

“I Wish You Had Called Me First”

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Goal of Presentation

- As a long-term care providers, you encounter a variety of issues on a daily basis, many of which are unexpected or challenging
- It is important for providers to act in a way that is thoughtful and cognizant of potential legal ramifications; acting without considering potential legal consequences can compound issues and problems
- We have developed a list of issues that we, as LTC provider counsel, often wish the client had brought to us first, before acting
- War story time!

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Contracting with Vendors

- “After the Fact” questions that providers often ask:
 - How can I terminate or get out of this agreement?
 - How can I hold this vendor responsible for my losses?
 - The vendor says they’re not responsible for a particular service, but we say that they are!
 - If I terminate now, am I on the hook for the balance of the contract?
- Important contracts to be reviewed prior to execution:
 - Therapy, pharmacy, medical director, lab, staffing and others with vendors who will provide direct care to residents
 - Construction
 - Employment

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Contracting with Vendors

- Basic contract requirements/terms:
 - Services to be provided and responsibilities
 - Compensation and Billing
 - Term and termination
 - Indemnification and liability
 - Regulatory and HIPAA compliance

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Contracting with Vendors

- Basic contract requirements/terms:
 - Appeals (if applicable)
 - Solicitation and Non-Compete
 - Arbitration
 - Miscellaneous (Notice, Assignment, Governing Law)
- As you can imagine, we recommend that providers develop a “contract policy” for those tasked with negotiations

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Contracting with Vendors

- Compliance Requirements
 - Anti-Kickback Statute
 - Basic prohibition
 - “Any one purpose” test
 - Safe Harbors
 - Personal/Management Services
 - Investment
 - Space and Equipment Rental
 - Discounts
 - Employee
 - Group Purchasing

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Contracting with Vendors

- Compliance Requirements
 - Is compensation set consistent with fair market value, and not indexed to volume, value of business or number of referrals?
 - Is the “methodology” for payment set within the contract?
 - For agreements with physicians, does the contract satisfy a Stark Exception?
 - Is there an impermissible “swapping” arrangement within the contract?
 - Remember that the AKS applies to both parties to the agreement, so it is in everyone’s interest to ensure that the agreement is in compliance.

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Disputed Bills and Invoices

- What is the correct and appropriate way to handle a disputed bill or invoice?
- How should disputes be documented?
 - Providers are required to make timely payments of outstanding bills, so if a provider is disputing the bill it is important to be able to show the governmental agency that the provider is disputing the charge
- Your counsel should review the contractual notice requirements relative to disputes to ensure that you can preserve your rights and take action

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Admissions

- Admissions to all levels of long-term care/senior housing providers involves regulatory compliance issues, in addition to business and non-discrimination considerations
- The simplest fact here, especially within the licensed care setting, is that once a resident has been admitted, they can only be involuntarily discharged consistent with regulatory requirements, which can prove difficult
- It is important to understand current issues with respect to admissions, and review and adjust admission practices as may be necessary.
 - When was the last time that you reviewed and looked at your admissions policies and procedures
 - There have been some significant legal and regulatory updates relative to admissions that warrant review of your admissions policies and procedures to ensure that they are in compliance with regulatory and legal requirements

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Admissions

- Governmental agencies are particularly concerned about discriminatory admission practices so it is very important to review admission policies and procedure to ensure that there can be no issues relative to possible discrimination
- Opioid Use Disorder
 - State agencies have taken the position is that the denial of NF admission to an individual based on an Opioid Use Disorder (OUD) or the need for medications to treat, is a violation of the ADA, licensure regulations, and state Unfair Trade Practices and Consumer Protection Laws
 - Changes in federal law that eliminated the need for a waiver for physicians to prescribe treating medications for OUD; so to the agencies, a NF cannot argue that its physicians are not able to prescribe/oversee OUD residents
 - Very important to review admission procedures and policies to ensure that they do not contain discriminatory practices relative to OUD

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Admissions

- Resident/Applicant Background Checks
 - Criminal Background checks?
 - Megan's Law background checks?
 - Financial Background checks?
 - Social Media Checks?

