



## New CMS Guidance Regarding Health Care Texting and Involuntary Discharges

By Janet K. Feldkamp



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The Centers for Medicare and Medicaid Services (CMS) periodically provides guidance to the State Survey Agency Directors which outlines areas of emphasis or important

concerns for the health care industry. Two (2) recent issuances are of interest to the skilled nursing facility/nursing facility (NF) providers. CMS S & C 18-10-ALL and S & C 18-08-NH should be considered as NF providers monitor the facility ongoing operations.

[CMS S & C: 18-10-ALL](#) On December 28, 2017 CMS issued guidance applicable to all Medicare and Medicaid certified providers including NF related to texting in health care settings. This guidance specifically provides that “texting patient information among members of the health care team is permissible if accomplished through a secure platform.” Health Insurance Portability and Accountability Act (HIPAA) and general privacy requirements mandate the protection of patient/resident (Resident) information, including protected health information (PHI) such as names, health conditions, as well as a variety

of other information. PHI includes most Resident specific information for individuals receiving NF care. Some physicians and other health care providers encourage NF nursing staff to text Resident information as a quick and expedient communication method. However, the text must occur on a secure platform to safely protect the Resident confidentiality. Each NF must have policies and procedures to protect PHI in all manners of communication including texting. If a provider does not currently have a secure platform such as a program/product that assures end-to-end secure transmission of text messages, immediate action should occur. Texting between two (2) mobile devices is not generally secure without an additional product or program installed on each mobile device. Enforcement has occurred and will continue to occur for NF and other providers that are not adequately protecting PHI while texting. Additionally, [CMS S & C: 16-33-NH](#) issued August 5, 2016 highlighted the importance of protecting Residents from mental abuse related to photographs and audio/video recordings posted on social media by NF staff. Protection of Resident information and freedom from abuse related to electronic and social media are a top priority by CMS. Make sure that the NF policies

and procedures are in place but more importantly are consistently enforced.

[CMS S & C: 18-08-NH CMS](#) has provided guidance to State Survey Agencies to address NF initiated discharges that violate federal regulations. This issuance occurred December 2017 and provides strong language about “inappropriate” discharged by facilities. CMS states that “[f]acilities are required to determine their capacity and capability to care for the residents that they admit” and that without atypical changes to the condition, it should be rare to need to discharge those Residents based upon the inability to meet their needs. Long term care ombudsman frequently receive Resident and family complaints related to facility-initiated discharges and CMS states that improper discharges are of “great concern” since some discharges may cause unsafe and/or traumatic discharges for Residents and their families. The State Survey Agencies must forward the cited deficiencies to CMS of facility initiated discharges that violate federal regulations. CMS may take enforcement action if they deem necessary for such improper discharges. In fact, in late 2017, CMS Region V imposed a civil money penalty (fine) on a NF with a D level (potential for no more than minimal harm,

*(continued)*

isolated) deficiency for an alleged improper discharge cited by the State Survey Agency. NFs should be closely monitoring their policies and procedures regarding discharge to assure that requirements are being followed by the NF staff. Be assured that the Ombudsmen and the State Survey Agencies are giving these concerns a high priority.

As always, it is important for NF providers to be aware of new and ongoing guidance from CMS to the State Survey Agencies as it signals changes in policies or notes additional focus in certain areas of enforcement.

For more information on this topic, please contact **Janet K. Feldkamp** at [jfeldkamp@beneschlaw.com](mailto:jfeldkamp@beneschlaw.com) or (614) 223-9328.

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