

Hot Legal Topics & Updates for Senior Living and Long Term Care

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HOT LEGAL TOPICS

- Fair Housing Act
 - Recent HUD opinion
 - Residents with Excessive Overnight Guests
- National Tester Litigation – discrimination towards prospective residents
 - Fair Housing considerations and training for your staff
- Recent Attorney General’s Office Activity – MFCU and Civil Investigative Demands
- Nursing Homes and Arbitration Agreements
 - Survey enforcement around arbitration agreements
 - Is your arbitration agreement in compliance?
- C-Suite Criminal Liability
- Assisted Living Resident Discharges – “appeal rights”

FAIR HOUSING ACT

HUD: REASONABLE ACCOMMODATION

Gural, Harry D. & Ruth E. v. Albright Care Services, et al. (June 2022)

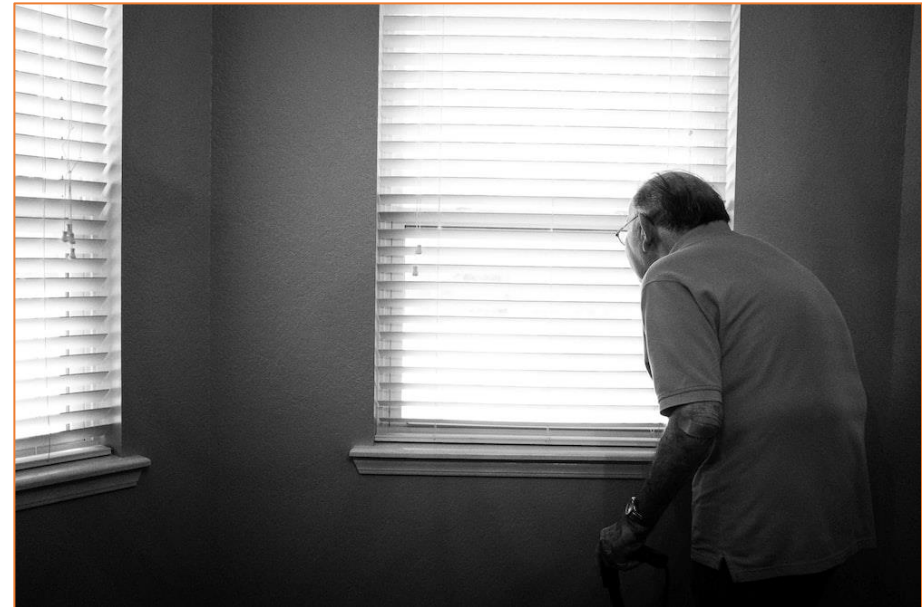
- HUD determined CCRC discriminated against IL resident on the basis of disability and violated Fair Housing Act by failing to permit a reasonable accommodation for son to live-in as resident's caregiver
- Facts:
 - CCRC for 62 and older; resident entered CCRC as IL resident
 - IL residents could continue residing "in the IL section" by paying for additional supportive services – either by hiring outside third party or staff at CCRC
 - CCRC policy – if it is no longer safe for resident to reside in IL apartment, they may transfer to other sections of campus
 - Resident diagnosed with Alzheimer's
 - Pre-Covid, resident had a private duty caregiver to provide daily ADL assistance
 - March 2020, CCRC closed campus to all visitors/friends bc of Covid; barred resident's private duty aid from entering campus.

