



PACAH 2018 Fall Conference
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Legal Potpourri: What's New for 2018/2019

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Overview

- Tackle CMS ROPs for Phase 3, effective November 28, 2019
- Assess risks under Pennsylvania's Act 53 (HB 1124) which created new criminal liability for neglect and abuse of care-dependent persons effective August 28, 2018
- Develop strategies for incorporating training about abuse and neglect prevention and reporting requirements

Phase 3 of the ROPs

- 483.12 Freedom from abuse, neglect, and exploitation
 - (b)(4) Coordination with QAPI Plan
- 483.21 Comprehensive person-centered care planning
 - (b)(3)(iii) Trauma informed care

Phase 3 of the ROPs

- 483.25 Quality of care
 - (m) Trauma informed care
 - ▶ Training to staff
- 483.40 Behavioral health (BH) services
 - (a)(1) As related to residents with a history of trauma and/or post-traumatic stress disorder
 - ▶ Expand existing BH processes to include staff assessments/competencies for caring for residents with a history of trauma and/or post-traumatic stress disorder

Phase 3 of the ROPs

- 483.70 Administration
 - (d)(3) Governing body responsibility for QAPI program
 - ▶ Board must have responsibility and accountability for QAPI
 - ▶ How will you engage your governing body
 - ▶ *Tip: Get this on Board agenda before November 28, 2019*

Phase 3 of the ROPs

- 483.75 Quality assurance and performance improvement
 - (g)(1) QAA committee the addition of the Infection Control Prevention Officer (ICPO)
 - ▶ DON, Medical Director or designee, at least 3 other members (including NHA, owner , board member or other person in a leadership role
 - ▶ *Tip: Do not forget Infection Control Committee and community representative*

Phase 3 of the ROPs

- 483.80 Infection control
 - (b) Infection “preventionist” (IP)
 - (c) IP participation on QAA committee
- 483.85 Compliance and Ethics Program (CEP)
 - Compare existing CEP to new regulations
 - Revise and implement changes if required
 - More rules if >5 SNFs

Phase 3 of the ROPs: Elements of CEP

- Written CEP standards, policies, and procedures capable of reducing the prospect of criminal, civil, and administrative violations and promoting quality of care
- Assignment of specific high-level personnel with responsibility to oversee compliance
- Sufficient resources and authority to the individual responsible to oversee the compliance and ethics program

Phase 3 of the ROPs: Elements of CEP

- Effective communication of the standards, policies and procedures to entire staff, individuals providing services under a contractual arrangement, and volunteers, consistent with their expected roles
- Auditing and/or monitoring *and* an anonymous reporting mechanism

Phase 3 of the ROPs: Elements of CEP

- Enforcement through appropriate discipline
- Take all reasonable steps to respond appropriately to violations and to prevent future violations
- Conduct an annual review of CEP

Phase 3 of the ROPs: 5 or More SNFs

- Mandatory annual staff training
- Compliance officer who reports to governing body and is not subordinate to general counsel, chief financial officer, or chief operating officer
- Compliance liaison at each facility

Phase 3 of the ROPs

- 483.90 Physical environment
 - (f)(1) Call system from each resident's bedside
 - ▶ Allow residents to call for staff assistance through a communication system which relays the call directly to staff member or to a centralized staff work area from the resident's bedside, toilet and bathing facility

Phase 3 of the ROPs: Training

- 483.95 Training requirements Phase 3 topics:
 - Communication: effective communications for direct care personnel
 - Resident Rights and Facility Responsibilities
 - Abuse, Neglect, and Exploitation: exploitation
 - ▶ Taking advantage of a resident for personal gain through manipulation, intimidation, threats, or coercion

Phase 3 of the ROPs: Training

- QAPI & Infection Control: written standards, policies, and procedures for each program
- Compliance and Ethics: operating organization for each SNF must include training as a part of their compliance and ethics program
 - ▶ *Annual training* if the operating organization operates five or more facilities

Phase 3 of the ROPs: Training

- Behavioral Health Training: training of entire staff based on facility assessment
- Applies to new and existing staff, contractors and volunteers

CMS Hand in Hand: A Training Series for Nursing Homes

- Focuses on caring for residents with dementia and preventing abuse
- Five modules
 - Four on dementia
 - One on preventing and responding to abuse

https://surveyortraining.cms.hhs.gov/pubs/ClassInformation.aspx?cid=0CMSHandinHand_DL

https://surveyortraining.cms.hhs.gov/pubs/ClassInformation.aspx?cid=0CMSHIH_ONL

Act 53 of 2018: Criminal Neglect & Abuse of Care-Dependent Persons

- Expands law governing criminal neglect of care-dependent persons (18 P.S. § 2713)
- Creates new crime of criminal abuse of care-dependent persons (18 P.S. § 2713.1)
- Passed unanimously as H.B. 1124, signed by Governor Wolf on June 28, 2018, and effective on August 28, 2018

Act 53: Expands Definition of Caretakers

- Caretaker is any person who is an owner, operator, manager or employee of any of the following:
 - Nursing home, personal care home, assisted living facility, private care residence or domiciliary home
 - Community residential facility or intermediate care facility for a person with mental disabilities.

