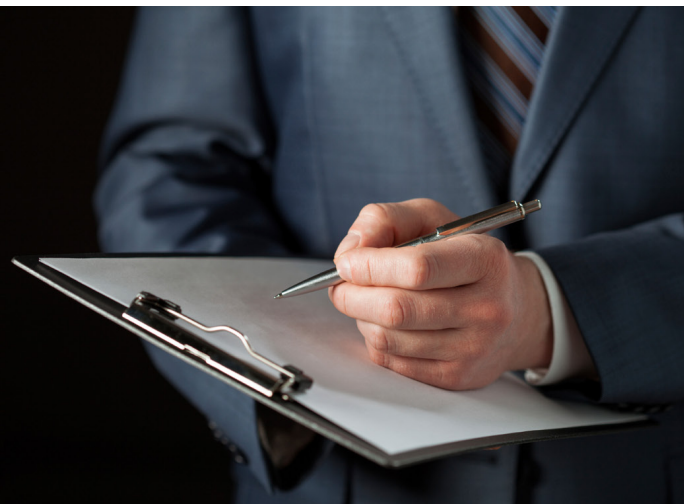


Legal Issues for Long-Term Care Providers



Long-Term Care Surveys, Certification and Enforcement Actions: Concerns and Collateral Consequences

Survey and certification issues present an ongoing challenge for long-term care providers. Annually, only around five-percent of providers will be deemed deficiency free. Thus, the overwhelming majority of providers must be prepared to address survey and enforcement challenges. Because of increased penalties and mounting collateral consequences, the need for a comprehensive survey response plan is more important than ever. With a team of attorneys focused on survey and certification issues, including counsel formerly responsible for representing the government in its survey actions, Arnall Golden Gregory LLP is here to help. Here are just a few of the direct and collateral issues to consider when facing an adverse survey:

1 Defending Invalid Survey Results

Surveys with serious deficiencies increasingly result in harsh enforcement actions by CMS. Civil money penalties (CMPs) are often in the high six-figure range. Additionally, CMS has recently begun using its discretionary authority to impose draconian Directed Plans of Correction (DPoC), requiring facilities to engage an independent consultant to perform a Root Cause Analysis and provide monthly written reports to CMS and the State survey agency. Facilities should vigorously defend against survey deficiencies that are not legally supportable. Highly skilled and experienced counsel is necessary to successfully challenge CMS.

2 Collateral Civil Litigation

The Statement of Deficiencies (CMS Form 2567) may be evidence of *negligence per se* in some states. Regardless, personal injury/wrongful death firms frequently use the 2567 in a wrongful death or negligence case, especially when it contains conclusory and inflammatory statements such as “the facility’s negligence caused the Resident’s death.” Whether through an informal dispute resolution (IDR), an *independent* informal dispute resolution (IIDR) process or appeals to the Departmental Appeals Board (DAB) and beyond, facilities have a critical interest in avoiding the collateral civil litigation that is often fueled by inaccurate survey findings in the Statement of Deficiencies.

3 Impact on Loans

A finding of “immediate jeopardy” or Substandard Quality of Care (SQC) may jeopardize a facility’s HUD and non-HUD financing. Consequently, any such inappropriate findings need to be challenged.

4 Loss of NATCEP Program

CMS will impose a mandatory loss of the facility’s Nurse Aide Training and Competency Evaluation Program (NATCEP program) whenever it imposes a CMP of \$5,000 or more and/or it alleges Substandard Quality of Care (SQC) existed. Loss of a facility’s NATCEP program may create a devastating financial burden and compromise quality resident care. There are some narrow exceptions to the mandatory loss of a NATCEP program which require a legally sufficient approach. As with any CMS enforcement action, where CMS lacks a factual and/or legal basis, an aggressive challenge is warranted.

5 Insurance Premium Escalation

Some insurance carriers will increase the cost of insurance if there are G-level deficiencies (i.e., an isolated instance of actual harm that is not immediate jeopardy); many will increase premiums if immediate jeopardy or substandard quality of care is determined. This is yet another reason to defend against inappropriate survey findings.

