



## LEGAL ISSUES

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### Legal and Regulatory Risks With Involuntary Discharges

News articles on patient dumping by skilled nursing facilities have been making flashy headlines across the country, and they have raised advocates' concerns for patient safety. In recent years, state regulatory agencies have cited both facilities and their owners for these alleged improper actions, and residents, families, and advocates have been filing lawsuits as well.

The clinical and operational leaders of nursing facilities must understand the laws, regulations, and requirements related to involuntary discharges as well as the ramifications of failing to comply when moving residents out of a facility without their consent. Several recent lawsuits highlight the consequences of such improper resident discharges.

#### Lawsuits in the News

In March 2017, a California facility was sued for wrongful death related to a resident discharge. The resident, originally admitted from a local county jail, had resided in the facility for several years. The resident had numerous medical conditions — including blindness, bipolar disorder, and dementia. The complaint alleged that the resident was dropped at a local hotel with a 30-day paid room, and was provided with his medication, some food, and the promise of home health care visits during that time. Allegedly no home health care visits occurred; he was found dead 4 days after his discharge. The coroner's report listed his cause of death as lack of oxygen to the brain caused by cardiac arrest. The facility allegedly failed to notify the individual's family of the discharge, provide them with appeal instructions, or take all the necessary steps for a safe discharge. The lawsuit was resolved in July 2017 with a confidential settlement.

Another lawsuit filed early in 2018 in California alleged that a nursing home company routinely fails to provide its residents with the required advance written notice of discharge, including information on the resident's right to appeal. The facility denies the allegations of violating any individual rights. The suit specifically alleges patient dumping occurred of two residents who were unable care for themselves, and who were not provided the proper notice as required by state and federal laws and rules.

The AARP Foundation filed a lawsuit in 2016 against yet another California nursing home alleging that the facility refused to allow the return of a combative female resident from the hospital after an evaluation. The suit sought an injunction against the facility to force readmission of this resident and

is seeking damages for each day that the facility violated the admission and discharge requirements.

Although all these examples pertain to California, it is far from the only state with issues and concerns about involuntary resident discharges.

#### Guidelines

Despite federal protections, improper involuntary discharges have been one of the most frequent complaints to the Long-Term Care Ombudsman. The Centers for Medicare & Medicaid Services, the oversight agency for Medicare- and Medicaid-certified nursing facilities, periodically issues regulatory guidance to the state agencies (SAs) that perform inspections and monitoring. CMS has announced an initiative to examine and provide training and guidance at the SA level concerning discharges, along with additional enforcement options to be levied against noncompliant facilities.

On December 22, 2017, CMS issued "An Initiative to Address Facility Initiated Discharges That Violate Federal Regulations" (S&C 18-08-NH), which highlights the government's position regarding discharges that fail to comply with the requirements, rules, and laws. As this memo states, facilities are required to determine their capacity and capability to care for residents before they are admitted, so without a significant, documented change in a resident's status and needs, a facility should not be involuntarily discharging residents. The guidance goes on to describe the most frequently reported reasons that residents are discharged as being behavioral, mental, or emotional "expressions" or indications of resident distress.

CMS has instructed SAs to forward to their CMS regional office for review and potential sanctions any facility-initiated discharges that violate federal requirements. Questionable discharges would include placements in an unsafe setting when a resident has not been readmitted after hospitalization or the facility has a pattern of improper discharges. CMS has indicated that enforcement action is within their discretion after a detailed review. Also, the memo provides references to eight related regulatory tags for SA to consider for review and citation if the facility's actions do not meet the regulatory requirements.

Facilities must be knowledgeable about the numerous state and federal laws and regulations related to resident discharges. For example, facilities are required to provide a resident and the resident's representative a written notice of transfer or discharge in a language



Poorly planned or unsafe discharges can put your facility where it doesn't want to be: on the front page of the newspaper.


and manner they understand. This also includes transfers and discharges for acute care treatment, such as transfers to a hospital. The regulation at 42 CFR 483.15(c)(3)(i) also requires that a copy of such notice be provided to the state's Long-Term Care Ombudsman, which is meant to provide additional oversight to this discharge process. CMS provides information in S&C 17-27-NH (issued May 12, 2017) about the notice requirements at the time of transfer or discharge, including emergency discharges.

Facility leaders also must be aware of any state laws or regulations that may be different, additional, or more prescriptive than the federal laws and regulations. The federal certification requirements are included in the recently updated Appendix PP of the State Operations Manual (SOM). The SOM provides the regulatory requirements as well as interpretive guidance for surveyors when they are assessing facility compliance or noncompliance. The discharge and transfer requirements were enhanced and modified as a part of the November 2017 updated Requirements of Participation. The November update required all Medicare- and Medicaid-certified nursing facilities to revise and update their policies, procedures, and practices related to discharge and transfer, in addition to modifications for many other actions and practices within the facilities.

#### Planning for Compliance

For success in the complex area of involuntary discharge, facility leaders should consider several actions.

- Carefully review potential residents before admission to ensure that the facility can provide the necessary care and services, to avoid unnecessary discharges later.
- Understand the ramifications of failing to comply with state and federal rules after moving or discharging SNF residents without their consent and without meeting the regulatory notice and preparation requirements.
- Review, understand, and train SNF staff to implement the state and federal requirements related to discharge notices. Failing to observe all the statutory and regulatory state and federal requirements or to provide the required notice may invalidate a discharge at any later discharge hearing.
- Educate staff members to ensure their competency in the documentation and other requirements related to discharges.
- Work cooperatively with the resident and family to identify any discharge concerns early, and to develop a workable, appropriate discharge plan that includes adequate discharge preparation for everyone.

Despite a facility's best efforts to meet a resident's needs, involuntary discharges are sometimes necessary. Changing conditions might require acute hospitalization or a need for services that cannot be provided at the facility. Facilities should strictly follow the state and federal notice and documentation requirements, which may include physician documentation. The resident and family should be educated about the necessity of the transfer and the safe discharge plan. Facilities also should communicate as required with the SA and the ombudsman. Don't be the next facility to make the headlines over a poorly planned or unsafe discharge. 

This column is not to be substituted for legal advice. Ms. Feldkamp practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, OH.