

MDS Alert

Compliance: Lapsed Licenses, Certification Create A Hidden Liability Trap

The right risk management can help avoid this costly pitfall.

Picture this: Unbeknown to the nursing facility, the MDS nurse forgot to renew her license two months ago in the midst of a personal crisis or had it suspended due to a malpractice issue that arose in a previous work setting. In addition, a rehab therapist didn't renew his license but has continued to provide therapy coded in Section P1b.

Those types of scenarios, which experts say are not that uncommon, pave the way for survey woes and open a Pandora's box of potential problems in the payment and compliance arenas.

State law and Medicare or Medicaid payment policies require a licensed nurse to provide certain services. And if the nurse is not appropriately licensed at the time she provides those services, a healthcare facility could be subject to payment recoupments, cautions **Alex Hendler**, an attorney with **Powell Goldstein LLP** in New York City.

Not only that, but attorney **Paula Sanders** is aware of instances where nursing facilities have been cited under the administration tag for allowing nurses with lapsed licenses to work in the facility. "In many states, statutes or regulations would authorize the Medicaid agency to impose a fine or monetary sanction on a facility that had an unlicensed practitioner," adds Sanders, partner with **Post & Schell** in Harrisburg, PA. And "it's not hard to imagine" the government going after a facility for filing false claims if it billed for services provided when a DON or nurse supervisor in charge of the nursing staff and CNAs worked without a current and valid license, adds Sanders. She could see "similar problems" where an unlicensed nurse assessment coordinator completed and signed the MDS. "In addition to having potential personal liability, an RNAC who works under a lapsed license could expose her facility to other sanctions, including possibly having the government try to invalidate any assessments signed by the nurse," Sanders adds.

Payback time for rehab: Consultant **Ronald Orth, RN, NHA, RAC-CT, CPC**, has encountered scenarios where a facility has discovered that an unlicensed therapist provided therapy under Part A. In such a case, the facility removed those therapy minutes from the MDS in Section P1b by submitting a modified assessment, says Orth, president of **Clinical Reimbursement Solutions LLC** in Milwaukee.

RACs May Increase Detection

The **Centers for Medicare & Medicaid Services'** Recovery Audit Contractors (RACs) program, which continues to roll out nationally, will be reviewing Medicare claims for overpayments and underpayments.

"Under the RAC program, in which the contractors function like bounty hunters, an organization employing doctors, nurses, etc., without current licenses in good standing could be subject to payment recoupments under Medicare," advises **Matthew Haddad**, president and CEO, **Medversant Technologies LLC**, in Los Angeles.

Many Reasons for Snafus

So how does a practitioner typically end up without a license to practice? All too easily, says Haddad. Some practitioners simply forget to renew their licensure, or "a person may have forgotten to get the required continuing education credits and isn't eligible for renewal at the time."

Malpractice issues resulting in licensure actions are also fairly common, he adds. "It doesn't have to be a lawsuit -- a doctor or nurse may commit a serious error that a hospital reports to the state board [resulting in an adverse licensure action such as suspension or termination]."

Check for this certification: Medicare requires speech-language pathologists to have their Certificate of Clinical Competency, which is only available through the **American Speech Language Hearing Association**, notes **Donna Senft, PT, JD**, with the law firm of **Ober/Kaler** in Baltimore, MD. (Additionally, the SLP can be obtaining his supervisory experience and working toward certification, she adds.) "The SNFs, and even the therapy companies providing under-arrangement services, do not always pay attention to this requirement, since SLPs do not need certification under the licensure laws in most states," Senft says. "So you may have an SLP who has worked with dysphagic children in the school system apply for a job working with residents with swallowing disorders -- and no one thinks to see if she's certified."

Take A Proactive Approach

A lot of organizations do check employees' credentials up front. But they only recheck employees' licensure/certification status infrequently, or sometimes not at all, says Haddad.

Facilities should have a very good process in place to check licensure renewals, advises Orth. "To do that, they need to know when the state issues renewals, e.g., whether it's the same time every year or two or three years or based on the licensed person's birthday, etc."

When evaluating employees' licensure status, also review multiple databases and cross-reference the information, Haddad suggests. "You can do this manually. Go to the state licensure database [applicable to the provider] and the OIG excluded provider database" (for details on the latter, see the sidebar below).

You can also investigate software solutions that provide real-time tracking of employees' licensure status. For example, Medversant Technologies has a software product that tracks employees' status in real time. The system "goes out and finds any discrepancies between background information reported by the employee's record and outside databases," Haddad explains.

If the software program finds a problem, the system will alert anyone the organization wants alerted, including the administration and/or the employee himself. The software monitors license information, DEA certification, HHS Office of Inspector General and federal sanctions, criminal complaints, as well as malpractice complaints reportable to state or federal databases.

Take Immediate Action Upon Discovery

Once a facility detects an employee practicing without an active license, the administrator should immediately stop the person from providing care within the organization, advises Haddad.

At that point, anything the unlicensed care provider does subjects the facility to increased liability for negligent credentialing -- and obviously for payment recovery from payment sources, Haddad cautions.