6 Adverse Publicity

Where negative survey findings have been publicized, facilities report that pending admissions were cancelled and future admissions dropped off. An approach that addresses the adverse publicity and challenges the underlying assertions by CMS requires a coordinated effort on multiple fronts.

7 Decrease in Staff Morale

Even when negative survey findings are not publicized, quality staff members, including the administrator and Director of Nursing sometimes resign or are removed following a particularly negative survey. The overall impact on staff morale can be severe, creating additional problems. Facilities should realize that adverse resident outcomes are rarely caused by one individual. Rather, faulty systems allow mistakes to happen. Counsel can work with facilities to identify and bolster systems to build in safety redundancies and mitigate, if not prevent accidents involving residents.

8 Quality Improvement Organization

A Quality Improvement Organization (QIO) will investigate a facility (and provider, such as the Medical Director) following a complaint from a resident or family member. QIOs have the statutory authority to make a referral to the HHS Office of Inspector General (OIG) for exclusion and/or a CMP. A QIO may impose a Quality Improvement Plan on its own. Because there are no appeal rights beyond the hearing before the QIO, it is imperative that skilled and knowledgeable counsel represent the facility at the QIO hearing. This is underscored by the fact that a complaining party will likely use the QIO's written findings that "the standards of care were violated," against a facility and physician in a wrongful death case.

9 Increased likelihood of becoming a Special Focus Facility (SFF)

Because the scope and severity of each deficiency (F-tag) carries a numerical value (e.g., a J-level is 75 points) the more negative the survey findings, the greater the likelihood of a facility remaining on the SFF list or becoming a SFF. Facilities should challenge unjustified survey findings through either IDR or IIDR and formal appeals. Both IDR and IIDR offer unique opportunities and potential pitfalls. Consequently, facilities need to understand whether an IDR or an IIDR will be the more appropriate choice in a given situation. Careful consideration at this early stage may affect the ultimate outcome. (CMS will use adverse IDR or IIDR findings to its advantage in any pending appeal.)

10 Preparation and Successful Execution of Appeals

Because of the many potential adverse consequences of survey findings and enforcement actions, facilities should aggressively defend against inappropriate survey findings as well as unwarranted enforcement actions. Even if a deficiency exists, the CMP may be inappropriate and subject to attack. (The federal regulations provide that a CMP may be challenged as "unreasonable" in certain circumstances.) Historically, providers have not fared well in appeals, with more than 95% of the decisions favoring CMS. Providers need skilled counsel to assist them with all aspects of litigation and when appropriate, settlement. Skilled negotiators with a demonstrable track record can best protect a facility's interests.

11 Termination from the Medicare Program

Any instance of noncompliance (i.e., a D-level deficiency or higher) triggers the mandatory 180-day termination cycle. Even when termination is not mandatory, CMS has terminated SFF facilities that had negative survey findings. Because termination from the Medicare program almost always results in the "financial death" of the facility, providers need to take appropriate measures such as, an expedited appeal before the DAB and simultaneously filing a temporary restraining order, where appropriate. Additionally, time-sensitive high-level discussions with CMS may thwart a termination by offering alternative solutions, such as a voluntary Systems Improvement Agreement (SIA) or a change in ownership (CHOW).

12 Impact on Related Facilities in Other States

Some states will not issue a license approval, a Certificate of Need (CON), or a Medicaid enrollment if a related facility's license was revoked or if the facility was terminated from the Medicare or Medicaid program in another state. Such state-specific practices require a coordinated effort to avoid both the direct and indirect consequences of a termination.

For more information, please contact:

Alan Horowitz

alan.horowitz@agg.com
phone: 404.873.8138

Hedy Rubinger

hedy.rubinger@agg.com
phone: 404.873.8724

Glenn Hendrix

glenn.hendrix@agg.com
phone: 404.873.8692

Jason Bring

jason.bring@agg.com
phone: 404.873.8162

About Arnall Golden Gregory

Selected to The National Law Journal's prestigious 2013 "Midsize Hot List" for helping clients adapt to increasing globalization and regulatory complexity, Arnall Golden Gregory has more than 150 attorneys in Atlanta and Washington, DC who offer big-firm services to growing companies without big-firm costs and bureaucracy. AGG celebrates its 65th anniversary this year of providing exceptional client value.