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Admissions

- Megan's Law Background checks
 - There is no law or regulation directing long-term care providers to either admit or deny admission to a registered sex offender and, as sex offenders are not a "protected class" under the Constitution, adopting a policy of prohibiting sex offenders from being allowed admission to a health care facility does not constitute unlawful discrimination.
 - As such, skilled nursing facilities are able to enact policies barring admission to registered sex offenders. One caveat to adopting such a policy is that it must be administered uniformly; otherwise, admitting one sex offender while denying admission to another could constitute discrimination on different grounds
 - This is a hotly-debated current topic; various legislatures are considering weighing in, and there are advocacy groups who are seeking to ensure that such offenders have access to care despite their convictions

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Admissions

- Megan's Law Background checks
 - If an individual with a Megan's Law offense in their background is admitted, it is important to understand how that admission will or could affect the rights of other residents and staff.
 - However, it is critical that the facility cannot discriminate against that resident with the Megan's Law offense background, as the long-term care regulations make no distinction with respect to their rights, which are just the same as any other residents
 - The key, of course, is that once the resident is admitted, he/she can only be discharged consistent with federal and state requirements, and absent inappropriate conduct, the mere fact that the resident is on Megan's List is not sufficient to involuntarily discharge

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Admissions

- Megan's Law Background checks
 - Implement a policy relative to admission of registered sex offenders.
 - If the intent is to prevent the admission to registered sex offenders, then the provider would develop a policy...*"If an applicant is seeking admission to the facility, the facility shall utilize the State Police Megan's Law Website and the National Megan's Law Website (hereinafter collectively referred to as "Megan's Law Website") to determine if the applicant has been convicted of a sexual offense"*.
 - Again, the trick here is to conduct this search prior to admission.

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Admissions

- Financial Background checks
 - Provide authorizations to obtain financial information at time of admission for resident or agent to sign
 - Utilize if the family becomes uncooperative
 - Authorization to obtain documentation and financial information for the CAO

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Admissions

- Financial screening tool/admission application
 - Track the MA application
 - Ask whether any assets have been transferred within the last five years
 - If yes, obtain details (when, who, why, how much)
 - Certify that information in the application is true and correct to best of individual's knowledge, information and belief
 - Intervention before transition to next level of care

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Admissions - CCRC

- Entrance Fee refund
 - Standard refund makes refund payable to resident/resident estate
 - If third party pays entrance fee (e.g. a trust or family member), they may have an expectation of a refund that is contrary to the agreement
 - Addendum may be appropriate
 - Requests to issue refunds to third parties after execution or after death are more problematic
 - Discuss potential issues with counsel; Indemnification agreement may be a solution

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Admissions

- Section 1557 Updates
 - On July 25, 2023, the Biden Administration published a proposed rule updating the Section 1557 anti-discrimination provisions, as follows:
 - Reinstates the scope of Section 1557 to cover HHS/ health programs and activities.
 - Clarifies the application of Section 1557 nondiscrimination requirements to health insurance issuers that receive federal financial assistance.
 - Aligns regulatory requirements with Federal court opinions to prohibit discrimination on the basis of sex including sexual orientation and gender identity.
 - Makes clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including “pregnancy termination”.
 - Ensures requirements to prevent and combat discrimination are operationalized by entities receiving federal funding by requiring civil rights policies and procedures

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Admissions

- Section 1557 Updates
 - On July 25, 2023, the Biden Administration published a proposed rule updating the Section 1557 anti-discrimination provisions, as follows:
 - Requires entities to give staff training on the provision of language assistance services for individuals with limited English proficiency (LEP) , and effective communication and reasonable modifications to policies and procedures for people with disabilities.
 - Requires covered entities to provide a notice of nondiscrimination along with a notice of the availability of language assistance services and auxiliary aids and services.
 - Explicitly prohibits discrimination in the use of clinical algorithms to support decision-making in covered health programs and activities.
 - Clarifies that nondiscrimination requirements applicable to health programs and activities include those services offered which must be accessible to LEP individuals and individuals with disabilities

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Fraud/Abuse/Compliance Issues

- Receipt of Notice of Investigation by a Governmental Agency
 - RAC, MAC, ZPIC, UPIC, MFCU, Attorney General
 - Focused on reviewing possible overutilization of supplies, double-billing, upcoding, kickbacks, implementation of medically unnecessary procedures, and rendering of substandard care
 - Contractors may require providers to supply them with owner names, business practices, licenses, claims, and billing and medical records
 - Appeals
 - Redetermination
 - Stay of recoupment
 - Success dependent on available documentation

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Fraud/Abuse/Compliance Issues

- Self-Audit or 3rd Party Audit which reflects significant unsupported claims or error rate above 5% of the sample
 - Claims identified with errors are subject to correction and return of money to the applicable payor
 - To the OIG, an error rate above 5% in the sample would require an expanded review to confirm whether the errors are “persistent or pervasive”
 - This requires an expanded investigation to set the scope of the review
 - How many claims will need to be reviewed?
 - How far back in time must we review?
 - Can/should we do an extrapolation?
 - Attorney-client privilege
 - Return of money process

