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SHORTS ON LONG TERM CARE

International Award Winning Newsletter for the North Carolina LTC Community from Poyner Spruill LLP

What's Up With Nursing Facility "Mandatory" Corporate Compliance Programs?

by Ken Burgess

Every skilled nursing facility (SNF) owner or operator should know by now that one provision of the infamous health care reform act required that all SNFs have effective corporate compliance programs in place by March of 2013. We've received many calls and emails from our readers asking if we plan to issue guidance on compliance programs to help providers and why we haven't already done that.

The answer to question one is yes, we plan to offer guidance. The answer to question two is that we haven't issued any guidance yet because the March 2013 deadline for "mandatory" SNF compliance programs came and went without the Centers for Medicare and Medicaid Services (CMS) issuing the regulation required to flesh out and implement the statutory requirement for mandatory compliance programs.

In fact, CMS officials have been deafeningly quiet about the status of the compliance program regulation. This while SNFs should already have effective compliance programs to comply with the statutory deadline in place, we have not heard of any enforcement by CMS. It's not clear if CMS has adopted an official policy of "no enforcement" until its regulation is issued. As for timing of the regulation, the "best guess" we've heard is sometime late this summer or early fall.

We've also frequently been asked what we expect to see in the regulation when it is issued. That is anybody's guess. So I'll share with you my best guess at the very real risk of being wrong. I would expect to see a CMS regulation that looks a lot like the existing "voluntary" CMS guidance on compliance programs that was first issued by CMS in 2000 and updated in 2008. It seems to me unlikely that the primary structural components of a compliance program will change in the regulation (that is, the requirement for a code of conduct; a compliance officer and committee; employee education and discipline components and the other mechanical aspects of the program).

I would also guess that CMS will update the "risk areas" it previously defined in the voluntary guidance. Risk areas are those operational and legal issues that CMS has determined pose the greatest risk for noncompliance and the greatest harm or loss to the Medicare program and/or to program beneficiaries (SNF residents). Risk areas identified by CMS to date, during the "voluntary" stage of SNF compliance programs, include such things as violations of the Anti-Kickback Statute or the False Claims Act; hiring or contracting with individuals or entities who have been excluded from the Medicare program or other federal health care programs; HIPAA violations and others. In its last "update" to the list of risk areas published in 2008, CMS identified 18 broad categories of risk areas, many with sub-issues. We worked with AHCA during 2009-2010 to develop an online tool to help providers design and/or test and update their compliance programs. That tool detailed each of the risk areas identified by CMS as of that date and CMS has issued no further guidance since then. That tool is still available on the AHCA website.

So like you, we are waiting, watching and keeping our ear close to the ground for any information on the timing of a compliance program regulation, effective dates and content. The other issue we're often asked about is how will CMS enforce the statutory mandate for SNF compliance programs and the implementing regulation. Again, we don't know.

I have assumed that state survey agencies will have some role in ensuring that SNFs have compliance programs in place but that is just my guess. There is no other federal agency with a routine

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Updated OIG Exclusion Guidance Spells Out Recommended Employee Screening Procedures

by Ahaji Amos

On May 8, 2013, the Office of Inspector General (OIG) published an updated bulletin that spells out the frequency with which employers should check the OIG's List of Excluded Individuals and Entities and clarifies which employees should be checked as well as rules for volunteers. Each month, the OIG updates its searchable database of about 54,400 excluded individuals and about 2,800 excluded entities. According to the OIG, no federal health program payment will be made for goods or services provided by an excluded person or entity at the medical direction or based upon the prescription of an excluded person, regardless of the payment methodology (e.g., DRGs, cost reports, fee schedules, bundled payments, capitation). Providers that employ or contract with an excluded person are subject to civil monetary penalties of $10,000 for each item of service provided by the excluded person, plus three times the amount billed to the federal health care program, assuming the provider acted with reckless disregard, deliberate ignorance, or actual knowledge in employing or contracting with the excluded person. The new guidance urges monthly screenings and clarifies who is subject to the screenings.

Volunteers

Both paid employees and volunteers are subject to the same exclusionary rules described above.

Previously Excluded Entities

An excluded entity or person must apply to the OIG for reinstatement after the term of their exclusion is over. The exclusion remains in place until affirmatively lifted by the OIG upon application from the excluded person or entity for reinstatement after the exclusionary period has ended.

