

# STATE WIDE

## **New York StateWide Senior Action Council, Inc**

*Improving The Lives of Senior Citizens & Families in NY State*

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### **THE AFFORDABLE CARE ACT NURSING HOME CARE**

The Patient Protection and Affordable Care Act (ACA) of 2010 contains a number of provisions relating to nursing home care. This fact sheet describes some of the important sections of the law related to changes in the imposition of enforcement actions against nursing homes; changes in employee training and screening requirements; and improvements in transparency and complaint resolution.

#### **Nursing Home Transparency – Disclosure of Facility Ownership**

§6101: The Nursing Home Transparency provisions in the Affordable Care Act (ACA) provides for major improvements in the disclosure of owners and operators of nursing homes. This is an important provision of the law, since it will ensure that information that may be crucial to ensure accountability is available to government officials, long term care ombudsmen and the public. It will help overcome a growing problem around the U.S. in which some nursing home providers structure their ownership and operations in multi-level or other structures that hide the true owners of the business and/or property in order to reduce accountability in cases of resident neglect or abuse or fraudulent practices.

The law sets forth implementation of these requirements as follows:

- *Effective Now:* Nursing homes must provide the required information to the state and state long-term care ombudsman in which the facility is located and to the Department of Health and Human Services (DHHS) and the DHHS Office of Inspector General (OIG) upon request.
- *Effective March 2012:* DHHS publishes final regulations that include a standardized format for reporting information and procedures it will use to make the information public.

- *Effective June 2012:* Facilities begin reporting information to DHHS. *Effective by March 2013:* DHHS makes information available to the public.

New York currently provides information on all nursing homes in the state on the State Department of Health's website, including who owns the home and the type of entity it is (i.e., public, for profit or not for profit) and who operates the home. It can be found here:

<http://nursinghomes.nyhealth.gov/>.

### **Nursing Homes Required to Have Effective Compliance and Ethics Programs**

§6102: The Affordable Care Act requires that nursing homes implement programs to detect and prevent criminal, civil and administrative violations. These programs should set compliance standards and procedures for reducing violations, and include training for personnel to learn these standards. They must include systems for monitoring, reporting and responding to violations. The ACA gives nursing homes until 2013 to adopt such a program. After three years, DHHS will conduct an evaluation to determine whether this requirement has resulted in a decrease in nursing home citations or other indications that nursing home quality has improved.

### **Quality Assurance and Performance Improvement (QAPI) Program**

§6102: Prior to the Affordable Care Act, nursing facilities had to have a quality assessment and assurance committee made up of the director of nursing services, a physician and at least three other staff members. The committee would meet at least quarterly to identify quality issues, and develop plans to correct deficiencies. Under the ACA, DHHS is required to establish standards relating to quality assurance and performance improvement and provide technical assistance to facilities on the development of best practices in order to meet such standards. No later than one year after the date on which the regulations are promulgated, each facility must submit to DHHS a plan for how the facility will meet these standards and implement the best practices, including how to coordinate the implementation of the plan with quality assessment and assurance activities. DHHS is required to implement this program by December 31, 2011.

### **Availability of Three Years of Inspection Reports**

§6103: The Affordable Care Act requires that skilled and non-skilled nursing facilities must have reports from surveys, certifications and complaint investigations from three preceding years available for any individual to review on request. They must post the availability of these reports "in areas of the facility that are prominent and accessible to the public."

### **Nursing Home Compare Website**

§6103: This website, actually a section of the federal medicare.gov site, has information on all nursing homes in the country that are certified for Medicare and/or Medicaid including quality ratings, health inspection results, staffing levels and more. The Affordable Care Act requires that the website specifically provide staffing information based on payroll data (rather than permitting facilities to self-report their staffing levels, as has been the practice), information on

substantiated complaints against facilities, information on criminal violations by a facility or its employees committed inside the facility or outside of the facility, when they resulted in serious bodily injury to an elderly person. It will also require the addition of a more visible section that lists and explains consumer rights and how to take action if these rights are violated. As of July 2011, the website must contain information about the number of substantiated complaints and enforcement actions levied for each nursing home. The website can be accessed at:

<http://www.medicare.gov/NHCompare/>.

