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CMS Warns Against Social Media Postings Involving Nursing Facility Residents [Ober|Kaler]

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In an August 5, 2016, Survey and Certification memorandum to state Survey Agency Directors, the Centers for Medicare and Medicaid Services (CMS) directs surveyors of nursing facilities on matters relating to the use of social media by facility staff, volunteers, and visitors.¹ The new guidance comes amid recent reports of facility employees using social media platforms, such as text messaging, Facebook, or Snapchat, to post humiliating or graphic pictures of residents. The guidance advises surveyors that, in addition to considering such actions to be violations of rules protecting resident privacy, surveyors should also consider citations against the facility for failing to protect residents from mental abuse. Individuals covered by the guidance include facility “employees, consultants, contractors, volunteers, and other caregivers who provide care and services to residents on behalf of the facility.”

The determination that social media postings may constitute abuse if they cause or have the potential to cause residents to experience “humiliation, intimidation, fear, shame, agitation, or degradation,” creates affirmative obligations for facilities. Specifically, facilities should update their policies and procedures related to abuse prevention to address mental abuse and social media's role in it. The facility must also ensure the implementation of such policies and conduct in-services with staff addressing these issues. In addition to staff training, guidance on facility policies should be established and distributed to all non-employed individuals considered as “staff” for these purposes, such as contractors and volunteers.

Additionally, a full and thorough investigation will be required if a facility discovers that pictures or video may have been taken or shared. Because abuse may be at issue, the facility must report incidents to law enforcement in accordance with federal Elder Justice Act requirements. Involved staff members should be reported to licensing boards as appropriate. The facility should also be cognizant of any additional local requirements regarding abuse reporting.

Finally, facilities should note that these standards apply to individuals with cognitive deficits as well as those who may be more aware of abusive conduct. With respect to residents who are unable to understand the nature of the conduct and may not register actual mental or emotional harm, surveyors will apply a reasonableness standard in evaluating whether harm has occurred.

Ober|Kaler's Comments

Facilities should immediately update their abuse prevention policies and procedures and conduct appropriate in-services to ensure that staff is aware of these new standards. Surveyors will begin to look for such policies immediately going forward. Conducting these trainings and policy updates as quickly as possible is imperative because CMS, the Department of Justice, and state-level agencies are increasing the scrutiny of nursing facilities in a variety of contexts. Should an incident occur, an investigation will be critical to rebutting a potentially subjective surveyor's view as to whether it is reasonable to conclude that an incapacitated resident has suffered harm. Proactive responses to incidents when they occur can also result in a finding of “past noncompliance” rather than a current deficiency.

Citations for failure to prevent abuse may negatively affect a facility's CMS star rating, which, in turn, may affect a facility's ability to partner with hospitals and other providers in alternative payment models such as the Bundled Payments for Care Improvement program and other new pilot programs focused on coordinating acute and post-acute to coordinated care. Furthermore, because findings of abuse run the risk of being cited as causing immediate jeopardy to residents, a survey tag regarding these issues could have implications that include greater state involvement in facility management and substantial civil monetary penalties.

CMS's social media memorandum also provides an opportunity to evaluate policies and compliance with reporting obligations under the Elder Justice Act and similar local laws.

¹ Survey and Certification Letter 16-33-NH, Aug. 5, 2016, [Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff](#).