Ancillary Service Providers

Ancillary service providers such as laboratories, durable medical equipment suppliers, pharmacies and radiology centers are prohibited from carrying out orders provided by excluded physicians, or other excluded providers.

Administrative and Management Personnel

Excluded persons are also precluded from providing administrative and management services that are payable by federal health programs. This means that excluded persons can't serve in executive or leadership roles, such as CEO, CFO, general counsel, director of health information management, director of human resources, or physician practice manager because federal health programs often reimburse for at least a portion of administrative costs related to the provision of health care.

Dual Funding Streams

If providers conduct non-federal business with excluded parties, they are not subject to the civil liability described above. However, providers have to ensure that no claims are submitted to federal health care programs for services provided by excluded individuals or entities. While the OIG has previously required separate funding streams for federal and nonfederal business to ensure that non-federal services (which can be provided by an excluded individual) are not commingled with federally-paid services, the new bulletin states that there is no need for dual funding streams. Federal and non-federal funds can be comingled as long as the excluded individual's responsibilities are separate from those provided to federal health care beneficiaries.

Contractors

According to the OIG, the liability risk is greatest for those persons who provide items or services that are integral to the provision of patient care. However, questions have arisen regarding whether a provider is required to screen for temporary workers, such as nurses who work for staffing companies. Although companies that employ such temporary workers will conduct screenings of their own employees, providers should not rely on screenings performed by other entities because each Medicare certified agency is still on the hook for overpayments stemming from reimbursement for goods or services furnished by excluded persons, despite the contractor status of the excluded party.

ASSISTED LIVING COMMUNITIES

If a provider chooses to rely on a third party to screen its contracted employees, it should take measures to ensure that the third party effectively performs the screens. These measures could shield a provider from a civil monetary penalty, limiting the provider's liability for repayment of the overpayment.

Indirect Care Providers

Providers should screen staff who provide indirect patient care, such as surgical set-up personnel, treatment plan review staff and pharmacy technologists, because these services may be reimbursed by federal programs.

Screening Frequency

It is clear that to avoid overpayments to federal health programs and associated civil monetary penalties, providers should periodically use the OIG's database to screen current and prospective employees and volunteers, as well as vendors for exclusion. The OIG would like to see providers screening monthly for exclusion from federal health programs. As such, it is important to establish a monthly screening policy because showing a good faith effort to comply may reduce or prevent the payment of fines and penalties in the event of a violation.

Self Disclosure

If a provider employs an excluded person or entity, the OIG's Self-Disclosure Protocol can be used to resolve civil monetary penalty liability. If a provider had a policy in place to periodically check the OIG's database of excluded persons or entities, but still billed for services performed by an excluded person or entity anyway, a simple Medicare refund should resolve any issue.

The Bottom Line

- Screen all new hires
- Screen all existing employees on a monthly basis
- Screen all contracted employees, or contractually require that third party staffing agencies do so at least monthly
- Screen all volunteers and visiting staff
- Draft clear screening policies and educate management on those policies
- Remove any excluded employees from any role that is either directly or indirectly reimbursed through a federal health program
- Self-disclose any errors as soon as possible, with the assistance of legal counsel

Ahaji Amos *is the newest addition to our Health Law team. She comes to us from Strategic Planning at Duke University Health System and we are thrilled to have her on our team. Ahaji may be reached at aamos@poynerspruill.com or 919.783.1009.*

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presence in nursing facilities that could take on that role so if compliance with the requirement is going to be systematically examined, it stands to reason that survey agencies may play a role. Otherwise, it would seem that violations of the compliance program requirement would be measured by another federal agency (perhaps the Office of Inspector General) based on complaints or by looking at state survey results for evidence of system failures that could suggest the lack of an effective compliance program. Our contacts at the N.C. Division of Health Service Regulation tell us that, to date, they have received no information to suggest that they will play a role in measuring compliance with this requirement.

So we will see. In the interim, we will continue to monitor and report on the SNF mandatory compliance program requirement through *Shorts* and our firm's periodic client alerts.

