Legal Issues for LeadingAge Texas Members Regarding COVID-19 (Coronavirus)

As of this week, 18 residents and one visitor of a skilled nursing facility in Kirkland, Washington, have died from Coronavirus Disease 2019 (COVID-19). As of March 10, 2020, the Texas Department of State Health Services is reporting one additional travel-related case of the novel coronavirus, COVID-19, bringing the state total to 13. Texas long-term care and senior housing providers will likely face some of the most challenging implications of the spread of COVID-19 in Texas.

In response to this growing concern, CMS has taken actions and released guidance to address the coronavirus in nursing homes and hospitals. LeadingAge has circulated communications to its members nationally, and LeadingAge Texas, in consultation with Macdonald Resnevic, PLLC, wants to make sure you are aware the relevant CMS memorandums, CDC guidance, and other practical considerations.

At this point in time, the federal guidance includes directing questions and concerns to local health entities. As such, LeadingAge Texas members should be prepared to reach out to their local health entities, utilizing the Texas Department of State Health Services' directory available here: https://www.dshs.state.tx.us/regions/2019-nCoV-Local-Health-Entities/.

CMS Guidance

On March 4, 2020, CMS released guidance to Statute Survey Agencies regarding infection control and prevention of COVID-19 in nursing homes (Ref: QSO-20-14-NH). In the guidance, CMS makes the following general recommendations and statements:

- Nursing facilities should monitor the CDC website for information and resources and should contact their local health department if they have questions or suspect that a resident has COVID-19.
- Prompt detection, triage and isolation of potentially infections patients is essential to prevent exposure to others.
- Facilities should consider frequent monitoring for potential symptoms of respiratory infection.

Monitoring or Limiting Visitors and Staff

In addition to general guidance, CMS makes specific recommendations regarding ***monitoring or limiting visitors and staff***. According to CMS, nursing facilities should screen visitors and staff for:

- International travel within the last 14 days to certain restricted countries. The list of restricted countries is available at: https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html.
- Signs or symptoms of a respiratory infection, such as a fever, cough, and sore throat.
- Contact with someone with or under investigation for COVID-19.

According to CMS, if ***visitors*** meet any of the above criteria, facilities may restrict entry to the facility.

In addition, based on the screening referenced above, CMS makes the following recommendations regarding ***staff members***:

- Those with signs and symptoms of a respiratory infections should not report to work.
- If signs and symptoms of a respiratory infection develop while on-the-job, the employee should:
    - Immediately stop work, put on a facemask, and self-isolate at home;
    - Inform the facility's infection preventionist or other designated person of the situation, and provide that person with information on the individuals, equipment and locations that the staff member came in contact with;
    - Contact and follow the local health department recommendations for next steps.

In addition to taking these steps for staff, CMS recommends reviewing CDC guidance for exposures that might warrant restrictions, even if the staff member is not showing symptoms. The guidance is available here: https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html. CMS also directs nursing facilities to the CDC's general information for healthcare professionals, available here: https://www.cdc.gov/coronavirus/2019-nCoV/hcp/index.html.

What to do if a Resident is Suspected of Having, or is Confirmed of Having, COVID-19

1. Contact local health department.

2. You are not required to transfer the patient to the hospital if:
    a. the resident does not require a higher level of care; and
    b. the facility can adhere to the rest of the infection prevention and control practices recommended for caring for a resident with COVID-19, available at: https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.

3. If neither of the above conditions in 2 are met, the nursing facility should transfer the resident to the hospital unless the resident does not require hospitalization, in which case, and if deemed medically and socially appropriate, the resident can be transferred home. In either case, pending and during transfer, place a facemask on the patient and isolate him/her in a room with the door closed.

Additional General Guidance

In addition to the specific guidance referenced above, CMS suggests:

1. Increasing the availability and accessibility of alcohol-based hand sanitizer (ABHS) (including in all resident-care areas and inside and outside of resident rooms), tissues, no touch receptacles for disposal, and facemasks and healthcare facility entrances, waiting rooms, patient check-ins, etc.

2. Put up signs encouraging vigilance in hand hygiene and cough etiquette.

3. Properly clean, disinfect and limit sharing of medical equipment between residents and areas of the facility.

4. Provide additional work supplies to avoid sharing (e.g. pens, pads) and disinfect workplace areas (nurse's stations, phones, internal radios, etc.).

