

## Long-Term Care Survey Alert

### Risk Management: Fight A Rise In IJ Citations With Awareness, The Right Survey Management Plan

Don't get caught in an avoidable nightmare.

Brace yourself: Nursing facilities may be getting hit with more immediate jeopardy citations, which means you need to put together an effective IJ-prevention kit -- now. **The reality:** IJ citations climbed 22 percent from 2000 to 2006, the **Centers for Medicare & Medicaid Services** notes. And according to recent data from particular states and based on the cases he's handling, attorney **Joseph Bianculli** believes surveyors have recently been citing more IJ cases.

Your Peers Dish On The Trend

Kelly Priegnitz, general counsel for **Sun Healthcare Group**, noted that she's seeing a "lower bar" for IJ where deficiencies that surveyors would have cited as G's in the past are now J's or higher. Priegnitz and Bianculli spoke on survey trends at the recent **American Health Lawyers'** Long-Term Care and the Law conference in New Orleans.

Bianculli is seeing "lots and lots of cases" where surveyors are citing things as IJ that aren't even actual harm. And he's seeing surveyors testify at administrative hearings that they were told to cite things that pose only the potential for serious harm.

**Joan Redden**, VP of regulatory and consumer affairs for **Skilled Health Care Inc.** in Foothill Ranch, CA, says her organization has observed what appears to be a "spike in IJ." Some of the areas involved in such citations include staffing, infection control, pressure ulcers and elopement.

#### Implement a 3-Prong Plan

Take the survey management bull by the horns before your facility gets cited with actual harm or IJ citations that draw the attention of attorneys general investigating substandard care. Here's how:

1. **Set the record straight with surveyors while you have the opportunity.** "When surveyors come into the building, keep asking them questions until you get answers about what issues they have identified -- and which residents they are focusing on, and so forth," Bianculli advises.

So many of the IJ cases involve scenarios in which the facility actually had documentation showing it provided appropriate care, he adds.

2. Never sweep anything under the rug. When you discover a mistake, self-identify and rectify it as soon as you can, Bianculli advises. "Sometimes facilities hope no one notices a fall, elopement, significant medication error or resident altercation," which are the things that typically get cited as IJ. "And when surveyors show up and find it, they cite retroactive IJ with a huge CMP when they might have just cited past IJ with a per instance CMP capped at \$10,000," he adds.

3. Consider taking a more aggressive approach toward informal dispute resolution (IDR) and appeals. To head off survey and collateral actions, Sun Healthcare is taking a new look at IDR when it gets deficiencies -- and viewing IDR as the first step in what may be a long judicial process, including going to federal court, Priegnitz told AHL conferees.

Going to federal court may be necessary depending on how high the stakes are, considering that the odds of prevailing

at an administrative law judge (ALJ) hearing or the Departmental Appeals Board (DAB) are hardly stacked in nursing facilities' favor these days. And a facility isn't guaranteed a DAB review. In fact, Bianculli is taking a number of cases to federal court, including one involving a large CMP where the facility got cited at F323 when no accident or injury occurred.

Delay, you pay: Make sure to get your request for a hearing in on time -- or else.

Bianculli reports losing a case in federal court recently where an ALJ had dismissed an appeal because the facility submitted its request for a hearing too late. In the case, the facility claimed it never got the original notice of remedies and didn't learn about it until the state told them about it. As a result, the facility filed a request for a hearing a couple of weeks late, Bianculli explains.

The DAB upheld the dismissal of the appeal involving multiple \$100,000 CMPs for which the facility had a good defense. "CMS argued that a provider can't appeal a dismissal for untimeliness, and the federal court agreed."

**A wake-up call:** The ruling is a wake-up call for facilities to file a request for hearing on time, which is 60 days from the first notice of imposition of a remedy, whether that remedy is a CMP, denial of payment or termination from Medicare/Medicaid, Bianculli says.

**Remember:** An IDR request will NOT toll the time period for filing a hearing request for an appeal, emphasized attorney **Ari Markenson**, who presented at the AHL conference on due process issues.