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SKILLED NURSING FACILITIES AND NURSING HOMES BEWARE: HEALTH CARE REFORM CHANGES HOW FACILITIES APPROACH COMPLIANCE

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The era of the voluntary compliance program has come to an end. The Patient Protection and Affordable Care Act of 2010 ("PPACA")[1] requires all providers and suppliers, including skilled nursing facilities and nursing homes (collectively referred to as "nursing facilities") to have compliance programs as a condition of Medicare enrollment. Now is a good time for nursing facilities to dust off their compliance programs and review the effectiveness of their current programs.

Nursing facilities must have an effective compliance plan in place no later than March 23, 2013. The compliance program must be designed to prevent and detect criminal, civil, and administrative violations as well as promote quality of care. The health care reform legislation sets forth required elements of effective compliance programs that nursing facilities must integrate into their current programs. Those elements include:

(1) The implementation of compliance standards and procedures to reduce the prospect of criminal, civil, or administrative violations.
(2) The designation of a member of senior management to provide oversight.
(3) Limitations on authority to certain persons whom the nursing facility knew or should have known had a propensity to engage in criminal, civil, or administrative violations.
(4) Mandatory training requirements.
(5) Periodical audit requirements.
(6) Implementation of reporting mechanisms.
(7) Consistent enforcement of reasonable and appropriate disciplinary measures.
(8) Implementation of systems to respond to violations and prevention of incidents of noncompliance.
(9) Periodic review requirements.

OIG Report Reveals Weaknesses In Nursing Facility Background Screening of Employees

A recent report[2] published by the OIG illustrates the importance of compliance programs and why facilities need to start addressing compliance issues now. Federal regulations currently prohibit Medicare and Medicaid nursing facilities

[1] P.L. 111-148 (March 23, 2010).
[2] Department of Health and Human Services, Office of Inspector General, "Nursing Facilities' Employment of Individuals with Criminal Convictions," OIE-07-09-00110 (Mar. 2011) (hereinafter "Criminal Convictions").

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from hiring persons convicted of abusing, neglecting, or mistreating residents, or who have a finding entered into a state nurse aide registry for abuse, neglect, or mistreatment of residents or for the misappropriation of resident property.[3] An effective compliance program (complete with employee and independent contractor screening policies) can help nursing facilities avoid the employment of these types of individuals. The OIG's study concluded that nursing facilities were not doing an effective job of screening employees.

In the study, the OIG randomly sampled 260 Medicare-certified nursing facilities (from a total of 15,728) requesting data on all employees hired as of June 1, 2009. The OIG found that ninety-two percent (92%) of the nursing facilities hired at least one person with at least one criminal conviction. Additional findings included:

> Nearly half of nursing facilities employed five or more individuals with at least one conviction. Forty-four percent of employees with convictions were convicted of crimes against property (e.g., burglary, shoplifting, writing bad checks), making it the most common type of crime committed. Overall, 5 percent of nursing facility employees had at least one conviction in FBI-maintained criminal history records. Most convictions occurred prior to employment. Eighty-four percent of employees with convictions had their most recent conviction prior to their beginning date of employment.[4]

Although the FBI data did not specify whether the crimes involved nursing facility residents, should a facility want these types of individuals to have access to their residents? The fact that the OIG could not identify whether the crimes involved nursing facility residents did not prevent it from recommending that HHS implement nationwide criminal background check procedures to ensure that states consistently conduct background checks. Specifically, the OIG asked CMS to: "(1) clearly define the employee classifications that are direct patient access employees and (2) work with participating States to develop a list of State and local convictions that disqualify an individual from nursing facility employment under the Federal regulation and periods for which each conviction bars the individual from employment."[5] In written comments to the OIG's draft report, CMS stated that a "direct access employee" is anyone "who routinely comes into contact or has the potential to come into contact with residents/clients." For nursing facilities, this definition includes all staff, including clinical staff, janitors, maintenance, housekeepers, laundry, dietary, etc. Nursing facilities that have inconsistently performed background checks on their employees and independent contractors should make those screenings a priority.

An Effective Compliance Program Could Lead to a Reduction In CMPs Assessed for Noncompliance

CMS also recently issued a final rule[6] implementing significant changes to the civil monetary penalties ("CMPs") rules for nursing facilities. The changes were mandated by the health care reform legislation, and will become effective as of January 1, 2012. These changes are designed "to reduce the delay which results between the identification of problems with noncompliance and the effect of certain penalties that are intended to motivate a nursing home to maintain continuous compliance with basic expectations regarding the provision of quality care."[7] Specifically, the final rule provides: (1) in a case where CMPs are imposed, the establishment of an escrow account where CMPs may be placed until after a nursing facility's administrative appeal process has been concluded; (2) in a case where CMPs are imposed, the ability for the nursing facility to participate in an independent, informal dispute resolution process; (3) in a case where a nursing facility self-reports noncompliance and promptly corrects its noncompliance, a

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[3] 42 C.F.R. § 483.1(c)(1)(ii).
[4] Criminal Convictions, p. ii.
[5] Criminal Convictions, p. iii.
[6] 76 FR 15106 (Mar. 18, 2011).

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reduction in the amount of CMPs assessed against the nursing facility by as much as fifty percent (50%); and (4) the use of collected CMPs to benefit nursing facility residents.

With regard to the self-reporting of noncompliance, the final rule states that CMS's CMPs reduction authority "works in harmony with section 6102 of the Affordable Care Act that requires nursing homes to implement effective ethics and compliance programs. . ." The take away is that nursing facilities with effective compliance programs will be in a better position to take advantage of the self-reporting mechanism, which may lead to a reduction in the CMPs assessed for noncompliance.

These recent developments illustrate the importance the government places on compliance. Although nursing facilities have until March 23, 2013 to implement a compliance program, facilities should not delay in addressing compliance issues. They won't go away. If a facility currently has a compliance program, now is the time to review that compliance program, evaluate what works, what does not work, and make any necessary changes to the compliance program. For those facilities that do not currently have a compliance program, they should begin that process now. It can take several months to develop, implement, and train personnel on a program that works for the organization. If a nursing facility waits until March 2013, it will be too late.

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[7] 76 FR 15106.

For Further Information

If you have questions or want more information regarding your compliance programs, you should contact your legal counsel to ensure compliance with the new rule. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Brooke Bennett Aziere is available to assist you. Brooke Bennett Aziere can be reached at (316) 291-9768 or **baziere@foulston.com.**

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