FAIR HOUSING ACT

HUD: REASONABLE ACCOMMODATION

Facts:

- Son: I will move in and serve as her caregiver
- CCRC made exception to no visitor policy; allowed son to stay with resident
- Guest policy of no more than 14 overnights per year
- Two months later, CCRC sent letter to son to vacate the apartment; violating visitor policy Community
- Son: Asked for a reasonable accommodation to visitor policy as he was serving as live-in aid for resident
- CCRC denied son's reasonable accommodation request
- Son filed fair housing complaint with HUD
- HUD investigates allegations of discrimination under FHA



FAIR HOUSING ACT

HUD: REASONABLE ACCOMMODATION

Community's defenses

- We are a CCRC, do not offer intergenerational living;
- Permitting son to live at community would fundamentally alter business model and create a financial burden
- We are a 62 plus community

HUD investigative findings:

- Resident needed assistance with ADLs – has a disability (duty to reasonably accommodate)
- Community did not have sufficient staff to meet her needs with its enhanced service offerings
- Son could provide same level of services as third party private duty aide because resident did not need specialized care
- Community violated Fair Housing Act – discriminating based on disability

FAIR HOUSING ACT

HUD: REASONABLE ACCOMMODATION



Lessons Learned

- Do not prevent outside care provider
- Move resident through continuum to AL
- Offer needed assistance through existing CCRC services rather than agreeing to son moving in even temporarily
- Document in writing a temporary reasonable accommodation with date to revisit issue
- Guests: Consistently enforce your guest policy
 - This case is distinguished from residents who abuse guest overnight policies
 - Document in writing/ letter to residents who are having excessive overnight guests

FAIR HOUSING ACT

TESTER LITIGATION

- Lawsuits are the product of undercover campaigns by fair housing organizations.
- Local fair housing organizations have filed “tester lawsuits” against senior living providers in Arizona, Michigan, New Mexico, New York, and elsewhere.
- Providers of all types - for-profit and non-profit, religious, assisted living, SNFs - have been named as defendants in these lawsuits.
- “Testers” pose as potential residents or family member - willing to admit the prospective deaf resident and accommodate with an ASL interpreter and other aids ?
- Based on a facility’s response, fair housing organization then files a lawsuit alleging its response to the tester’s inquiry violated federal or state discrimination laws.

FAIR HOUSING ACT

TESTER LITIGATION

- Employees at the facilities almost always told testers they could not or would not offer interpreters; that residents could provide their own or communicate with staff through lip reading or writing
- Lawsuits seek monetary damages, including punitive damages, as well as injunctive relief in the form of policy changes at facilities.
- Reported settlements have ranged between \$90,000 and \$250,000.
- Issue: Duty to reasonably accommodate disabilities
- State and federal law forbid discrimination based on disabilities (includes hearing) and require housing providers to make “reasonable accommodation” so that individuals can “use and enjoy a dwelling”
 - What is dwelling? Includes IL, AL, CCRC, and nursing homes depending on length of stay

FAIR HOUSING ACT

What is Discrimination?

- Refusal to rent or sell because of protected class
- Discriminatory rental terms or conditions
- Discriminatory advertising
- Refusal to reasonably accommodate an individual's disability
- Refusing to allow a resident to participate or access services due to a protected class



FAIR HOUSING ACT



Discrimination on Basis of Disability

- Any physical or mental impairment that substantially limits one or more major life activities
- Seeing
- Hearing
- Breathing
- Speaking
- Walking
- Social activities
- Executing manual tasks
- Self-care
- Many more . . .

FAIR HOUSING ACT

Discrimination is prohibited on the basis of:

Having a disability, or

Having a record of a disability, or

Being regarded as having a disability.



FAIR HOUSING ACT

What is Reasonable Accommodation?

- Change, adoption or modification of a policy, practice or service which allows the resident an equal opportunity to use or enjoy the dwelling including public and common spaces.
- But, it must *not impose undue financial or administrative burden*
- Made on case-by-case basis, such as cost of requested accommodation, financial resources of provider, benefits to the requesting resident, availability of alternative accommodations that would effectively meet the requester's disability-related needs
- *Must not fundamentally alter* the nature of the program
- Must be *structurally feasible* (for changes to physical structure of dwelling)

FAIR HOUSING ACT

- What can you do?
 - Training! Train facility staff who speak with current or prospective residents and families about reasonable accommodation.
 - Focus on facility's duty and willingness to accommodate disability
 - Engage in interactive process to determine if there is a reasonable accommodation
 - Have anti-discrimination policies (include in residency agreement)
 - Conduct periodic reviews of how community is doing on compliance with policies
 - Place signs in facilities and on corporate and community websites to show they comply with fair housing laws