### **Reporting of Expenditures**

§6104: Reports, designed by private sector accountants who have experience with Medicare and Medicaid facility home cost reports, must be readily available to parties on request (by procedures that DHHS will establish). Cost reports submitted under Medicare and Medicaid by skilled nursing facilities will separately report expenditures for wages and benefits for direct care staff. The Affordable Care Act requires that DHHS redesign such reports before this requirement takes effect. DHHS will categorize expenditures on an annual basis for each facility as follows: spending on direct care, spending on indirect care, capital assets, and administrative services costs. This information will be available to interested parties upon request.

### **Requirement for Standardized Complaint Forms**

§6105: The Act requires that DHHS develop a standardized complaint form that the state survey agency must make available to those who wish to file a complaint. Residents or persons acting on a residents behalf will use the forms to file complaints with the State survey and certification agency and a state long-term care ombudsman program. It is important for consumers to understand that the standardized form will not be the only mechanism available to make complaints, but will be available to all. A resident or person acting on a resident's behalf must have access to a state-authorized standardized complaint form. A model standardized complaint form is available on the Nursing Home Compare Medicare Website:

<http://www.medicare.gov/NHCompare/> (go to "File a Complaint with your State," and then "Nursing Home Complaint Form).

### **Complaint Resolution Process**

§6105: The Affordable Care Act establishes three responsibilities that the state must execute to ensure that a resident's complaint is addressed. First, the state must have a procedure for keeping track of complaints and notifying the resident that it has received his complaint. Second, the state must establish a procedure to determine the severity of and to investigate the complaint. Finally, the state must set a deadline to respond to the complaint and inform the resident about the outcome of the investigation. These new criteria for complaint resolution processes are designed to make sure that a person who has complained in good faith is not retaliated against, and that a resident's legal representative is not denied access to him or her. The new process is also designed to prevent bias in favor of the standardized complaint forms should patients choose other mechanisms to complain. It took effect March 23, 2011.

### **Improved Reporting of Nursing Home Staffing & Care Data**

§6106: Nursing homes must submit to DHHS, in a uniform format, direct care staffing information (including information with respect to agency and contract staff) based on payroll and other verifiable and auditable data in a uniform format. These data include: the category of work the staff member performs (i.e., registered nurse, nurse aide, therapist, etc...), resident census and case mix (i.e., the residents' care and service needs), information on employee turnover and tenure, and hours of care provided by employees per resident, per day. This requirement must be implemented no later than March 23, 2012.

### **Five Star Rating System**

§6107: As noted above (§6103), the Five Star Rating system is a component of the Nursing Home Compare website. Nursing homes receive star ratings in three separate areas – health inspections, staffing and quality measures – and the three ratings are combined for one overall rating. These ratings are an important tool for consumers to gain insights into a nursing home's quality. They are, however, limited in several ways. For one, the rigorousness of inspections vary greatly within and across states. Additionally, quality indicators are self reported and only capture a few aspects of care. The Affordable Care Act requires that the Government Accountability Office review the Five-Star Nursing Home Rating System, analyzing, among other factors, the following: how the system is being implemented; any problems with the system or its implementation and how it could be improved, either through legislation or administrative action.

### **Fines to Improve Resident Care and Quality of Life**

§6111: Federal Civil Money Penalties (CMPs) are generally imposed when a nursing home has been found to have a significant failure to maintain minimum standards of safety or care. They are important to consumers and the public because they must be used to improve resident care or quality of life. Especially in times of federal and state fiscal problems, CMPs can be a valuable resource to make a difference in the lives of nursing home residents.

The ACA provides for significant improvements in terms of the efficiency with which funds are collected and, importantly, how the states can use the funds for activities that improve resident care and quality of life. Following are some of the major changes of interest to consumers and the public:

- The Centers for Medicare and Medicaid Services (CMS, the federal agency which oversees all Medicare and Medicaid services) now has authority to approve a state's plan for use of the funds. States must also now provide an annual CMP spending and project report to CMS, including end-of year CMP funds available. These are major improvements for consumers and the public because it will increase transparency, accountability and the beneficial use of CMPs to directly improve resident care and

quality of life. It will help reduce instances of state failing to use the funds or failing to use them appropriately to benefit residents in their states.

