SENIOR LIVING & LONG-TERM CARE

Legal News™

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Legal News: Senior Living & Long-Term Care is part of our ongoing commitment to providing legal insight to our clients and our colleagues.

Please contact the author of these articles if you have any questions about this issue or would like to discuss these topics further.

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What's in Your Wallet? OIG Advisory Opinion Approves Credit Card Rewards Program at Nursing Home

On April 3, 2007, the Office of the Inspector General (OIG) posted an Advisory Opinion (No. 07-03) regarding the use of rewards from credit card issuers for the benefit of a residential health care facility and its employees. The requestor proposed the use of credit cards, issued in the facility's name, in order that it could purchase goods and services for its use, and use the credit card issuers' rewards (e.g., airline mileage, cash rebates, points for purchases, etc.) to benefit the facility by: (1) purchasing additional goods and services for the facility or (2) providing the rewards to its employees as performance-based compensation.

The OIG concluded that the arrangement proposed by the facility would not generate any prohibited remuneration in violation of the anti-kickback statute.

In rendering its opinion, the OIG relied on the facility's certification that the employees' incentives would not be based upon referrals or the generation of any business payable by any federal health care program. The facility also certified that only bona fide employees would be eligible to receive the rewards, and then only for furnishing items or services for which payment was made in whole or in part by the Medicare, Medicaid, or other federal health programs as performance-based compensation for fulfilling their job duties and responsibilities. The OIG determined that these assurances brought the rewards program within the statutory exception and regulatory safe harbor for employee compensation.

The OIG noted that the use of the rewards to obtain Medicare and Medicaid-covered items and services might raise issues regarding proper reporting of such items and services for reimbursement purposes. In response to those concerns, the facility certified that it would account for all benefits it obtained through the rewards program by reflecting the items and services on the cost reports and claims it submits to federal health programs. For tax purposes, the facility certified that the rewards would be characterized as part of an employee's compensation.

Access a copy of the Advisory Opinion.

Blurring the Line Between Termination and Exclusion? CMS Publishes Proposed Rule Revising Medicare Appeals Process and Implementing Three-Year Reenrollment Prohibition for Revoked Providers

In March, the Centers for Medicare & Medicaid Services (CMS) published a proposed rule (CMS-6003-P2) establishing a revised appeals process for providers and suppliers whose applications for enrollment or renewal of enrollment in the Medicare Program were denied. The proposed rule titled,

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"Medicare Program: Appeals of CMS or Contractor Determination When a Provider or Supplier Fails to Meet the Requirements for Medicare Billing," grants providers and supplies the right to an administrative hearing within the United States Department of Health and Human Services when a provider's Medicare billing privileges are revoked. The proposed rule also grants a provider the right to seek an appeals board review of an adverse hearing decision. However, the proposed rule shortens deadlines and adds restrictions on providers whose applications have been revoked.

Current Medicare regulations under 42 C.F.R. 498 provide appeal rights for providers and suppliers that have been found to not meet certain conditions of participation or established standards. In addition, regulations at 42 C.F.R. section 405.874 provide an appeals process for suppliers of durable medical equipment, prosthetics and orthotics and supplies. In October 1999, CMS published proposed revisions to the appeals process under 42 C.F.R. section 405.874. See 64 FR 57431. CMS issued the current proposed rule in order to clarify and revise the appeals process in response to the comments CMS received from the 1999 proposed rule and to comply with Section 936(b)(1) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (specifying timeframes in which contractors must process provider and supplier enrollment actions).

A significant change included in the proposed rule would create a waiting period for reapplication to the Medicare program when a provider or supplier is revoked. Under the rule, a revoked provider would be prohibited from applying for reenrollment for three years. This change, found at proposed 42 C.F.R. section 424.535(c), is intended to address providers who react to Medicare termination by immediately seeking reentry into the program. The commentary to the proposed rule argues that such a practice, although common, "makes a sham of the enforcement process." However, this proposed rule change is troublesome to the extent it blurs the line between termination from the Medicare program (by terminating the current provider agreement but permitting reenrollment) and exclusion from the Medicare program (which bars a provider for a certain number of years). Exclusion is reserved for more serious offenses and typically carries a threshold of proof.

The proposed rule would reduce the time a provider has to submit supporting information to an application from 60 days to 30 days. Under the proposed rule, a provider has 60 days to file an appeal of any adverse decision, whether an initial application, a reconsideration, or an appeal of an administrative hearing ruling. Contractors must adjudicate initial determinations and revalidations within 180 days.

CMS is currently accepting comments on the proposed rule. The comment period is open until 5:00 p.m. on May 1, 2007.

Access a copy of the report.

Electronically submit comments.

States Address Evolving Long-Term Care Needs With Regulatory Changes and New Licensure Categories

In March, the National Center for Assisted Living (NCAL) issued a report detailing a state-by-state summary of assisted living regulations in 21 different categories. The report titled, "2007 Assisted Living State Regulatory Review," reviews the state regulations governing assisted living facilities, in which nearly one million Americans currently reside. The majority of states use the licensing term "assisted living," but some states use other similar terms (e.g., California uses "residential care" and Tennessee uses "assisted care living"). The report surveys all the similar facilities.

