

Long-Term Care Survey Alert

Risk Management: HEAD OFF CITATIONS, LIABILITY CAUSED BY TEMP STAFF

A nurse from a temporary agency leaves a resident unattended in the bathtub and he slips and falls trying to climb out on his own. Luckily, the resident isn't injured, but the facility lands on the fast track to decertification.

As unfair as it may seem, a defense built on "the temp nurse did it" won't hold water with surveyors. The **Centers for Medicare & Medicaid Services** takes the position that the facility is ultimately liable for what goes on in its facility.

That's also true under most state licensing laws, according to **Harvey Tettlebaum**, an attorney with **Husch & Eppenberger** in Jefferson City, MO. "As a practical matter, the facility is responsible no matter what in today's marketplace," he adds.

With that in mind, facilities can take the following steps to oversee temporary and private duty staff and mitigate survey and litigation woes.

1. **Set uniform standards for temp or private duty staff.** "These would include a criminal background check, training, expected conduct while on duty, and the person's willingness to adhere to the facility's corporate compliance program," says Tettlebaum. "There should also be procedures for notifying the family if the private duty person becomes unacceptable."
2. **Maintain written evidence of abuse screening.** Many state laws require temporary agencies to screen employees whom they send into nursing homes. If the agency does such screening, "ask the temp staff person to bring a copy of her background screening from the agency the first time she works in the facility," suggests **Richard Butler**, president of **Survey Management** in Indianapolis, IN. Otherwise, the facility should perform its own background check.

"The facility can also refuse to allow families to employ a person as a private duty nurse unless a criminal background check has been completed by the facility at the family's expense," Tettlebaum adds.
3. **Perform background checks on temporary agencies.** Temp agency staff aren't the only ones in need of a background check. "At the very least, make sure the agency has liability insurance and is paying its various obligations," suggests **Rick Carter**. Carter is president and CEO of **Care Providers of Minnesota**, an **American Health Care Association** affiliate that has been instrumental in getting Minnesota to pass a state law requiring temp agencies to meet standardized requirements.
4. **Spell out and follow training and orientation requirements.** The facility can require that the temp staff or private duty person show successful completion of the state and federally required training before working in the facility.

Butler recommends the facility also have a system to orient all temp or private duty caregivers to the facility and to the specific residents assigned to them. "The facility should ensure the temp staff is capable of caring for patients who have complex comorbidities or skilled nursing procedures."

5. **Try to limit temporary and private duty staff to your own staff or those familiar with the facility.** For

example, some facilities are allowing facility staff to moonlight as private duty nurses hired by residents' families. "The advantage is that the facility knows the private duty staff is credentialed and the facility has better oversight and coordination of care," says **Howard Sollins**, a health care attorney with **Ober/Kaler** in Baltimore. Facilities can also ask temporary agencies to supply a regular group of staff that is familiar with the facility, if possible, Carter adds.

6. **Seek indemnification from financial liability.** Of course, the facility can't contract away its liability from survey sanctions. But it can attempt to pass along financial liability and damages resulting from the acts or omissions of a temporary agency or private duty staff person. The facility's contract with the temporary agency, for example, should include an indemnification provision.

"The facility would also be wise to require the family to hold the facility harmless and to indemnify it from the negligence of the private duty person," suggests Tettlebaum. "Or the facility could require the private duty person to carry casualty insurance naming the facility as an additional insured entity."