

Long-Term Care Survey Alert

Risk Management: Is Your Facility Vulnerable to Mega-Million Dollar Lawsuits Alleging Staffing Shortfalls?

If you use this method to communicate about staffing concerns, watch out.

Skilled Healthcare Group recently got blindsided by a \$671 million dollar judgement in a class action lawsuit claiming that the chain's California SNFs failed to meet state-mandated nurse staffing levels. The case provides a jarring wakeup call that nursing facilities could become a target for plaintiffs' attorneys looking for a windfall.

Not the only case: "Several of the more recent cases alleging understaffing have resulted in high verdicts and punitive damages" against nursing facilities, cautions attorney **Paula Sanders**, with Post & Schell in Harrisburg, Pa. "The plaintiff's bar has started to perfect how it presents allegations of understaffing to the jury ..."

To help prevent staffing issues from leading to litigation woes, follow these key steps.

1. Do more than show you're meeting certain staffing thresholds. "Raw numbers alone are not enough," says attorney **Joseph Bianculli**, in private practice in Arlington, Va. He advises focusing documentation more "on some assessment of whether the skills, and number of licensed versus unlicensed staff, etc., are adequate to meet resident needs." (For two ways to do that, see the next Long-Term Care Survey Alert.)

2. Examine how your facility communicates about staffing-related complaints. If the answer is by using email, consider switching tactics -- fast.

"According to published reports, in the Skilled Healthcare Group case, the plaintiff's attorney had e-mails from staff complaining about staffing," says Sanders. "So many of these cases are lost because of email records where people have gotten used to using email without the forethought that you'd use if you wrote a memo. So the facility ends up with carelessly drafted emails and text messages which [are media that] staff can very easily use to vent."

Another problem: Using an email system for reporting staffing concerns could lead to a "buried message" that the intended recipient either didn't receive or couldn't act on, warns attorney **Wayne J. Miller**, with the Compliance Law Group in Thousand Oaks, Calif. And that message could become Exhibit A in a future case, he adds.

2. Develop an effective process for evaluating and addressing complaints about staffing problems. Be prepared to show how the facility investigated complaints about inadequate staffing "and didn't ignore them," urges Sanders. Under the Affordable Care Act, "facilities should have a strong commitment to have an effective compliance program and an atmosphere where people feel comfortable voicing concerns."

Tips: Have systems in place for staff or residents to report any alleged non-compliance with requirements (including staffing shortfalls) on a "name or no-name basis" to a designated individual or department, advises Miller. If you use a telephone reporting system, make sure to log when a complaint is made, who received it, and the investigation or actions taken, he adds. "This documentation would tend to counter a claim that the facility was aware of and ignored possible staffing issues."

The Medicare OIG compliance plan for SNFs also clearly says that SNFs should evaluate staffing needs, in part, related to negative outcomes and vice versa, Miller adds. In addition to falls and pressure ulcers, etc., evaluate potential staffing issues related to "rapid medical deterioration resulting in an emergency hospitalization, adverse medication events, missed or undocumented [medication] dosages or nurse checks, or patient dignity complaints (dirty, not clothed, etc.)," he suggests.

Legal tip: "If a facility deals with staffing issues as part of a review committee or quality assurance (QA)," Sanders says, the issue has to be truly used for QA in order to be considered privileged. States differ, however, on whether they view that as "discoverable" in litigation.

3. Focus on documenting care correctly and timely. Facilities might address "a lot of the problems related to allegations of staffing shortfalls" with staff training and appropriate documentation, Sanders counsels. For example, monitor documentation of medication and treatment administration records (MARs and TARs), and ADL care flow sheets on a shift-by-shift basis, she suggests. "That's one advantage of having a CareTracker or other such system. The supervisor should be able to see if there is missing documentation when care should have been provided." Then the supervisor can investigate and intervene, if needed, on a more real-time basis.

Also re-educate staff about how to make corrections in the record appropriately so you can see it's a correction, Sanders advises. In a recent civil case, a facility's former employees testified that staff and even consultants routinely filled in holes on care flow sheets, she cautions.

Don't overdo it: Too many documentation requirements and forms can overwhelm staff. Instead facilities need "appropriate and user-friendly" formats for communicating resident care needs, advises **Janet Gerber RN-BC**, president and CEO of Gerber Consulting Services Inc. in Clymer, Pa. She advises "tearing apart every nursing documentation process" to eliminate duplication and unnecessary documentation entries.

Editor's note: To read more about the Skilled Healthcare Group lawsuit, go to <http://www.prnewswire.com/news-releases/skilled-healthcare-group-reports-humboldt-county-verdict-97921299.html>. Most recently, the chain filed a motion for mistrial based on juror misconduct: <http://www.news-medical.net/news/20100807/Skilled-Healthcare-Group-files-Motion-for-Mistrial-on-grounds-of-juror-misconduct.aspx>.