

## Long-Term Care Survey Alert

### Survey Management: Nail Down the Latest on This Elder Justice Act Mandate

#### Is your facility up to speed?

**Heads up:** Surveyors are now "screening to see that a facility has Elder Justice Act policies, has notified covered people - and posted the required signs," observes attorney **Paula Sanders**, with Post & Schell in Harrisburg, Pa.

Background: "Covered individuals" in nursing facilities are supposed to let the survey agency and local law enforcement know if they develop "any reasonable suspicion of crimes committed against a resident of that facility," says a June 2011 survey and cert memo. A covered individual is "an owner, operator, employee, manager, agent, or contractor" of a federally funded long-term care facility, according to an excerpt in the survey memo from the Elder Justice Act. The memo also advises facilities to "develop and maintain policies and procedures that ensure compliance ... including the prohibition of retaliation against any employee who makes a report, causes a lawful report to be made, or takes steps in furtherance of making a lawful report pursuant to the requirements of the statute." (See Long-Term Care Survey Alert, Vol, 13, No. 8.)

#### Be Aware of This Jan. 20 Survey Memo

CMS published a Jan. 20 edition of the survey memo, which indicates that it has been "revised to include updated versions of the Questions and Answers and Appendix One Documents." The January memo has this Q&A:

Question: "...I find some information on what to include in the notice that we must conspicuously post. Is there any other information that should be included in the notice regarding employee's rights?"

CMS answers that "the notice should include the following:

#### REQUIREMENTS FOR POSTING:

1. Individual's right to file a complaint with the SA if they feel the facility has retaliated against an employee or individual who reported a suspected crime under this statute, and how to file such a complaint with the SA;
2. The sign may be posted in the same area that the facility posts other required employee signs, such as labor management posters.
3. Size and type requirements for the sign should be no less than the minimums required for the other required employment-related signs."

Don't miss: The following Q&A "is probably one of the more important changes that CMS made" in the Jan. 20 memo, says **Zach Cattell**, general counsel for the Indiana Health Care Association.

Question: "Is it acceptable for a facility in its compliance policy to state that covered individuals may either (a) report reasonable suspicion of crime directly to the state survey agency and law enforcement, or (b) report reasonable suspicion of crime to the facility administrator who will then coordinate timely reporting to the state survey agency and law enforcement on behalf of all covered individuals who made the report to the administrator?"

CMS' answer: "Yes, covered individuals may (a) report reasonable suspicion of crime directly to the State Survey Agency and law enforcement, and/or (b) report reasonable suspicion of crime to the facility administrator who will then coordinate timely reporting to the state survey agency and law enforcement on behalf of all covered individuals who

made the report to the administrator. Reporting to the administrator would suffice if an individual has clear assurance that the administrator is reporting it. Reports should be documented and the administrator should keep a record of the documentation. Everyone who saw a possible crime has the obligation to report it. The administrator could coordinate the reports submitted, but each person has to report. In addition, facilities cannot prohibit or circumscribe reporting directly to law enforcement even if they have a coordinated internal system."

Analysis: The original June 2011 survey memo "discusses multiple persons reporting, and how 'it remains the responsibility of each covered individual to ensure their individual reporting responsibility is fulfilled,'" says Cattell. "But CMS does say that multiple persons can 'file a single report that includes information about the suspected crime.' So CMS was already contemplating then that multiple covered persons could report together," adds Cattell, who is also in private practice with the Indianapolis office of Krieg DeVault. "I think the update in the Jan. 20 memo is a logical outgrowth of that multiple person reporting flexibility."

"The policy can state that the covered individual may report on their own or to the facility administrator -- it doesn't say they shall or that the facility can require the covered individual report to the administrators," Cattell emphasizes. "That's important because of the retaliation provision in the guidance. It's permissible to have multiple individuals report but you can't require a [covered individual] to report in that manner. The person has to have the freedom or flexibility to report as an individual on their own," he adds.

Cattell doesn't "see a conflict of interest in having the administrator help guide a multiple person report to completion because -- and I think even CMS admits this -- there's a huge overlap between incident reporting" and the EJA reporting. "Caregivers and administrators are already responsible for reporting incidents and unusual occurrences, such as sexual or physical abuse, to the state agency and the adult protective services and ombudsman," says Cattell. (Review the survey memo Q&As on page 29 of this issue.)

#### Keep a Sharp Eye Out for the EJA Exclusion Provision

CMS warns in a Q&A added to the June memo in August: "If a long term care facility employs any covered individual who has been excluded from participating in any Federal health care program ... due to failure to meet the reporting requirements ... then that facility will be ineligible to receive Federal funds... CMS is currently working with the Office of the Inspector General on a database that will include a list of such excluded individuals." (See Long-Term Care Survey Alert, Vol. 13, No. 10.)

Stay tuned: "There appears to be no additional action at this time on creating a new exclusion list or adding to the existing LEIE [List of Excluded Individuals/Entities] list for 'covered individuals' (as defined in the act) who fail to report possible long-term care facility crimes," says attorney **Wayne J. Miller**, with the Compliance Law Group in Los Angeles, Calif. "Part of the reason for this may be that rules implementing this law which may better define the circumstances in which exclusion would be appropriate are still pending."

"It is my understanding," says Cattell, "that CMS does plan to promulgate a rule to implement the CMP and exclusion penalties... I was at a recent meeting held by CMS in Region V and they confirmed that a rule would be forthcoming -- but they aren't sure when."

Editor's note: To read more Q&As in the Jan. 20 survey memo, see page 29 of this issue.