CDC Guidance

It is critical that at least one dedicated person at each LeadingAge Texas member community familiarize himself/herself with the guidance from the CDC on COVID-19. The CDC's guidance for long-term care facilities is particularly relevant for LeadingAge Texas members, and it is summarized below:

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

The CDC recommends the following specific steps to prevent the introduction of respiratory germs into your facility:

1. Post signs at the entrance instructing visitors not to visit the facility if they have symptoms of respiratory infection.

2. Ensure sick leave policies allow employees to stay home if they have symptoms of respiratory infection.

3. Assess residents' symptoms of respiratory infection upon admission to the facility and implement appropriate infection prevention practices for incoming symptomatic residents.

The CDC recommends the following specific steps to prevent the spread of respiratory germs within your facility:

1. Restrict residents with fever or acute respiratory symptoms to their room. If they must leave the room for medically necessary procedures, have them wear a facemask (if tolerated).

2. In general, for care of residents with undiagnosed respiratory infection use Standard, Contact, and Droplet Precautions with eye protection unless suspected diagnosis requires Airborne Precautions (e.g., tuberculosis).

3. Ensure employees clean their hands according to CDC guidelines, including before and after contact with residents, after contact with contaminated surfaces or equipment, and after removing personal protective equipment.

4. Put alcohol-based hand rub in every resident room (ideally both inside and outside of the room).

5. Make sure tissues are available and any sink is well-stocked with soap and paper towels for hand washing.

6. Identify dedicated employees to care for COVID-19 patients and provide infection control training utilizing the free training available here: https://www.cdc.gov/longtermcare/training.html

7. For those residents that may have a respiratory infection, post signs on the door or wall outside of the resident room that clearly describe the type of precautions needed to enter and required personal protective equipment, have the necessary personal protective equipment, including facemask, eye protection, gowns, and gloves immediately available outside of the room, and position a trash can near the exit of the room to make it easy for employees to discard the personal protective equipment.

CDC Interim Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with COVID-19

This guidance provides a helpful overview of coronaviruses, generally, and COVID-19, in particular. According to the CDC:

> Published and early reports suggest spread from person-to-person most frequently happens during close exposure to a person infected with COVID-19. Person-to-person appears to occur similar to other respiratory viruses, mainly via respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths, noses, or eyes of people who are nearby or possibly be inhaled into the lungs. Although not likely to be the predominant mode of transmission, it is not clear the extent to which touching a surface contaminated with the virus and then touching the mouth, nose, or eyes contributes to transmission.

This guidance illustrates the heightened diligence required of those in the healthcare setting. According to the guidance, "Healthcare facilities should have a low threshold for evaluating symptoms and testing symptomatic healthcare personnel (HCP), particularly those who fall into the high- and medium- risk categories described in this guidance."

At least one dedicated staff person at each LeadingAge Texas member community, preferably one with clinical training, should carefully review this guidance and be prepared to utilize it in making determinations regarding exposure to COVID-19.

Texas Department of State Health Services

We recommend that LeadingAge Texas members review the Texas Department of State Health Services' (DSHS) COVID-19 website daily. It is available here: https://www.dshs.state.tx.us/coronavirus/.'

This website provides daily updates on the state count of COVID-19 cases, including the county of residence. As of March 10, there are 12 cases in the Houston area, and one Collin County. As the infection spreads, the level of precautions to take may be heightened by the location of identified cases.

This website also provides contact information for the DSHS Call Center: 1-877-570-9779

Assisted Living and Independent Living

LeadingAge Texas members should consider adopting the CMS guidance for nursing homes described above (e.g. screening employees and visitors) in the assisted living and independent living setting. While there is no clear directive to do so because the federal government does not regulate such settings, applicable portions of the guidance may need to be considered "best practices" for such providers during the current situation.

Changes to Surveys in Response to 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 that have a history of infection control deficiencies at the immediate jeopardy level in the last three years; and
- Surveys of facilities that have a history of infection control deficiencies at lower levels than immediate jeopardy.

Additional detail regarding changes to surveys stemming from COVID-19 are available here: https://www.cms.gov/files/document/qso-20-12-allpdf.pdf-1.

