

# Client *Urgent* Briefing

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## Addressing a Risk Area: Restrictions on the Discharge of Nursing Facility Residents

*Awareness Is Key to Avoiding Potential Pitfalls*

by Kevin M. O'Connor

Do you have an unruly guest in your long-term nursing facility who threatens the safety of other residents, and even the staff? Think it will be easy to discharge him before it gets worse? Think again. Recently, the increased public and media concern over access to long-term care, coupled with recent investigations into allegations of patient dumping by nursing homes in the Southeast and Midwest, has had the usual results—heightened scrutiny of the transfer and discharge of nursing home residents, and increased enforcement of government regulations.

The U.S. Department of Health and Human Services ("HHS") Office of the Inspector General ("OIG") issued two reports in recent months - one in June and one in September - which specifically address the issue of access to nursing facilities. The OIG's compliance guidance for nursing facilities also lists the improper denial of access to care as a risk area that should be addressed by facilities as part of a compliance program. In addition, state surveyors, at the insistence of HHS' Health Care Financing Administration ("HCFA"), have been more strictly enforcing the requirements regarding resident discharges to prevent facilities from denying access to care.

In this kind of environment, awareness of the regulations that govern the discharge process is essential. And while the federal and state regulations are generally consistent with one another, both sets of regulations must be considered by a facility when planning a discharge. They outline the circumstances under which an involuntary discharge is permissible, stressing the importance of documenting the reasons for the discharge and providing notice to the resident.

### Know When An Involuntary Discharge Is Permitted

Of course, a resident who has not been adjudicated incompetent can always leave a nursing facility voluntarily. To prevent nursing facilities from discharging problem residents for the

sake of convenience or in an attempt to maximize reimbursement, HHS was authorized by Congress to issue regulations which prohibit a facility from involuntarily discharging a resident, except in limited circumstances.

### The Six Grounds for Discharge

Under federal regulations, a facility may discharge a resident only when:

1. The resident's needs cannot be met in the facility and a discharge is necessary for his welfare.
2. The resident's health has improved so that he no longer needs the facility's services.
3. The resident's continued stay would endanger the safety of individuals in the facility.
4. The resident's continued stay would endanger the health of individuals in the facility.
5. The resident has failed to pay for his stay at the facility. In order to discharge a resident for non-payment, the resident must have failed, after reasonable and appropriate notice, either to pay for his stay, or arrange to have his stay paid for by Medicare or Medicaid.
6. The facility no longer operates.

### How It Applies to Ohio State Law

The states have adopted rules governing involuntary discharges which typically follow the example set in the federal regulation. Ohio's regulation is similar to the federal regulation in that it permits an involuntary discharge under certain circumstances; i.e. for medical reasons, for nonpayment, for the welfare of the resident or the welfare of other residents. The Ohio regulation also lists facility-orientated reasons for an involuntary discharge such as the revocation of a facility's license, or a facility's loss of its Medicare or Medicaid certification.

Typically, though, an involuntary discharge will relate to the status or condition of the resident, not the facility. When contemplating an involuntary discharge, be sure that the circumstances fit one of the permissible reasons listed in the federal and state regulations.

#### **Always Document The Record**

As is often true, documentation is one key to preventing a government investigation or litigation against your facility. In the case of an involuntary discharge, the regulations require that the facility note in the resident's clinical records the fact of the discharge and the reason for it. If the discharge is based on the resident's health, then his record must be documented by his attending physician. If the resident is to be discharged because his continued stay poses a threat to the health of others, then any physician may provide documentation outlining the reason for the discharge. The federal regulation doesn't specify who is responsible for documenting a resident's record when the discharge is prompted by either a threat to the safety of others or a failure to pay. In those cases, either the facility's administrator, director of nursing, or director of social services could satisfy the documentation requirements.


#### **Notice: The Likely Target**

Compliance with the notice requirements for the involuntary discharge of a nursing home resident is critical. It is the one step in the discharge process that is most likely to be challenged. The two key elements of the notice are its timing and its contents. The notice to the resident, and the resident's sponsor (e.g., adult relative, friend, or guardian who is responsible for the resident's welfare) must be in written format and delivered at least thirty days before the transfer or discharge of the resident. An involuntary discharge with less than thirty days notice may be possible in cases of emergency. For instance, if the resident's stay poses a threat to either the staff or other residents, or in cases where the medical condition of the resident requires an immediate transfer/discharge.

The federal and state regulations provide a laundry list of items that must be included in the facility's notice to the resident. Among other things, the notice must state the reason for the discharge, the effective date of the discharge, the location to which the resident will be discharged or transferred, contact information for various support agencies (such as the long-term care ombudsman) and, when applicable, agencies that advocate for the developmentally disabled or the mentally ill. The notice must also contain a statement detailing the resident's right to a hearing should he wish to contest the discharge, and must provide an address and telephone number for the legal services office of the Ohio Department of Health.

#### **How We Can Help**

The planning of an involuntary discharge is a time for caution since a facility is subject to avenues of attack if a misstep occurs. The likelihood of facing a major investigation or even a lawsuit increases if the discharge process is not done properly and appropriately. Walter & Haverfield attorneys have counseled numerous facilities through the involuntary discharge process, and have represented facilities in administrative hearings and civil litigation involving resident discharges. We would be happy to assist you or answer any questions you might have regarding the discharge process.

Please call Mark McGrievy ([mmcgrievy@walterhav.com](mailto:mmcgrievy@walterhav.com)) or Kevin O'Connor ([koconner@walterhav.com](mailto:koconner@walterhav.com)) at 216-781-1212 with your questions or comments 

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#### **Need Further Information?**

Please call Mark P. McGrievy or Kevin M. O'Connor at 216-781-1212 with your questions or comments.



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