FAIR HOUSING ACT

Do's and Don'ts

Do

- Tell prospective residents and representatives that we will work to reasonably accommodate the resident's disability.
- Assisted Living: We accept all people within our Disclosure of Services so long as we can safely meet their needs
- Focus on the care and services needed by the resident so that we can determine if we can meet their needs
- Adopt policies that allow access of higher acuity residents to common areas, dining, activities
- Make decisions to exclude residents based on legitimate and individualized concerns about safety, disruption, or disease/infection

Don't

- Do not make blanket statements about who can and cannot be admitted
- Example: We don't admit people who are [fill in disability]
- Instead: We do admit [disability]. We will assess and evaluate the resident to see if we can meet your needs.
- Don't have blanket policies barring higher acuity residents from common areas, activities or dining

MFCU INVESTIGATIONS

Medicaid Fraud Control Unit (MFCU)

- Receives federal funding and federal oversight, but are state agencies
- Overseen by OIG of U.S. Dept of Health and Human Services
- In Washington, the Medicaid Fraud Control Division is housed within Attorney General's office; can investigate (1) abuse and neglect and (2) "other federal health care program fraud"
- Conducts civil and criminal investigations of (1) Medicaid provider fraud; and (2) abuse and neglect of patients (i) in "health care facilities" that receive Medicaid payments; (ii) who reside in "board and care facilities," or (iii) who personally receive medical assistance under Medicaid in a noninstitutional or other setting.
- MFCU is law enforcement.

MFCU INVESTIGATIONS

Types of Investigations

- Regulatory compliance and licensing – RCS
- Criminal investigations – to determine whether a crime was committed and collect evidence to support criminal prosecution
 - Government must prove beyond reasonable doubt that a crime was committed
 - Crime could be felony (sentence over a year) or misdemeanor (max sentence less than a year)
 - Common prosecuted crime in this area is criminal mistreatment. Elements:
 - (1) withholding basic necessities of life; (2) great or substantial bodily harm or risk thereof to vulnerable adult; (3) defendant is entrusted with physical custody of vulnerable adult, or a person is employed to provide basic necessities of life
- Civil investigations

MFCU INVESTIGATIONS

One powerful tool in criminal investigations: Search Warrant

- Recent search warrant “raids” in Washington assisted living facilities
- AG representatives arrive unannounced with armed law enforcement
- Execute the search warrant to collect documents immediately
- Example: Search warrant to investigate alleged criminal neglect, gross misdemeanor; Resident A’s assessment, plan of care, prog notes, incident reports, policies procedures, personnel records/ training, billing records



MFCU INVESTIGATIONS

- MFCU can conduct civil investigations, seeking to recover money that was fraudulently received along with statutory penalties
 - Lower standard of proof in civil investigations; preponderance of the evidence (greater than 50 percent)
 - In civil investigations, MFCU can issue Civil Investigative Demand (CID) – like subpoena
 - You are obligated to produce those (unless your attorney successfully contests the scope or validity of CID)
 - Government uses those documents to build a civil case against provider

MFCU INVESTIGATION

If you are subject of search warrant execution (“raid”):

- Comply with instructions from agents
- They have already gone to a judge for the search warrant
- Agents accompanied by armed law enforcement
- You can ask questions, read search warrant and keep a copy
- Usually agents provide business cards – Ask for those and keep them
- Call your attorney immediately. Cannot stop the search, but can come to community if possible, talk to the agent, talk to the AAG
- Keep complete inventory of everything collected; ask if you can make copies of any records taken