Ken Burgess *may be reached at kburgess@poynerspruill.com or 919.783.2917.*

General Assembly Calls For Study On Increasing Assisted Living Communities In Rural Areas

In a legislative session that continues to leave many North Carolinians of all political persuasions "jaw-dropped," a bill introduced in the NC House of Representatives, if passed, would require the Department of Health and Human Services to "examine strategies for increasing the number of assisted living residences in rural areas of the state." The bill would specifically require the department, among other approaches, to "examine the advantages and disadvantages of exempting adult care homes, including adult care homes that serve only elderly persons, from certificate of need review." The department would be required under the legislation to report its findings to the House Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Joint Legislative Oversight Committee on Health and Human Services no later than February 1, 2014. We will continue to track and report on this legislation.

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Rumors of Retirement Greatly Exaggerated

by Ken Burgess

During World War II, the English Prime Minister, Winston Churchill, beset by enemies and critics from the Nazi Alliance and his own countrymen, was famously reported to say, upon hearing that he had died, "the rumors of my death are greatly exaggerated." I recently had occasion to feel a kinship to Mr. Churchill when one of my very loyal clients and friends called me in a dither to ask, "What's this I hear about you retiring?"

After I recovered from the absolute shock of that announcement – and my fear that I was, in fact, being retired, I asked her where she heard this. She said, "Well, a mutual friend heard it from another friend who saw it on someone's LinkedIn account."

I've never much liked all this social media stuff, probably because I'm too old and media-challenged to really understand it. But, in that moment, I realized the power of social media.

In prior issues of *Shorts*, we've shared the developing legal areas of social media risks and privacy concerns. We've written about employee policies limiting the use of social media and about provider risks from tapping into this vast, but often uncontrollable, technological craze.

With all that information in my worldly experience, it still shocked me that now I was one of those people we've been writing about. Some poor soul somewhere, obviously with nothing better to do, decided that I was retiring, or heard it from someone else, and whether by innocent inadvertence or malicious design, set off a chain of rumors. When I got the third call about my retirement, I felt again the power of social media.

Like so many other folks who have been the subject of groundless and annoying public announcements released via Facebook, LinkedIn or Twitter, I've spent considerable time and energy responding to the news that I'm retiring from my practice.

On one hand, I'm sort of flattered that anyone would care. On the other hand, I'm sort of annoyed to think that IF I were retiring, someone else could steal my thunder by announcing it before I could.

So, to set the record straight, I'm not retiring. I haven't even thought about retiring. Of course, if my $1 Mega Millions ticket hits, all bets are off. In the meantime, I decided to do what old codgers like me do – use a traditional, old-fashioned medium, our newsletter, to beat back the rumors of social media. Perhaps to the dismay of my competitors and hopefully to the delight of my clients (or I'm REALLY in trouble), let me assure you that I'm not retiring.

Though it may seem I've been around practicing long term care law since Christ was an infant, as the old saying goes, it's only been 28 years and though from time to time, I think about running away from it all – to a beach in Tahiti and making coconut shell cups, I'm not quite ready for that yet. I'm afraid I'll still be around for years to come, God willing. So, if you hear about my retirement, wait until you hear it from me.

Remember this lesson that we've written about so often in *Shorts* – social media is here to stay and it's a powerful, and often positive tool, but it has its downside. Make sure your policies on the use of social media by your company, and especially your employees are accurate and controlled. And, as a personal favor to your aging but still kicking lawyer, if you hear that I'm retiring from any CREDIBLE source, like my firm's management committee, please let me know. :) *Thanks, Ken*

Upcoming Lectures/ Speaking Events

Wilson Hayman and Julie Hampton are presenting at the NC Association of CPAs Annual Healthcare Industry Conference, *NCs Medicaid Managed Care Demonstration Program* – June 14 in Greensboro

Ken Burgess will be presenting to the Association for Home Care and Hospice of NC, *Nursing Facility/Hospice Relationships Under the Medicare Conditions of Participation* – June 25 in Raleigh and June 26 in Charlotte

Ken Burgess will be presenting at the NC Healthcare Facilities Association's Summer Convention, *Long Term Care Legal Update (including SNF corporate compliance programs and effective clinical/legal documentation)* – August 6-8 in Myrtle Beach

Ken Burgess will be presenting at the National Aging Services Risk Management's Annual Conference – October 17-18 in Chicago, IL

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