prepared to implement them any time you spot potential issues in your Community.
4. Be proactive in finding and fixing your own noncompliance and, if you're not sure how to do it well and thoroughly, get some help.
5. When you do identify potential issues, and design and implement steps to correct them and prevent their recurrence, document all your actions. You may need to show them to surveyors later to make your

case that you should not be cited because of HB 667.

6. Finally, in designing corrective action plans in your Community,
 - a. Be creative and expansive – ask “are there any other causes of this problem that we've not identified, and is there anything else we could try to fix this and make that fix stick?”
 - b. Talk to your staff about ideas for spotting and fixing issues—after all, they're the ones out on the floor and often have great ideas.
 - c. Vet your plans of correction with corporate staff if you have them, other providers whose opinions you respect or outside consultants or counsel. In these cases, an ounce of prevention is worth a pound of cure.

Make sure your Community's leadership, both local and at the corporate level, are aware of this important change in N.C. law governing AL surveys.

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