Crisis Communications with Residents, Families, Employees and Other Stakeholders

In the event of a COVID-19 case in your facility or your local community, you will need to be prepared to respond from a communications standpoint. Whether communications are handled internally, or with an outside resource, or both, COVID-19 should be immediately added to the set of issues this team is prepared to address. The communications team will need to be prepared for prompt communication with residents, families and staff, as well as other stakeholders including your local health entity, HHSC, referral sources, hospitals, insurers, lenders/landlords, vendors and the press. Media inquiries may come at any moment without notice, and you should designate, ahead of time, who in your organization will respond. LeadingAge national has prepared specific materials for addressing the relevant stakeholders including resident, families and the medial. Please see https://leadingage.org/covid19?_ga=2.143484277.1386117153.1583531475-728033611.1551900140

For general guidance on communications plans and strategies developed by LeadingAge, see: https://www.leadingage.org/magazine/march-april-2018/Is-Your-Communications-Strategy-Up-to-Date-V8N2

In addition, LeadingAge Texas is hosting a Crisis Communications Workshop on April 2 in Austin. The session includes principles and tips for crisis communications, along with media training you can use every day and an opportunity to be on camera and practice what you learn. https://www.leadingagetexas.org/events/EventDetails.aspx?id=1317481&group=

Patient Privacy in an Emergency

During an emergency, your residents are still entitled to personal privacy and confidentiality protections, including those protections offered under HIPAA and state privacy laws. A public health emergency is an important time to remind staff of the critical importance of patient privacy protections, because there is a temptation to disregard such practices in the face of urgent demand for information from residents, family, and the media.

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. This means that the covered entity must make "reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."

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.

Employees

It is important to educate your staff as to when they should not report to work due to their own health issues. According to current CDC guidance, they should not report to work 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 so appropriate actions and precautions can be taken. We recommend that you review your sick leave or PTO policies to respond to a heightened need by staff to utilize such benefits, but also that you be prepared to immediately adjust your policies as this situation develops. You should develop a plan for adjusting staffing (including overtime) in the event your pool of staff is reduced due to COVID-19, whether because of staff member illness, or illness among staff family members. Your human resources professional should monitor guidance from the CDC, OSHA and the Texas Workforce Commission and be prepared to utilize signage, posters and other educational materials these agencies make available for COVID-19.

Communications and Telemedicine

This is a good time for LeadingAge Texas members to review their IT and communications systems and capabilities to consider whether telemedicine can be utilized. There may be clinicians and experts with whom you will need to communicate to help with resident assessments, treatments or otherwise, but they may not be able to visit your facility. Last week the U.S. House of Representatives voted to authorize governmental payor program payments for telemedicine services in a declared

national emergency as part of the coronavirus-response legislation that passed overwhelmingly and was signed into law. This an area to monitor in the coming days and weeks as the need for telemedicine grows in response to COVID-19. LeadingAge's white paper on telemedicine is a useful starting point for the issue, and it is available at: https://www.leadingage.org/white-papers/telehealth-and-remote-patient-monitoring-long-term-and-post-acute-care-primer-and. We would also encourage you to review guidance from the Texas Medical Association (TMA) regarding telemedicine, available here: https://www.texmed.org/TexasMedicineDetail.aspx?id=52651. LeadingAge Texas will keep members apprised of additional developments in this area.

Additional Resources

To view the recent memos from CMS on COVID-19, 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

Please also see:

- 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

General CMS infection control guidance is available here:

- Long term care facility – Infection control self-assessment worksheet: https://qsep.cms.gov/data/252/A._NursingHome_InfectionControl_Worksheet11-8-19508.pdf
- Infection control toolkit for bedside licensed nurses and nurse aides ("Head to Toe Infection Prevention (H2T) Toolkit"): https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/LTC-CMP-Reinvestment
- Infection Control and Prevention regulations and guidance: 42 CFR 483.80, Appendix PP of the State Operations Manual. See F-tag 880: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Downloads/Appendix-PP-State-Operations-Manual.pdf

If you have questions about the information above, please contact Cory Macdonald or Kate Resnevic at Macdonald Resnevic, PLLC.

Cory Macdonald is available at cmacdonald@mrfirm.legal and (512) 579-0087.

Kate Resnevic is available at kresnevic@mrfirm.legal and (512) 579-0092.