

Long Term Care and Senior Housing Hot Sheet -- Breaking Developments in Long Term Care and Senior Housing Law

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Centers for Medicare and Medicaid Services Clarifies Reporting Requirements for:

Alleged Violations of Mistreatment, Neglect and Abuse, Including Injuries of Unknown Origin

In late December 2004, the Director for the Center for Medicaid and State Operations/Survey and Certification Group of the Centers for Medicare and Medicaid Services ("CMS") issued a clarification of the reporting requirements for allegations of abuse and neglect. See S&C-05-09 Dec. 2004. This clarification was issued at the request of state survey agencies. CMS's clarification applies only to nursing homes. However, because state survey agencies are inclined to apply a one-size-fits-all approach to issues pertaining to reporting of abuse and neglect, we expect that CMS's recent clarification will impact all senior housing providers, not just nursing homes.

The CMS clarification requires facilities to ensure that all alleged violations of abuse and neglect statutes are reported *immediately* to the administrator and the state survey agency. The results of any investigations must be reported to the administrator and the state survey agency within five days of the incident.

CMS's recent directive requires facilities to:

[E]nsure that all *alleged violations*, including mistreatment, neglect or abuse, including injuries of unknown source are reported *immediately* to the administrator of the facility and to other officials in accordance with state law.

(Emphasis added.)

CMS's recent directive goes on to define neglect as "a failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness." Abuse is defined as the willful infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish. An injury should be classified as "of unknown source" if the injury was not observed by any person, or if the source of the injury could not be explained

by the resident, and if the injury is suspicious because of its extent, location, number or duration over time. Mistreatment is not defined by CMS at this time.

CMS believes the term "immediately" means as soon as possible, but not to exceed 24 hours after discovery of the incident. The agency has further determined that the phrase "in accordance with state law" modifies the word "officials" only. As such, this phrase does not modify the types of alleged violations that must be reported or the timeframes in which the reports are to be made.

The CMS directive could be problematic in that it requires all alleged violations to be reported immediately, without benefit of the opportunity to investigate whether these alleged violations can be otherwise explained. Washington State's survey agency has long interpreted the reporting requirement in this manner. Indeed, the Department of Social and Health Services ("DSHS") and the Aging and Disability Services Administration ("ADSA") has been known to issue citations for failure to report abuse and neglect when there was no doubt that the incidents themselves were not abusive or neglectful. In these situations, DSHS/ADSA took the position that despite the facility's investigation revealing that abuse or neglect had not occurred, the obligation to report was incurred upon the initial suspicion of abuse or neglect.

Given the recent "clarification" by CMS, providers can expect DSHS/ADSA to continue to require the immediate reporting of allegations or suspicions of abuse or neglect. CMS has directed all state survey agencies to implement the directive within 30 days. CMS has further directed all state survey agencies to share the directive with all survey and certification staff, and state training coordinators.

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