

Legal Issues for Tennessee Long Term Care and Senior Housing Providers Regarding COVID-19

Virtually all of you have seen the news reports about a skilled nursing facility in Kirkland, Washington, with multiple confirmed cases of COVID-19, including several deaths at the facility, as well as dozens of confirmed COVID-19 cases in various other states. On March 5, 2020, Tennessee joined that list with its first confirmed case of COVID-19. This week has also seen the release by CMS of actions to address the coronavirus in nursing homes and hospitals. LeadingAge has circulated communications to its members nationally, and LeadingAgeTN, in consultation with Bradley, wanted to take this opportunity to make sure you were aware of not only the relevant CMS memorandums, but also some other practical considerations so that Tennessee long term care providers are prepared to comply with applicable rules and regulations and otherwise address risks that may arise.

While this covers some legal and regulatory considerations regarding the COVID-19 outbreak, for clinical recommendations and prevention strategies, providers should refer to the links below for information from CDC, TDOH and other agencies.

Regulatory Considerations and Surveys

Expect regulatory compliance to be heightened until COVID-19 issues are better understood and controlled. On March 4, 2020, CMS issued QSO-20-14-NH (Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes). While this guidance is specific for nursing homes, QSO-20-13-Hospitals has also been issued for hospitals. Assisted living facilities and other senior housing providers would be well advised to review such guidance, and applicable portions may need to be considered “best practices” for such providers during the current situation. Links to this guidance can be found below, and the memorandum is intended to help nursing homes “improve their infection control and prevention practices to prevent the transmission of COVID-19.” To do that, all facilities are encouraged “to monitor the CDC website for information and resources and contact their local health department when needed.”

CMS is also issuing three memoranda to state survey agencies, state survey agency directors and accrediting organizations to inspect thousands of Medicare-participating healthcare providers across the country, including nursing homes and hospitals.

“Today’s actions, taken together, represent a call to action across the health care system,” said CMS Administrator Seema Verma. “All health care providers must immediately review their procedures to ensure compliance with CMS’ infection control requirements, as well as the guidelines from the Centers for Disease Control and Prevention (CDC). We sincerely appreciate the proactive efforts of the nursing home and hospital associations that have already galvanized to provide up-to-the-minute information to their members. We must continue working together to keep American patients and residents safe and healthy and prevent the spread of COVID-19.”

CMS has temporarily adjusted the focus of surveys on infection control and other emergent issues. However, in addition to the focused inspections, statutorily required nursing home inspections will continue according to the following regime:

- Immediate jeopardy complaints and allegations of abuse and neglect;
- Complaints alleging infection control concerns, including facilities with potential COVID-19 or other respiratory illnesses;
- Statutorily required recertification surveys;
- Any re-visits necessary to resolve current enforcement actions;
- Initial certifications;
- Surveys of facilities/hospitals that have a history of infection control deficiencies at the immediate jeopardy level in the last three years; and
- Surveys of facilities/hospitals/dialysis centers that have a history of infection control deficiencies at lower levels than immediate jeopardy.

Other CMS memoranda provide answers to common questions that nursing homes and hospitals may have with respect to addressing cases of COVID-19, such as screening staff and visitors with questions about recent travel to countries with known cases, transferring patients between nursing homes and hospitals in cases for which COVID-19 is suspected or diagnosed, and when providers should take precautionary measures (including isolation and mask wearing) for patients and residents diagnosed with COVID-19 or showing signs and symptoms of COVID-19.

Crisis Communications with Residents, Families, Employees and Other Stakeholders

Be prepared for the (hopefully unlikely) possibility of a “local crisis” in your facility or your local community. You likely have a communications team, not only of facility employees, but perhaps also including a communications or public relations professional you can call in the event of a host of “bad news possibilities.” You should consider adding COVID-19 to the list of possibilities that might need to be promptly communicated not only to residents, families and staff, but also to a variety of other stakeholders. These can include not only your regulatory agencies, but also referral sources, hospitals (including both those with which you have transfer agreements and others in your service area), insurers, lenders/landlords and vendors. Media inquiries may be sudden, and the time to identify your spokesperson is not when the reporter and camera operator are walking into the facility. Unlike other public relations events that you may have already planned for, a public health emergency (whether real or perceived) may require assistance from medical professionals. You should also consider consultants to work with to ensure you are meeting standards of practice and to assist in your external communications. For example, you may need assistance from medical professionals you do not normally deal with, such as infection prevention specialists.

