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Attention Nursing Facilities: Know the Five “Cs” of Compliance Program Planning

CLIENT ADVISORY

The Health Reform Act (the “Act”) is now a reality, and while its actual legal and practical impact may take years to sort out, one fact is clear – nursing facilities have significant compliance program criteria to meet, and a short time in which to meet them.

Until recently, nursing facilities enjoyed a relatively low-priority status on the Federal government’s fraud and abuse radar screen. They were one of the last entities to receive guidance from the Office of Inspector General (“OIG”), after OIG began its 1998 initiative encouraging health care providers to develop voluntary compliance programs (that initial guidance is available here: www.oig.hhs.gov/authorities/docs/cpgnf.pdf; and Supplemental Guidance, issued by the OIG in 2008, can be reviewed here: www.oig.hhs.gov/fraud/docs/complianceguidance/nhg_fr.pdf). The programs would, ideally, prompt facilities to combat fraud and abuse in Federal health care programs, and prevent the submission of erroneous claims – if, of course, the facilities chose to implement them.

But for nursing facilities (both Skilled Nursing Facilities and Nursing Facilities), having a compliance program is no longer an option, and procrastination is not a good alternative. The Act demands that within 36 months of enactment of Section 1128I, nursing facilities “have in operation a compliance and ethics

program that is effective in preventing and detecting criminal, civil, and administrative violations under this Act and in promoting quality of care consistent with regulations developed under paragraph (2).” Paragraph 2 of the Section goes on to explain how facility owners and administrators will have help in their compliance program planning, through regulations (and perhaps even a model plan) the Secretary and OIG for the Department of Health and Human Services must issue...but aren’t *required* to issue for another two years. By then, the deadline for implementation of effective, fully operational compliance programs within nursing homes will have slipped to within a year – not a significant amount of time for facilities which weren’t required to have formal (not to mention working) fraud and abuse detection mechanisms in place at all until now. Facilities wishing to gain an edge on the compliance curve are advised to start their planning efforts now – broadly, because formal guidance is still two years away – but with an eye toward the Five “Cs” that cover the Act’s eight compliance program components:

1. **Crack the Codes.** The very first component for a nursing facility compliance and ethics program, listed under Section 1128I, requires a sort of mini legal education for facility supervisors and staff:



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(A) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal, civil, and administrative violations under this Act.

When it comes to building an unshakable compliance program, there is no substitute for a solid foundation – a practical knowledge of the Federal fraud and abuse laws, and the types of activities the Act seeks to prevent. Seek opportunities now to educate yourself and your staff regarding these laws and their purposes, and you'll be better equipped to develop policies and standards that protect them. Legal counsel can assist you with this education, but a good place to start is with the OIG Guidance and Supplemental Guidance described above (links provided in first paragraph). The OIG Guidance covers a broad range of targeted risk areas – from physician self-referral, to quality of patient care, to HIPAA -- and effective compliance should address all of them. Until regulations are issued, the OIG Guidance is probably the closest thing providers will get to a model checklist.

2. **Command and Control.** Two whole components -- the second and third under Section 1128I -- concern employee oversight and supervision:

(B) Specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures and have sufficient resources and authority to assure such compliance.

(C) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in criminal, civil, and administrative violations under this Act.

The Act spotlights its emphasis on effective oversight and implementation of the compliance program, and the employees who implement it, by devoting two of its eight components to these concepts. Employers (even those who currently implement due diligence in their hiring processes) should take care now to reevaluate their supervision mechanisms, and perhaps seek counsel's advice as to how these can be improved. Remember, even aside from the Act's mandates, one instance of fraud or abuse at a nursing home can result in significant monetary and reputational loss to the facility. Resources spent evaluating and improving oversight mechanisms are always resources well spent.

3. **Communicate and Collaborate.** The fourth and fifth components make clear that compliance planning should not take place on the facility's senior administrative level, alone:

(D) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, such as by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.

(E) The organization must have taken reasonable steps to achieve compliance with its standards, such as by utilizing



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monitoring and auditing systems reasonably designed to detect criminal, civil, and administrative violations under this Act by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report violations by others within the organization without fear of retribution.

The Act emphasizes the importance of involving facility staff at every level as partners in preventing and reporting fraudulent and abusive activities. Remember, the future evaluators of the programs will look at not only at effort, but at effectiveness. The best compliance plan on paper will not work if employees are unaware of how it works, or are afraid to act under it for fear of retribution. Work with legal counsel now to develop materials advising staff of their rights and responsibilities, and describing the importance of compliance in an accessible manner.

4. **Consistently Apply.** The sixth and seventh components govern putting compliance planning in action:

(F) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense.

(G) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses, including any necessary modification to its program to prevent and

detect criminal, civil, and administrative violations under this Act.

Developing an enforcement and disciplinary system is the often the hardest, and most legally intimidating aspect of compliance planning for an employer. Learn your rights and responsibilities now, and consult with counsel on effective disciplinary responses.

5. **Check and Recheck.** While the Act's requirement for a "compliance program" is singular, the program itself must be ongoing and adaptable, per the final component:

(H) The organization must periodically undertake reassessment of its compliance program to identify changes necessary to reflect changes within the organization and its facilities.

If a facility's compliance program is not working, not only will the Federal government know, but under the Act, the public will know. Per the Act, criminal activity that occurs inside a nursing home will now be reported, alongside other information, on the new Medicare Nursing Home Compare website.

If you don't have a compliance program, now is the time to begin development and implementation. If you have a compliance program already in place, now may be a good time to conduct an effectiveness assessment.



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If you would like more information on compliance planning requirements under the Health Reform Act, or if you would like our assistance with education, identification of risk areas, or program development or assessment at your facility, please contact Mary Malone (mmalone@hdjn.com), Emily Towey (etowey@hdjn.com), or Elizabeth Trende (etrende@hdjn.com) at 804-967-9604, or visit our website at www.hdjn.com.

Richmond 4701 Cox Road Suite 400 Glen Allen, VA 23060 PO Box 72050 Richmond, VA 23255-2050 ○ (804) 967-9604	Fairfax 3975 Fair Ridge Road Suite 475 South Fairfax, VA 22033 ○ (703) 591-3440
Harrisonburg 3210 Peoples Drive Harrisonburg, VA 22801 ○ (866) 967-9604	Virginia Beach One Columbus Center 283 Constitution Drive Suite 301 Virginia Beach, VA 23462 ○ (757) 321-6555
Lewisburg, WV 210 West Randolph Street Lewisburg, WV 24901 ○ (866) 967-9604	Franklin, TN 725 Cool Springs Blvd. Suite 600 Franklin, TN 37067 ○ (866) 967-9604