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Fraud/Abuse/Compliance Issues

- 2024 proposed Medicare Rule includes a proposed change that would require the reporting and returning of overpayments to CMS within 60 days of identification
 - If finalized, the rule change would revise the meaning of "identification" to remove the "reasonable diligence" standard and replace it with the False Claims Act's (FCA's) "knowing" standard. Under the proposed rule, providers, suppliers, Medicare Advantage Organizations (MAOs), and Part D sponsors will be deemed to have identified an overpayment if they have "actual knowledge of the existence of the overpayment or act in reckless disregard or deliberate ignorance of the overpayment."
 - the proposal goes further by eliminating the current regulatory language that an overpayment has to be quantified before the 60-day reporting requirement is triggered—that is, before the overpayment has been “identified.”

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Fraud/Abuse/Compliance Issues

- Compliance Plan Implementation and Updates
 - March 2023 DOJ Updated its Evaluation of Corporate Compliance Programs guidance
 - In the guidance Boards are encouraged to evaluate and respond to a series of important new corporate compliance initiatives recently announced by the DOJ.
 - These initiatives, and corresponding changes to DOJ's Evaluation of Corporate Compliance Programs (ECCP) guidelines, are an important leadership reminder that the presence (or absence) of a functioning compliance program is an important element of DOJ's decision making in corporate fraud matters.

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Acting Without Seeking Government Pre-Approvals When Pre-Approval is Required

- Discussing restructuring, repositioning of the organization are important discussions that ownership and/or the Board of a provider should have regularly
- Changes in ownership, governance, or services that would trigger regulatory notices
 - Closing units/wings of facilities
 - Changing of facility "doing business as" name
 - Leasing space within the facility

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Acting Without Seeking Government Pre-Approvals When Pre-Approval is Required

- Providers should be aware that restructuring, rebranding, etc... could trigger mandatory notifications to various regulatory/governmental agencies, at minimum and sometime may require governmental approval
- To be safe, prior to making any restructuring or rebranding changes consult with counsel to ensure that all regulatory notifications are made timely

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501(c)(3) Issues

- Nonprofit organizations exempt under IRS rules must operate within certain parameters in order to maintain exemption from taxation.
 - Expanding a service that may not be consistent with current 501(c)(3) exemption, 1023 or IRS 990 submissions on file
 - Maintaining a financial assistance policy which does not demonstrate the actual provision of charity
 - Providing improper inurement/excess benefits or compensation to individuals (e.g. Board Member compensation or fees in exchange for services)
 - Developing “for profit” subsidiaries for certain operations or joint ventures with outside organizations
 - Misclassification of Parent Entity (e.g. Supporting Organization) or not acting consistent with reported classification
 - Political involvement/advocacy in campaigns

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Employment Issues

- Employment decisions can be particularly fraught with potential legal concerns
- Providers should ensure that their employment policies and procedures are reviewed regularly by counsel to ensure that they incorporate the latest legal requirements

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Employment Issues

- Imposing Disciplinary Measures Against an Employee
 - What are procedures for handling employee discipline?
 - Always follow the policies/procedures in your employee handbook each and every time and for each and every employee.
 - As with all employment matters, proper documentation is key and could be a litigation document some day!!
 - Check with counsel prior to termination. What are the employee's protected categories? Does the employee have the basis for a lawsuit no matter how weak or remote?
- Responding to Allegations of Discrimination
 - What are procedures are in place for handling and responding to discrimination complaints by employees?
 - Interview all witnesses and document what you find. Take necessary actions to stop any confirmed discrimination.
 - Follow up with the complainant.
 - Seek counsel if necessary.

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Employment Issues

- FMLA and ADA accommodation issues are among the most common and difficult issues employers face on a daily basis
- Non-routine FMLA recertification and calculation issues are worth a call to counsel to ensure compliance with the Act
- Undue hardship and questions regarding the propriety of requested ADA accommodations should be determined on a case-by-case basis

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You Received a Subpoena, Pleading, Findings Letter, or Court/Tribunal Filings

- You have received a subpoena, etc. Now what???



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Not the time to put your head in the sand!

- Most legal filings or governmental determination correspondence have strict response deadlines or appeal deadlines
- Delay in consulting with counsel may reduce options that you may have in responding to the filing
- Ignoring the filing will not result in an erroneous action going away, and will likely lead to a penalty, including, potentially, loss of the case
- Your counsel may be able to reach out to counsel for the party that issued the filing to get a sense of the object of the filing or the scope of the filing- you may not even be the target or subject of the filing

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Conclusions/Questions

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