You can find an article by LeadingAge on information and resources to use as you plan for and respond to COVID-19 at:

https://leadingage.org/covid19?_ga=2.143484277.1386117153.1583531475-728033611.1551900140

You can find an article on communications plans and strategies by LeadingAge at:

<https://leadingage.org/magazine/march-april-2018/Is-Your-Communications-Strategy-Up-to-Date-V8N2>

Resident Rights and HIPAA Compliance

While some rules may seem to get “brushed aside” by some during a crisis, your residents are still entitled to personal privacy and confidentiality, including the HIPAA requirements and state law requirements. Reminders to your staff of those rules may be in order, especially if your facility is “in the spotlight” during an isolated outbreak affecting only one or two facilities. While HIPAA permits certain disclosures to some health authorities to prevent or control the spread of disease, that exception is subject to the “minimum necessary” rule and deserves advance consideration. Certain situations that pose a serious and imminent threat to the health or safety of a resident or others may permit the disclosure of resident-specific information to prevent or lessen the threat (including those who are not healthcare professionals but may be in a position to prevent or lessen the threatened harm). When disclosing information to family, friends, and caregivers of a resident, check with the resident or use good professional judgment to infer what is in the resident’s best interest and limit disclosures to information related to that person’s involvement in the resident’s care. As those rules can be confusing, consult with experienced counsel promptly as to any questions; after the crisis passes there may be “second guessing” of your actions and disclosures by families, regulators, tort attorneys and others.

Dealing with Employees

The past few weeks have brought interim “recommended strategies” for employers from the CDC, including education of your staff as to when they should not report to work due to their own health issues (until they are free of fever and certain other signs of illness and symptoms for at least 24 hours). Any employee exhibiting symptoms that could be associated with COVID-19 (fever, cough, shortness of breath, etc.) should be reported to supervisory personnel (self-reported or otherwise) so appropriate actions and precautions can be taken. Review your sick leave or “paid time off” policies to be sure they are reasonable and compliant with all regulatory requirements, including public health guidelines, and be prepared to immediately adjust your policies if new guidance from CDC, TDOH or others indicates that such changes are in order. Be prepared to make adjustments to your staffing (including overtime) in the event your pool of staff is reduced due to their own illness or illness within their families requiring an absence to care for sick children or other family members.

As the CDC, OSHA and other agencies make signage, posters and other educational materials available, utilize those resources as you educate your staff on the myriad of issues and best practices associated with COVID-19. Additionally, the Bradley Labor and Employment Practice Group has recently posted a blog article about potential pandemic issues, including COVID-19, regarding employees of all employers (including healthcare providers), which can be found at <https://www.employmentlawinsights.com>.

IT, Communications and Telemedicine

Providers might also consider this to be a good time to review their IT and communications systems, including investigating whether telemedicine would be beneficial, if they have not done so yet. There may be clinicians and experts with whom you will need to communicate to help with some resident assessments, treatments or otherwise, but they may be located hundreds or even thousands of miles away from your facility. The more robust and advanced a facility’s systems are the better outcomes the facility’s resident may experience. You can find an article on this issue by LeadingAge at <https://www.leadingage.org/white-papers/telehealth-and-remote-patient-monitoring-long-term-and-post-acute-care-primer-and>.

To view the recent memos from CMS noted above, please see:

Suspension of Survey Activities

<https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and/suspension-survey-activities>

Guidance for Infection Control and Prevention Concerning Coronavirus Disease (COVID-19):
FAQs and Considerations for Patient Triage, Placement and Hospital Discharge

<https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and/guidance-infection-control-and-prevention-concerning-coronavirus-disease-covid-19-faqs-and>

Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes

<https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and/guidance-infection-control-and-prevention-coronavirus-disease-2019-covid-19-nursing-homes>

Other helpful links include:

Coronavirus Disease (COVID-19) General Information from TDOH

<https://www.tn.gov/health/cedep/ncov.html>

COVID-19 Visitor Guidance from TDOH (including visitor prohibitions based on health symptoms and recent travel)

<https://www.tn.gov/content/dam/tn/health/documents/cedep/novel-coronavirus/COVID-19-Facility-Visitor-Guidance.pdf>

Hotline to report a COVID-19 case to the Tennessee Department of Health: (615) 741-7247 (ask to speak to the epidemiologist on call)

Information for Healthcare Professionals from CDC

https://www.cdc.gov/coronavirus/2019ncov/hcp/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-hcp.html

Coronavirus Disease 2019 Information from CDC

<https://www.cdc.gov/coronavirus/index.html>

Coronavirus Disease 2019 Information from LeadingAge

<https://leadingage.org/covid19>

Coronavirus Disease 2019 Information from American Hospital Association

<https://www.aha.org/2020-01-22-updates-and-resources-novel-coronavirus-2019-cov>

CDC Strategies to Prevent the Spread of COVID-19 in Long Term Care Facilities

<https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spread-in-long-term-care-facilities.html>

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