

MDS Alert

Surveys: Take 5 Actions Now To Prevent Social Media-Related F-223 Citations

Unauthorized photography/recording of nursing home residents now violates federal law.

In today's social media-obsessed world, has the concept of "abuse" in nursing home settings changed? Absolutely, says the **Centers for Medicare & Medicaid Services (CMS)**. And you can expect new scrutiny of your related policies and practices during your next survey.

On Aug. 5, CMS issued a memo instructing state survey agencies (SAs) to take a closer look at nursing homes' social media policies. Specifically, SAs will now begin requesting and examining your social media policies as they relate to prohibiting resident abuse, providing staff training on abuse prevention, and providing appropriate facility responses to reports of abuse.

Get ready: CMS instructed SAs to have the survey team request and review facility policies and procedures that prohibit staff from taking, keeping and/or distributing photos and recordings that demean or humiliate residents. Expect surveyors to start requesting your policies and procedures during your next standard survey □ both the traditional survey and the Quality Indicator Survey (QIS).

1. Know the Dangers of Social Media

Background: The CMS memo stems from a recent ProPublica report that detailed 47 instances of inappropriate use of social media by nursing home employees since 2012, according to an Aug. 12 analysis by Boston-based attorneys Robert Blaisdell and Callan Stein of Donoghue Barrett & Singal, P.C. The incidents cited in the report involved photographs and video recordings of vulnerable nursing home residents that demeaned or humiliated residents and that staffers had uploaded to Facebook, Instagram and Snapchat.

And several such incidents became publicized in March, involving nursing home staff recording residents with their smartphone cameras, according to the CMS Compliance Group Inc. (CMSCG) in Melville, N.Y. "Many facilities may not be aware of what their employees are doing on social media, which could mean abuse and dignity violations for their facilities."

Danger: Such incidents could earn your facility an F-223 deficiency citation related to abuse, because social media is an emerging area where you could have exposure for abuse, CMSCG says.

Abuse involving social media or unauthorized photo/audio/video recordings would fall into the category of mental abuse. "Mental abuse includes, but is not limited to, abuse that is facilitated or caused by nursing home staff taking or using photographs or recordings in any manner that would demean or humiliate a resident(s)," the CMS memo states.

But F-223 isn't the only deficiency you need to worry about when it comes to social media and recordings □ the memo also highlights F-164, which provides for a resident's right to personal privacy and confidentiality. Yet another deficiency citation could be for F-226, which requires facilities to develop and implement written policies and procedures that prohibit mistreatment, neglect and abuse of residents.

Bottom line: "Taking unauthorized photographs or recordings of nursing home residents to keep or distribute on social

media is a violation of federal law" under the resident privacy and confidentiality provision at 42 C.F.R. § 483.10(e), Blaisdell and Stein wrote. Photographing or recording residents may also violate HIPAA in many situations, because doing so would disclose individually identifiable information, even if the resident's name is omitted.

2. Update Your Policies & Procedures Immediately

There are several actions you need to take right now in response to the CMS memo, and one action is to review and revise your policies and procedures to ensure that they address photographing and recording residents. Make sure your policies specifically address the following:

- Residents' right to privacy □ "A nursing home resident has the right to personal privacy of not only his/her own physical body, but also of his/her personal space, including accommodations and personal care," CMS states. Staff must not take photographs or recordings of a resident or his private space without the resident's (or designated representative's) written consent.
- Prohibition of abuse □ Regardless of whether a resident provides written consent, a surveyor may find that abuse has occurred if a photograph or recording of a resident, or the manner that it is used, demeans or humiliates a resident. This would include (but isn't limited to) photographs and recordings of residents that contain:

- o Nudity, sexual and intimate relations, bathing, showering, toileting, and providing perineal care such as after an incontinence episode;
- o Agitating a resident to solicit a response;
- o Derogatory statements directed to the resident;
- o Showing a body part without the resident's face, whether it is the chest, limbs or back;
- o Labeling resident's pictures and/or providing comments in a demeaning manner;
- o Directing a resident to use inappropriate language; and/or
- o Showing a resident in a compromised position.

CMS defines mental abuse to include humiliation, harassment, threats of punishment or deprivation, intimidation, fear, shame, agitation, or degradation as experienced from a "reasonable" person's perspective. "Under this interpretation, social media posts depicting residents in a certain manner, even those residents with no actual physical harm or with cognitive impairments, may constitute mental abuse, if a reasonable person would experience mental abuse under the same circumstances," Blaisdell and Stein explained.

You must develop and implement written policies and procedures that prohibit all forms of abuse, including mental abuse, CMS instructs. And you must review and/or revise your written abuse prevention policies and procedures to include and ensure that your staff are prohibited from taking or using photographs or recordings in any manner that would demean or humiliate a resident.

"This would include using any type of equipment (e.g., cameras, smartphones, and other electronic devices) to take, keep, or distribute photographs and recordings on social media," CMS adds.

3. Train Your Staff on Abuse

Not only do you need to ensure that your policies and procedures include prohibitions on photographing and recording residents, but also you need to train all staff on abuse. Ensure that all staff who provide care and services to residents receive abuse training.

Beware: "The provision of in-service education on abuse prohibition alone does not relieve the nursing home of its responsibility to assure the implementation of these policies and procedures," the memo cautions. "The nursing home must provide ongoing oversight and supervision of staff in order to assure that these policies are implemented as written."

4. Respond Appropriately to Abuse Allegations

CMS also mandates that your facility "must report all allegations of abuse, provide protections for any resident involved in the allegations, conduct a thorough investigation, implement corrective actions to prohibit further abuse, and report the findings as required."

Make sure that your staff members know that they're responsible for reporting abuse and that residents aren't fearful of reporting incidents. Any time you receive an abuse allegation, you must not only report the alleged violation but must also take immediate action to investigate and prevent further potential abuse.

Surveyors will look for you to protect against future possible abuse following an alleged incident by taking specific actions like:

- Making staffing changes;
- Increasing supervision;
- Protecting reporters of abuse from retaliation; and
- Providing follow-up counseling for the resident.

5. Institute These Best Practices

Make sure your staff training, as well as your policies and procedures, address reporting allegations of resident abuse. "Staff members who observe social media posts involving residents must report these instances," Blaisdell and Stein stressed. "Nursing home management must ensure that these allegations are reported, investigated, and that appropriate corrective action is taken."

You should also consider developing a dedicated social media policy, if your facility doesn't already have one, Blaisdell and Stein recommended.

Consider this: Also, train your staff to understand that not all residents are capable of providing actual consent. "For example, a resident with Alzheimer's disease may be incapable of granting permission for a photograph to be taken, let alone posted on social media, even if it depicts the resident positively."

Your best bet is to tread extremely carefully when it comes to photographing or recording residents. After all, the stakes are high □ abuse can lead to fines, loss of license to practice, loss of Medicare and Medicaid inclusion, and even criminal charges.

Resources: To read the CMS memo (S&C: 16-33-NH), "Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff," go to www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-33.pdf. Also, the ProPublica report is available at www.propublica.org/article/inappropriate-social-media-posts-by-nursing-home-workers-detailed.