- A facility will now be able to participate in a new independent informal dispute resolution process (IIDR), in addition to the informal dispute resolution process that has long been in place, to dispute the imposition of a CMP. According to CMS, the interests of both facilities and residents must be represented and balanced in the IIDR.
- Following IIDR, CMP monies must be placed in escrow pending any formal appeal by the nursing facility. This is a major improvement, because up to now facilities have been able to delay – sometimes for years – the payment of a penalty for failing to meet minimum standards.
- If the facility successfully appeals the CMP, the funds in escrow will be returned to the facility with interest. If the appeal fails, 10% of the CMP will go to the U.S. Treasury, while 90% must be used to benefit nursing home residents.
- The law and rules now specifically allow for a number of good uses for CMP funds, such as: culture change projects, quality of life initiatives, enhanced palliative care, and helping individuals relocate to other facilities.
- The law and rules make clear that nursing homes should not be given CMP funds to pay for services they are already supposed to provide for their residents.
- If a facility self-reports and promptly (within 15 days of the incident or 10 days of the imposition of a CMP) corrects a deficiency, and waives its right to a hearing, CMS may reduce the CMP by up to 50%. However, CMS may not reduce the penalty for any deficiency or noncompliance that placed a resident in immediate jeopardy, constituted a pattern of harm, imposed widespread harm, resulted in the death of a resident, or was a repeat offense.

#### **National Demonstration Projects on Culture Change and Information Technology**

§6114: HHS will conduct two demonstration projects, one to develop best practices in nursing facilities involved in the culture change movement (including developing resources for facilities to find out how to get expertise and funding to undertake culture change), and one to develop best practices for the use of information technology to improve patient care.

#### **Dementia and Abuse Prevention Training**

§6121: Aides in nursing homes are now required to receive training in dementia management and patient abuse prevention. Note: Dementia training was already required in New York.

#### **Background Checks of Employees of Long-Term Care Facilities with Direct Patient Access**

§6201: The federal Department of Health and Human Services will establish a program to develop a system for long term care facilities and providers to conduct nationwide background checks on potential employees who will provide direct care to residents. Prospective employees will need to undergo a fingerprint check that will be run through state and national databases to check for any relevant criminal history. Funding for states to implement this program began in 2010.

### **Resources for Further Information:**

The Patient Protection and Affordable Care Act,

<http://www.gpo.gov/fdsys/search/pagedetails.action?packageId=PLAW-111publ148>.

The Long Term Care Community Coalition's nursing home civil money penalty (CMP) page with resources and information on the use of CMPs to improve resident care and quality of life,

[www.nursinghome411.org/articles/?category=civilpenalties](http://www.nursinghome411.org/articles/?category=civilpenalties).

CMS Guidance, *Publication of Final Rule, "Civil Money Penalties for Nursing Homes, Centers for Medicare and Medicare Services (CMS)-2435-F,"*

[http://www.cms.gov/SurveyCertificationGenInfo/downloads/SCLetter11\\_16.pdf](http://www.cms.gov/SurveyCertificationGenInfo/downloads/SCLetter11_16.pdf).

CMS Guidance, *Relationship Between Civil Money Penalty Funds Paid by Nursing Homes and the Money Follows the Person Demonstration,*

[http://www.cms.gov/SurveyCertificationGenInfo/downloads/SCLetter11\\_12.pdf](http://www.cms.gov/SurveyCertificationGenInfo/downloads/SCLetter11_12.pdf).

CMS Solicitation of Grant Proposals, *National Background Check Program,*

[http://www.cms.gov/SurveyCertificationGenInfo/04\\_BackgroundCheck.asp#TopOfPage](http://www.cms.gov/SurveyCertificationGenInfo/04_BackgroundCheck.asp#TopOfPage).

Families USA. "Comprehensive Look at the Affordable Care Act: Better Safety and Quality for Seniors with Disabilities." In *In Perspective: A Closer Look at How the Affordable Car Act Helps Everyone*, October 2010, <http://familiesusa2.org/assets/pdfs/health-reform/in-perspective/Seniors-and-People-with-Disabilities.pdf>

The National Health Law Program. "Affordable Care Act." In *Health Law and Litigation*, 2011,

<http://www.healthlawandlitigation.com/affordable-care-act/index.php>.

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<http://www.bricker.com/services/resource-details.aspx?resourceid=568>.