In addition to providing a categorical breakdown of regulations, the report analyzes broad nationwide trends in assisted living regulations. It notes that several states have responded to concerns of disaster responsiveness by enacting additional regulations related to safety, increased incident reporting, emergency preparedness, and disease control. For example, Delaware, Maryland, and Virginia added emergency power generator requirements to assisted living facilities.

Some states, including New Hampshire and Missouri, created new licensure categories to accommodate higher resident acuity levels. For example, Missouri replaced its old licensure terms (Residential Care Facility I and II) with new categories (Assisted Living Facilities and Residential Care Facilities). The Assisted Living Facility category allows for higher levels of acuity than the old licensure categories.

States continue to raise standards for Alzheimer's care by enacting new requirements for staff training, staffing, unit certification, and elopement control. Massachusetts created a new certification category titled, "Special Care Residence," that includes care for people with dementia. Florida enacted regulations requiring facilities to monitor and manage residents who wander and are at risk for elopement.

According to the report, most states have, by now, revised their assisted living regulations to provide for Medicaid coverage. Only a few states do not provide Medicaid coverage for assisted living, including Alabama and the District of Columbia. Other notable trends identified by the report include new or expanded facility disclosure and information requirements,

and heightened focus on medication management, staff training, and resident rights. The report also provides useful contact information for each state agency that oversees assisted living activities.

Access a copy of the report.

New Laws Require Carbon Monoxide Detectors in Long-Term Care Facilities

States nationwide are enacting legislation to require carbon monoxide detectors in residential buildings. These regulations require owners to install detectors in new and existing homes, apartments, long-term care facilities, dormitories, hotels and motels. Some states require an alarm in every room, like smoke alarms, while other states limit the alarms to certain building areas where there may be a carbon monoxide hazard. Illinois, for example, mandates that every dwelling unit must be equipped with at least one carbon monoxide alarm within 15 feet of every room used for sleeping purposes.

The push for such laws has been prompted by several recent carbon monoxide-related deaths and evacuations of long-term care facilities. In Florida, the legislation is dubbed "Janelle's Law" after a young couple, Janelle Bertot and Anthony Perez, died when carbon monoxide leaked into their car from a faulty exhaust system.

Carbon monoxide is a colorless, odorless gas found in combustion fumes that can cause sudden illness or death, according to the Centers for Disease Control and Prevention. It is produced by the incomplete combustion of organic fossil fuels such as oil, gas, or coal. If there is a lack of air during the combustion process or if a heating appliance is faulty, carbon monoxide can be produced. When inhaled, carbon monoxide combines with the blood and prevents it from absorbing oxygen. According to the U.S. Fire Administration, carbon monoxide poisoning is one of the leading causes of accidental deaths. It kills about 480 people each year and sends another 15,200 to hospital emergency rooms.

The laws generally specify that the owner is responsible for supplying and installing all required alarms. In several states, including Illinois, the owner also is required to give each tenant written information regarding alarm testing and maintenance and must ensure that the batteries are in operating condition at the time the tenant takes possession of a dwelling unit. The laws criminalize willful failure to install a detector (a Class B misdemeanor in Illinois) and tampering with, removing, destroying, or disconnecting a detector alarm (a Class B misdemeanor in Illinois).

At least nine states (Alaska, Connecticut, Massachusetts, Minnesota, New Jersey, New York, Rhode Island, Texas, and Vermont) have enacted carbon monoxide detector requirements. Massachusetts' law takes effect January 1, 2008. Florida's law, with an effective date of July 1, 2007, is currently working through the legislature but is expected to pass. Oklahoma's law unanimously passed the Senate and is in the House for consideration. Virginia's law (with an effective date of 2010) unanimously passed the Senate and is in the House for consideration.

Access a copy of the Illinois law (Public Act 94-741).

Access a copy of the Florida legislation (SB 1840 and HB 1303).

Events Calendar

April 25, 2007

Foley Executive Briefing Series: Tenant In Common Offering Seminar

The University Club of Orlando
Orlando, FL

www.foley.com/TICSeminarOrlando

April 26, 2007

Foley Executive Briefing Series: Tenant In Common Offering Seminar

University Club of Tampa
Tampa, FL

www.foley.com/TICSeminarTampa

April 27, 2007

Foley's Friday Focus: New Financing Option for Senior Living Facilities – The TIC Offering

Web Conference

www.foley.com/news/event_detail.aspx?eventid=1494

May 9 – 10, 2007

American Health Care Association/National Center for Assisted Living 25th Annual Congressional Briefing

Washington, D.C.

http://www.ahca.org/events/cb.html

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May 15 – 17, 2007

Assisted Living Federation of America 2007 Conference & Expo

Hilton Anatole Hotel
Dallas, TX

www.alfaconferenceandexpo.com

June 20 – 21, 2007

Long Term Care Health Information Technology Summit

Chicago, IL

www.ahca.org

Accomplishments

Foley Partner, **Matthew J. Murer** will be presenting "The Assisted Living Regulation Debate: Separating Fact From Fiction," at the ALFA 2007 Conference and Expo in Dallas, Texas. Speaking with him will be **Rick Harris**, the head of Alabama's licensing agency. The session will be moderated by **Paul Klaassen**, the founder of Sunrise Senior Living.

"The Liability Two Step: Simple Steps to Identify Potential Liability," authored by Foley Partner, **Matthew J. Murer** was published in the March issue of *Assisted Living Executive*. The second installment of that article is scheduled to appear in the May issue.

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