

MDS Alert

Compliance: Feds Wary Of Uncouth Discharges

Remember: Facilities are required to notify resident and ombudsman in advance.

The Centers for Medicare and Medicaid Services (CMS), as well as investigative journalists, and the general public, are zeroing in on long-term care facilities that discharge residents unlawfully. **David s. Wright**, director of CMS' **Survey and Certification Group** in Baltimore, sent out a late-December memo alerting facilities that federal agencies were aware of and cracking down on reckless - and illegal - discharges and evictions, effective immediately.

Listing illegal or inappropriate discharges and evictions one of the most frequent complaints to long-term care ombudsmen nationally, Wright warns that CMS will be looking at the circumstances surrounding discharges led by facilities. He notes that many of these discharges or evictions violate federal regulations and may be precipitated by a concern of payment or resident behavior.

"Analysis of federal deficiencies indicate that some discharges are driven by payment concerns, such as when Medicare or private-pay residents shift to Medicaid as the payment source. The most commonly reported reason that residents are discharged is due to behavioral, mental, and/or emotional expressions or indications of resident distress," Wright says. "Sometimes facilities discharge residents while the resident is hospitalized for health concerns unrelated to the behaviors that form the alleged basis for the discharge.

However, discharging a resident due to a change in payment source may be illegal, especially if a facility fails to inform residents about their bed-hold and readmission rights.

According to a transfer or discharge fact sheet put out by **National Consumer Voice for Quality Long-Term Care** (formerly NCCNHR): "The Nursing Home Reform Law gives Medicaid recipients the right to return to their facility after they have been out of the facility due to hospitalization or therapeutic leave. Some states will pay to hold a bed for Medicaid residents who are temporarily absent. If a Medicaid recipient loses a bed - either because the state does not pay to hold the bed, or they have exceeded the state's bed hold period, readmission rights permit him or her to return to the next available bed in a semi-private room in the nursing home. Residents are entitled to notice about bed-hold and readmission rights twice - upon admission and at the time of transfer."

"CMS is evaluating facility-initiated discharge issues in nursing homes and considering a variety of interventions, including surveyor and provider training, intake and triage training, CMP-funded projects that may help prevent facility-initiated discharges that violate federal regulations, and enforcement," Wright says.

Remember: The 2016 Final Rule Requirements for Participation require any facility-initiated discharges to give notice - and reason for the discharge - to the resident or resident representative, as well as the state long-term care ombudsman.

These regulations are supposed to apply to all discharge situations. "The Final Rule, therefore, seems to require that facilities provide prior written notice to the resident, resident representative, and LTC Ombudsman of all transfers and discharges, whether involuntary or voluntary, planned or unplanned," said **Peter Mellette, JD**, at **Mellette PC** in Williamsburg, Virginia, in a blog post about Phase 1 of the Requirements of Participation.

Hospitalization May Not Change Discharge Eligibility

"In situations where the facility has decided to discharge the resident while the resident is still hospitalized, the facility must send a notice of discharge to the resident and resident representative, and must also send a copy of the discharge notice to a representative of the Office of the State LTC Ombudsman," Wright said in a May 2017 survey and certification

group memorandum. "Notice to the Office of the State LTC Ombudsman must occur at the same time the notice of discharge is provided to the resident and resident representative, even though, at the time of initial emergency transfer, sending a copy of the transfer notice to the ombudsman only needed to occur as soon as practicable as described below.

"For any other types of facility-initiated discharges, the facility must provide notice of discharge to the resident and resident representative along with a copy of the notice to the Office of the State LTC Ombudsman at least 30 days prior to the discharge or as soon as possible. The copy of the notice to the ombudsman must be sent at the same time notice is provided to the resident and resident representative."

Follow Rules Carefully to Remain Compliant

Look to these examples from the January 2018 **Frequently asked Questions Related to Long term Care Regulations, survey Process, and training** for clarity on discharge situations you may find confusing. The bottom line in both of these situations is to notify the appropriate people: resident and resident representative, as well as ombudsman.

"For our long-term residents, they may be sent out to the emergency room for some acute issue going on. We do not know if they are going to be admitted or come back from the ER that same day after some treatment. Our intent is to accept them back when their health status is stable. These transfers can happen day, evening or weekends. Do we do the transfer/discharge notification?"

"Regarding facility-initiated emergency transfers or discharges to an acute care facility our interpretive guidance says: 'Emergency Transfers - When a resident is temporarily transferred on an emergency basis to an acute care facility, this type of transfer is considered to be a facility-initiated transfer and a notice of transfer must be provided to the resident and resident representative as soon as practicable, according to 42 CFR 483.15(c)(4)(ii)(D). Copies of notices for emergency transfers must also still be sent to the ombudsman, but they may be sent when practicable, such as in a list of residents on a monthly basis.' This requirement also applies in situations where a Medicare beneficiary must be discharged because of admission to an acute care facility."

"When we have unplanned discharges to the hospital, say for a UTI, or Altered Mental Status and the hospital treats the resident.... then sends them back to our facility ... do we have to notify the Ombudsman about this?... or do we only notify the Ombudsman when our facility is NOT ABLE to take the resident back from the hospital?"

"When a facility transfers or discharges a resident, notification of the ombudsman is required (in addition to the resident and resident representative). CMS has allowed an exception in the timing of providing notice for emergency transfers; notice may be provided as soon as practicable for emergency transfers. Additionally, facilities have the option of notifying the ombudsmen about emergency transfers using a monthly list, which must meet the requirements for content of the notice."

Surveyors Looking for Patterns of Noncompliance

Surveyors will be on the lookout for discharges or evictions they find suspicious, and are ready to levy the following Ftags for facility-initiated discharges:

- F177/F560: Right to Refuse Certain Transfers
- F208/F620: Admissions Policy
- F201/F622: Transfer/Discharge Requirements (Basis for Transfer/Discharge of Resident)
- F202/F622: Transfer/Discharge Requirements (Documentation for Transfer/Discharge of Resident)
- F203/F623: Notice Requirements Before Transfer/Discharge
- F204/F624: Preparation for Safe/Orderly Transfer/Discharge
- F205/F625: Notice of Bed Hold Policy Before/Upon Transfer
- F206/F626: Permitting Residents to Return to Facility

Templates for Notice May Be Available

Check in with your state long term care ombudsman office to see whether they offer a template for providing notification

of facility-initiated discharge. In any event, to remain compliant, you must provide the following information on your discharge notification, according to the National Consumer Voice for Quality Long-Term Care fact sheet.

- "the reason for the transfer or discharge,
- "the location to which the resident will be moved,
- "the date of transfer or discharge, and
- "information about the resident's right to appeal to the state concerning the transfer or discharge,
- "with the name, address, and telephone number of the state long term care ombudsman."