Act 53 of 2018: Caretakers Expanded

- An adult daily living center
- A home health service provider whether licensed or unlicensed
- Any entity licensed under the Health Care Facilities Act (including hospitals)
- An adult who lives with the care-dependent person and has a legal duty to provide care or has voluntarily assumed an obligation to provide care because of a family relationship, contract or court order

Act 53: Criminal Neglect Easier to Prove

- Prosecutors need only show that a caregiver intentionally, knowingly or recklessly endangered the welfare of a care dependent person for whom he is responsible by failing to provide treatment, care, good or services necessary to preserve the health, safety or welfare of the person
 - No need to prove actual injury

Act 53: Criminal Neglect Easier to Prove

- “Recklessly” is the conscious disregard of a substantial and unjustifiable risk to the care-dependent person
 - *Note: a repeated failure to follow a plan of treatment could be “reckless”*
- Neglect also includes intentionally or knowingly using a physical or chemical restraint or medication or isolating a care-dependent person contrary to law and causing bodily injury, serious bodily injury or death

Act 53: Penalties for Criminal Neglect

- 1st degree misdemeanor for bodily injury
 - ≤ 5 years in jail and/or $\leq \$10,000$ in fines
- 1st degree felony for serious bodily injury or death
 - ≤ 20 years in prison and/or $\leq \$25,000$ in fines
- 2nd degree misdemeanor for endangerment
 - ≤ 2 years in jail and/or $\leq \$5,000$ in fines
- 3rd degree felony for course of conduct of endangerment
 - ≤ 7 years in jail and/or $\leq \$15,000$ in fines

Act 53: New Crime of Abuse of Care-Dependent Person

- Caretaker with *intent to harass, annoy or alarm* care-dependent person:
 - Strikes, shove, kicks or subjects, attempts to subject or threatens a care-dependent person with physical contact
 - Engages in a course of conduct or repeatedly commits acts which serve no legitimate purposes

Act 53: New Crime of Abuse of Care-Dependent Person

- Communicates to a care-dependent person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures
- Communicates repeatedly with the care-dependent person at extremely inconvenient hours
- Commits a crime of stalking against care-dependent person

Act 53: Penalties for Criminal Abuse

- 1st degree misdemeanor
 - ≤ 5 years in jail and/or $\leq \$10,000$ in fines
- 3rd degree felony penalty for stalking a care-dependent person
 - ≤ 7 years in jail and/or $\leq \$15,000$ in fines

Act 53: Required Reporting

- Department of Aging, Department of Health and Department of Human Services *must report* to local law enforcement or to the Office of the Attorney General . . .
 - If in course of conducting a regulatory or investigative responsibility (i.e., a survey or inspection), it has a *reasonable cause to believe* that a caretaker has engaged in conduct that violates this law

Freedom From Abuse, Neglect and Exploitation

- F 600 – Right to be free from abuse, neglect & exploitation
- F602 – Exploitation and misappropriation
- F603 – Involuntary seclusion
- F604 – Physical restraints
- F605 – Chemical restraints
- F606 – Not employ/engage individual who was found guilty by a court or has finding on nurse aid registry; staff includes employees, medical director, consultants, contractors, volunteers, caregivers, students
- F607 – Policies and procedures re prohibiting abuse, neglect and exploitation, investigation, training
- F608 – Elder Justice Act
- F609 – Reporting of alleged violations involving abuse, neglect and exploitation
- F610 – Investigate, prevent and correct

Screening Volunteers

- Policies must address how pre-screening occurs for prospective consultants, contractors, volunteers
- Require same scrutiny prior to placement in facility, whether screened by facility itself, third-party agency, or academic institution
- Maintain documentation of the screening

Volunteer Abuse Training: F943

- Training must address:
 - Activities that constitute abuse, neglect, exploitation, and misappropriation of resident property
 - Procedures for reporting incidents of abuse, neglect, exploitation, or the misappropriation of resident property
 - Dementia management and resident abuse prevention

Federal Definitions

- Abuse: the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the *deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being.* **Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish.** It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology.

Federal Definitions

- Exploitation: taking advantage of a resident for personal gain, through the use of manipulation, intimidation, threats, or coercion
- Involuntary seclusion: separation of resident from other residents or from her/his room or confinement to her/his room against resident's will, or the will of the resident representative

Federal Definitions

- Misappropriation of resident property: deliberate misplacement, exploitation, or wrongful, temporary, or permanent use of a resident's belongings or money without resident's consent
- Neglect: the failure of the facility, its employees or service providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish or emotional distress

Federal Definitions

- Sexual abuse: non-consensual sexual contact of any type with a resident
- Willful means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm

Abuse Reporting Guidelines

	F608 42 CFR 483.12(b)(5) and Section 1150B of the Act (ELDER JUSTICE ACT)	F609 42 CFR 483.12(c)
What?	Any reasonable suspicion of a crime against a resident	1) All alleged violations of abuse, neglect, exploitation or mistreatment, including injuries of unknown source and misappropriation of resident property 2) The results of all investigations of alleged violations
Who is required to report?	Any covered individual, including the owner, operator, employee, manager, agent or contractor of the facility	The facility
To whom?	State Survey Agency (SA) and one or more law enforcement entities for the political subdivision in which the facility is located (i.e., police, sheriffs, detectives, public safety officers; corrections personnel; prosecutors; medical examiners; investigators; and coroners)	The facility administrator and to other officials in accordance with State law, including to the SA and the adult protective services where state law provides for jurisdiction in long-term care facilities
When?	Serious bodily injury- Immediately but not later than 2 hours* after forming the suspicion No serious bodily injury-not later than 24* hour	All alleged violations-Immediately but not later than 1) 2 hours- if the alleged violation involves abuse or results in serious bodily injury 2) 24 hours- if the alleged violation does not involve abuse and does not result in serious bodily injury.

Abuse and Neglect Strategies

- What is reportable abuse and neglect?
- How effective is on-line training?
- How are staff trained for media inquiries?
- What rights do you and your staff have when an investigator knocks?

Questions

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