CIVIL INVESTIGATIVE DEMANDS

- Recent activity by Attorney General's Office Consumer Protection Division issuing Civil Investigative Demands (CIDs) to Assisted Living Facilities – tool to conduct civil investigation
 - Not limited to Medicaid providers
 - Typically, some complaint is made to Consumer Protection Division which prompts investigation into possible CPA violations
- What is it? When the AG has reason to believe any person (including corporation) has documents or information relevant to Consumer Protection Act investigation, issue CID
 - Interrogatories
 - Requests for Production of Documents – Examples:
 - Produce website
 - Produce resident satisfaction surveys
 - Produce policies related to resident billing
 - Produce amounts spent on dining, cleaning, transportation, etc.
 - Give oral testimony (deposition)
- Consumer Protection Act vs. Regulatory Enforcement

CIVIL INVESTIGATIVE DEMANDS

If you receive a CID:

- Contact your attorney
- Notify your insurance carrier
- Your attorney has tools to respond to scope of requests, relevancy, and timing and issue investigation of his/her own
- The AG uses collected information to conduct the investigation.
- The facts or basis for the investigation are not disclosed by the AG office
- Exempt from Freedom of Information Act, may only be used by those investigating

SNF: Arbitration Agreements

CMS Surveyor Guidance

In September 2019, under 42 C.F.R. §483.70(n) –CMS added the requirements for SNF binding arbitration agreements.

In June 2022, CMS released its updates to the nursing home surveyor guidance found in Appendix PP to the State Operations Manual.

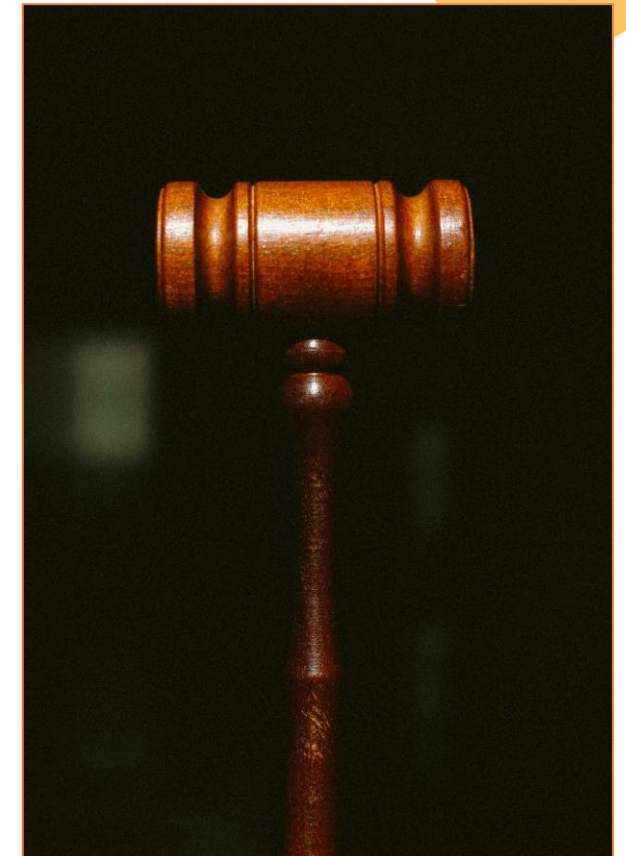
CMS added the requirements for SNF binding arbitration agreements to two brand new F-tags: F847 and F848.

On October 24, 2022, CMS began using this guidance to identify and cite non-compliance.

SNF: Arbitration Agreements

What is Arbitration?

- A private process where disputing parties agree one or more individuals will serve as the judge and make a decision to resolve the dispute after hearing and receiving evidence.
- Binding Arbitration – Decision is final, but for a few procedural exceptions
- Different from Mediation
- Typically private, faster than going to court/ jury trial
- Given new Surveyor Guidance, critical your staff are trained on presenting and understanding your arbitration agreement



SNF: Arbitration Agreements F-847; Required Elements

§483.70(n) Binding Arbitration Agreements

If SNF chooses to ask resident to enter arbitration agreement, SNF must comply with following:

1. Cannot Be Condition of Admission: Cannot require residents to sign arbitration agreements as a condition of admission, or as a requirement to continue to receive care at that facility.
2. Form, Manner, Language Resident Understands: Must ensure the arbitration agreement is explained in a form and manner, including language, that the resident or representative understands, and the resident or representative must acknowledge he or she understands the agreement.
3. 30 Day Right of Rescission: Arbitration agreement must explicitly grant the resident or representative with a 30-day right to rescind after signing it.
4. Voluntary: Arbitration agreement must be voluntary and optional. It must explicitly state that the resident and representative are not required to sign as a condition of admission or to continue to receive care.
5. Cannot Limit Communication with Officials: Arbitration agreement must not contain language that prohibits or discourages the resident from communicating with Federal, State, or local officials.

SNF: Arbitration Agreements

F-848; More Requirements

Under **F848**, the arbitration agreement must:

- Provide for the mutual selection of a neutral arbitrator and a venue convenient to both parties to hold the arbitration.
- SNF must retain a copy of the signed arbitration agreement and the arbitrator's decision for five (5) years after the dispute is resolved, making it available for inspection by CMS or its designee.

SNF Arbitration

CMS Surveyor Guidance

- Surveyors' investigation of compliance with F-847 will include interviewing sampled residents, resident reps, resident council (if one exists), Long Term Care Ombudsman, facility staff, and record review.
- Surveyors may ask residents and representatives:
 - What is your understanding of the arbitration process when a dispute arises?
 - Do you understand that you are giving up your right to litigation in a court proceeding?
 - Did you feel obligated, required, or pressured to sign the arbitration agreement?
 - Is there anything you would have liked to know before signing the arbitration agreement?

SNF Arbitration

CMS Surveyor Guidance

Facility staff should expect to be asked:

- When and under what circumstances do you request that a resident or his or her representative agree to an arbitration agreement?
- How do you ensure the resident or rep understands the terms of the arbitration agreement?
- How do you ensure the arbitration agreement is explained in a form and manner that accommodates the resident or his or her representative's needs?
- What is your process for allowing rescission of an arbitration agreement in the first 30 days?

SNF: Arbitration Agreements CMS Surveyor Guidance

- If surveyors find noncompliance, they will determine the scope and severity by determining if there has been psychosocial harm.
- Surveyors will need to gather evidence through interviews, record review and observation, and in some cases use the “**reasonable person concept**” to determine psychosocial severity, according to the CMS manual.
- CMS defines the reasonable person concept as the degree of actual or potential harm one would expect a reasonable person in the resident’s similar situation to suffer as a result of the noncompliance.

SNF: Arbitration Agreements CMS Surveyor Guidance

Best Practices for Compliance:

- Ensure that arbitration agreement meets requirements set forth in 42 C.F.R. 483.70(n)
- Train staff on why an arbitration agreement is offered, the key elements that should be explained to and acknowledged by residents, key definitions, and how the arbitration process works including the role of a neutral arbitrator
- Ensure staff can explain the agreement in a manner that residents and representatives understand
- Training staff is critically important so they are prepared not only to answer resident questions and ensure understanding, but to be prepared for investigation by surveyors

C-Suite Criminal Liability; Covid-19

- Involves a Private Pay AL Community in Los Angeles managed by Silverado Senior Living
- District Attorney brought 13 counts of felony endangerment charges against the CEO, AL Administrator, and Vice President of Clinical Services
- Allegedly related to “worst COVID-19 outbreaks in California” – 13 residents and a nurse died
- Allegedly management ordered staff to admit private pay resident directly after arriving on a flight from NY on March 19, 2020; contrary to existing protocols limiting admission and visitors



C-Suite Criminal Liability; Covid-19



- Community also allegedly failed to test for COVID-19 and did not quarantine new resident for 14 days per protocols
- Resident tested positive for COVID-19 day after arrival
- Prosecutors alleged management was financially motivated to admit resident
- Silverado denies all allegations

