

## MDS Alert

### Industry News to Use: Establish or Re-examine Staff Cell Phone Protocols, Stat, or Risk Fines and Litigation

**Don't let surveyors hit you with F-tags for outdated cell phone policies or staff misuse.**

Law enforcement authorities are laying criminal charges on former SNF staff after employees took photographs of residents without their knowledge or consent. Evaluate your facility's cell phone policies and protocols and provide ongoing training for staff to avoid F-tags and national news attention.

The Centers for Medicare and Medicaid Services update, "Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff," issued to State Survey Agency Directors on Aug. 5, 2016, outlines specific F-tags for surveyors to utilize in these cases.

CMS instructs surveyors to use the following F-tags and rationales if investigation warrants facility discipline:

- 42 CFR §483.13 (b) Abuse (tag F223) □ The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.
- 42 CFR §483.13(c) Staff Treatment of Residents (tag F223) □ The facility must □ (i) Not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion.
- 42 CFR §483.13(c) Staff Treatment of Residents (tag F226) □ The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

The stomach-twisting nature of current cases, some of which have made national news, compound the seriousness of these infractions, doing more damage to a facility's reputation than any F-tag. The journalism organization ProPublica has identified at least 47 instances of SNF staff abuse and dehumanization of residents via cell phone photos or videos since 2012. Some former SNF staff members who have been investigated for these abuses are now facing criminal charges.

**Beware:** Surveyors will ask to examine and review facility protocols and policies of staff cell phone use in regards to taking demeaning or humiliating photos or videos of residents or keeping or disseminating photos or videos. Make sure your facility has established policies that are in a shareable format.

#### **Put Personal Phones Away**

Surveyors are looking specifically to prevent resident abuse, but CMS notes that staff really shouldn't be utilizing the camera function of their cell phones at all while working with residents.

"Taking photographs or recordings of a resident and/or his/her private space without the resident's, or designated representative's, written consent, is a violation of the resident's right to privacy and confidentiality," says **David Wright**, director of Survey and Certification Group at **CMS**, in Baltimore, Maryland, in the August 2016 memorandum. "Examples include, but are not limited to, staff taking unauthorized photographs of a resident's room or furnishings (which may or may not include the resident), or a resident eating in the dining room, or a resident participating in an activity in the common area."

CMS is taking these infractions seriously, and journalists with national news organizations are also combing SNFs and records of active litigation to expose staff and the facilities where they worked. Facilities are responsible for the actions of all employees, contractors, volunteers, consultants, and other caregivers who work with residents at the facility, because they must protect residents. If your facility fails to protect residents from abuse or to uphold their inherent

privacy and confidentiality, you'll land in hot water.

Conduct abuse prevention trainings for all staff, with a particular focus on how cell phones or other photo- or video-taking equipment can be misused, CMS encourages. However, simply providing a training does not reduce a facility's responsibility or liability. Make sure your facility has established, written protocol and policies for cell phone use and that staff are aware of them and supervised to make certain all procedures are followed.

**Tip:** Make sure your facility's rules are consistent for all employees, in both usage and punishment. Really think through it, suggests **Kris Mastrangelo**, president and CEO of **Harmony Healthcare international** in Topsfield, Massachusetts. For example, "If you don't allow CNAs to use cell phones, should RNs or doctors be allowed?"

### **Know How to Handle Inappropriate Cell Phone Usage Allegations**

You and your team members must report any allegations of abuse. Work with your administration and employee and volunteer supervisors to create and foster an environment where individuals feel comfortable standing up for what is right, including reporting any allegations of abuse, without fear of recrimination.

Act quickly if a resident or family member (or anyone else) alleges that someone within your facility has taken inappropriate photos with the intention or result of demeaning or humiliating a resident. Contact your administrator with the specifics immediately, and take any possible actions to prevent further abuse. CMS suggests executing and enforcing both immediate and ongoing actions, including but not limited to "staffing changes, increased supervision, protection from retaliation, and follow-up counseling for resident(s)."

State surveyors will investigate, onsite, any and all allegations of abuse via photos or video within two to 10 days of reporting. Their investigations should reveal the specific incident, which resident or residents are affected or likely to be affected, and how the resident or residents are affected. State surveyors' findings determine whether law enforcement need be involved.

**For example:** CMS provides this example in the memorandum, of a "Severity Level 4" breach of F164 (Abuse) and F223 (Staff Treatment of Residents):

"The facility failed to protect two residents from mental and sexual abuse perpetuated by two staff members, who posted unauthorized videos and photographs on social media of the residents during bathing, toileting and grooming, including nude photos and photos of genitalia. Both residents were cognitively impaired and unable to express themselves. As a result, the two residents suffered public humiliation and dehumanization."

**Note:** If a resident is nonverbal or otherwise incapable of expressing his or her thoughts, the state surveyor will interview the resident's family to determine the resident's reaction and response.

### **Provide Common Sense Training and Supervision**

Restricting employee cell phone use entirely is probably unrealistic and unenforceable, so focus on creating a culture that prizes resident dignity and privacy and a strong sense of unity and kindness among staff. Provide continuous trainings that remind staff of their responsibilities for resident care, quality of life, and dignity.

Help boost staff integrity, too. If all team members feel empowered and like their work makes a positive difference in residents' lives, they're more likely to treat residents with the same respect. Make sure your facility's culture is person-focused, in terms of both residents and staff. Help everyone better understand each other's value.