Long-Term Care Survey Alert

Risk Management: Don't Let Staffing Or Monitoring Shortfalls Pull You Up Short In Court

Preempt the F tags that are land mines for providers - and gold mines for plaintiffs

Just when you think you're out of the woods after a nightmare survey, F tags from the past can come back to haunt your facility in a civil lawsuit.

A case in point: A resident collided with a wheelchair-bound resident when walking down the hall, fell and hit her head, became unconscious and later died of a cerebral hemorrhage.

The resident's family sued the facility, claiming the resident would not have had the accident if she had been monitored more closely, reports attorney **Brad Kelly**, with **Reed Smith** in Washington, DC, who handled the lawsuit for the facility. And the plaintiff's attorney dug up survey citations to prove that contention.

"The plaintiff wanted to introduce a survey report as evidence in the lawsuit showing how various survey deficiencies reflected insufficient staffing," reports Kelly.

"For example, the nursing facility had one citation claiming various residents had not received dining assistance or supervision," he says. "The plaintiff argued that this clearly indicated that the facility did not have enough staffing."

Yet "the resident who had fallen had been living in the facility for four years without any notable history of falls," adds Kelly. The facility staff believed the resident could have suffered the stroke and then fell, rather than the other way around.

The nursing home settled the case, so the court never ruled on the admissibility of the survey findings. Yet there's a lesson to be learned: Do your best to preempt the inadequate monitoring/staffing issue before you get written up.

Consider These Arguments

Say the surveyors are grilling you as to why one aide is responsible for 15 or 20 residents. A reasonable answer may actually lie in your facility's layout - and the residents' ADL status and acuity. "For example, the 20 residents may be located in 10 rooms, five on one side of the hall, five on the other," says Kelly. "In such a case, a nursing aide can reasonably walk up and down 60 or so feet of hall and check in on rooms over and over again during the shift," he says.

And if a number of the residents were fairly independent, then you can argue that the aide is really focusing on the smaller number of residents who need closer supervision, Kelly adds. "If the aide should be listening for moans or calls for help ... the fact that she is covering a fairly limited area will also help boost the argument that the residents are being monitored."

Be strategic: Facilities should look at how they break up their units so they can assign CNAs to focus on a limited area. For example, Kelly would rather see an aide cover both sides of half a hall rather than one side of the entire hall. "On the other hand, if two aides are each covering one side of a hall, start them at opposite ends, so that one of them is at each end at all times," he advises. "That way you can get the benefit of having people passing by rooms on a frequent basis."

Demonstrate 'Monitoring'

If surveyors challenge or cite you for failing to monitor a resident adequately, consider demonstrating what "monitoring" realistically involves, as Kelly has done successfully in appeals hearings and in a dramatic presentation at the 2004 **American Health Lawyers**' "Long Term Care and the Law" conference in Orlando. To drive home the point, Kelly shows how observing a resident at risk for falls every 15 minutes still leaves the person unattended the majority of the time. The take home message for survey agencies and juries: Staff can't be everywhere at once to prevent all accidents.

"Plaintiff's attorneys want one-on-one monitoring and de facto hold the facility to that standard, if you let them, but that's totally unrealistic," avers **Scot Sauder, JD**, former general counsel for a major nursing home chain and currently in private practice in Corrales, NM.

"A trained RN walking a patient or providing one-on-one care can't even prevent that resident from falling in every case," he says.

Risk-Adjust Monitoring

Facilities can, however, develop internal protocols that identify the types of patients or clinical scenarios requiring temporary one-on-one or more frequent monitoring at specified intervals. Patients with acute delirium or severe agitation would go in this high-maintenance category, Sauder says.

The QA committee can define monitoring protocols for various risk profiles and clinical conditions by using available evidence in the literature or published clinical guidelines, and expert input from the facility's clinicians, Sauder suggests.

But watch out: "If the facility has a protocol in place, and staff don't follow it, the facility has opened itself up to liability," Sauder cautions (see the related story "Follow These 2 Risk Management Must-Dos", this issue).