C-Suite Criminal Liability; Covid-19

Key Issues

- Timeline of COVID-19 protocols and requirements by CDC and health departments are critical to establishing liability
- Causation Issue
- For C-Suite, how involved is management in admissions process/resident care?
- Will we see more? Possibly. Potential wide range implications across sector

AL Resident Discharges

Reasons for Discharge, RCW 70.129.110:

- Transfer or discharge is necessary for resident's welfare and resident's needs cannot be met in the facility;
- Safety of individuals in the facility is endangered;
- Health of individuals in the facility is endangered;
- Resident has failed to make required payment for his or her stay; or
- Facility ceases to operate

AL Resident Discharges

- Required Elements to Notice of Discharge (RCW 70.129.110(5))
 - Reason for Discharge
 - Effective Date of Discharge
 - Location to Which Resident is Discharged
 - Contact Information for LTC Ombudsman
 - Agency contact information – residents with developmental disabilities, mental illness

Unlike SNF federal regs, Assisted Living state statute does not include appeal rights has mandated disclosure in notices of discharge

AL Resident Discharges

- Can AL resident appeal?
- Does AL resident have right to appeal discharge notice to Office of Administrative Hearings or Superior Court?
 - Disagreement about whether SNF and AL residents have, or should have, same rights of appeal to OAH
- OAH has taken position that it has jurisdiction over these appeals; RCW 70.129.005 which speaks to LTC residents having “basic rights”
 - It is the intent of the legislature that long-term care facility resident have the opportunity to exercise reasonable control over life decisions.
 - The legislature finds that the public interest would be best served by providing the “same basic resident rights in all long-term care settings.” Residents in nursing facilities are guaranteed certain rights by federal law and regulation, 42 USC 1396r and 42 CFR part 483. It is the intent of the legislature to extend those basic rights to residents in veterans’ homes, assisted living facilities, enhanced services facilities, and adult family homes.
 - Conflating between SNF and AL rights of appeal?

AL Resident Discharges

- Recommended language in AL Discharge Notices regarding appeal rights
- Washington lacks controlling legal authority regarding whether AL resident has right to an administrative appeal of this discharge notice, or if your due process is protected by the rules of Washington Superior Court. The applicable statute controlling discharge notices issued by assisted living facilities, RCW 70.129.110(5), does not require any information or disclosure about appeal rights. Nevertheless, you may contact the Ombudsman regarding your rights to appeal this notice. Without taking a position on your appeal rights and jurisdiction over this discharge notice, we disclose the following tribunals which may be available forums for an appeal if you choose to file one:
 - Office of Administrative Hearings
 - Superior Court

AL Resident Discharges

- Discharging Medicaid residents for nonpayment
 - Medicaid resident refuses to pay their participation
 - Wants to remain in facility when Medicaid is not accepted
 - AL facility must cover those costs until alternate placement is found
 - Example: AL facility discloses no Medicaid policy or only limited Medicaid, resident signs they understand, resident stops paying, AL issues notice of discharge for nonpayment, resident refuses alternative placement or alternative placement cannot be located.
 - Places undue financial burden on facility, which has a right to discharge.
 - Frequent scenario: Resident does not appeal, refuses to leave, and/or no alternate location

AL Resident Discharge

AL Facilities: After issuing notice of discharge, may file an ejectment action or eviction action (known as unlawful detainer) – filed in Superior Court.

- Office of Administrative Hearings does not have authority to compel a resident to leave a community. Thus, if resident appeals discharge notice, facility prevails and resident refuses to leave, facility must still go to Superior Court to obtain an order authorizing sheriff to remove resident. This adds 30-60 days to the discharge process.
- Time during appeals or application to court can be financially damaging to community if discharge is based on non-payment, or dangerous to staff or resident if endangering health and safety of others.
 - In court – Can apply for accelerated case schedule
- **IL Facilities** use eviction process in Superior Court after issuing meritorious eviction notices under landlord tenant statutes. IL residents have right to oppose notice in Superior Court.
 - Caution: Seattle and other cities now imposing city ordinances affecting process



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