Legal Alert
HEALTH CARE

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Rankings

- Individually recognized by *Chambers USA* since 2008
- Individually recognized by *Legal 500 USA* since 2011

Hospices and Palliative Care Organizations

Arent Fox represents hospices, palliative care programs, and home health agencies throughout the United States, advising them on regulatory matters, fraud and abuse issues, audits, investigations, surveys, reimbursement, contracts, compliance programs, training, corporate structuring, transactions, administrative appeals, state and Federal litigation, government relations, HIPAA and HITECH, managed care relationships, coverage and billing issues. Arent Fox attorneys conduct internal investigations; defend against Federal and state investigations and audits by DOJ, OIG, OMIG, MFCU, ZPIC, MIC, RAC; respond to survey and certification or accreditation deficiencies; conduct compliance audits; implement compliance programs and training; and act as general counsel, including labor and employment matters.

CMS Finalizes Regulations for *Long Term Care Facilities Offering Hospice Services*

CMS's final regulations entitled "*Medicare and Medicaid Programs; Requirements for Long Term Care Facilities – Hospice Services*" become effective on August 26, 2013. These LTC regulations complement Hospice regulations enacted in 2008, and found at 42 CFR § 418.112, which set forth contract and program requirements for a Hospice providing Hospice Services to residents of a Skilled Nursing Facility (SNF), Nursing Facility (NF), or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID). The purpose of the final LTC regulations is to ensure that a SNF or NF (LTC) that chooses to contract for the provision of Hospice Services with one or more Medicare-certified Hospices has in place a written agreement with the Hospice that specifies the roles and responsibilities of each entity, prior to commencing Hospice Services for the resident.

CMS, in its burden analysis, comments that an LTC facility will be required to have only one written contract with each Hospice that provides services in the facility. The regulations do not require a SNF or NF to have an individual contract with a Hospice for each resident receiving Hospice Services. If a SNF or NF chooses not to contract with any Hospice to provide Hospice Services, it must assist the resident in transferring to a SNF or NF that does so.

42 CFR § 483.75(t) entitled "*Administration – Hospice Services*" requires that an LTC facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well being of each resident. In 1986, with the enactment of the Omnibus Budget Reconciliation Act (OBRA), Congress decided that both Medicaid recipients and Medicare beneficiaries, residing in a LTC facility or ICF, should have access to Hospice Services. Congress permitted a State to add a Hospice benefit to their State Medicaid Plan that permits a resident of an LTC facility or ICF to receive Hospice Services. § 418.3 uses the term "*Hospice Care*," whereas § 483.75(t) uses the term "*Hospice Services*."

Many Hospices currently have written contracts with LTC facilities that comply with the Hospice condition of participation found at 42 CFR § 418.112, but they may need to revise their contracts in order to comply with 42 CFR § 483.75(t). The following is a checklist to assist in the revision. Search eCFR for the regulations.

1. *Professional Services and Timeliness* - § 483.75(t)(2)(i) and § 418.112(b) - Does the contract state that the LTC facility must ensure that the Hospice services provided to its residents meet professional standards and principles that apply to individuals providing services in the facility, and the "*timeliness of services*"?

   Recommend this provision be included be in the Article covering LTC Responsibilities. In its comments, CMS stated that the LTC should be monitoring the delivery of services to its residents, and is responsible for assuring that the services provided meet the assessed needs of each resident. The LTC facility is also required to ensure that the Hospice will provide services to the resident in a way that meets their needs in a timely manner. The example given is "*increasing the resident's pain medication to ensure an optimal comfort level.*" There is a similar requirement for Hospices under § 418.112(b), the standard for *Professional Management*.

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Palliative Care Programs

Arent Fox advises providers on how to establish different types of palliative care programs, and comply with a complex and ever changing regulatory landscape. Arent Fox is on the forefront of the palliative care initiative, working with state and Federal regulators in an effort to lobby for changes in laws and regulations. We were instrumental in New York State's amending its hospice licensure law to include palliative care programs. Arent Fox partners have served on the Regulatory and Public Policy Committees of the National Hospice and Palliative Care Organization.

Home Health Agencies

Arent Fox assists hospitals, health care systems, and free-standing home health agencies in establishing appropriate corporate subsidiaries and relationships which maximize the development of new service capabilities and revenue potential. These projects include personal care companies, home infusion partnerships, private duty nursing companies, and management companies. In the area of professional services agreements, management agreements, and joint ventures, Arent Fox has assisted numerous HHAs in constructing or analyzing relationships to minimize the legal risks of state and Federal anti-kickback and Stark laws.

2. *Written Authorized Contract* - § 483.75(t)(2)(ii) and § 418.112(c) – Does the LTC facility have a written contract that is signed by an authorized representative of the LTC facility, and the Hospice before Hospice Services are furnished to any resident?

   Some LTC facilities are asking Hospices to enter into a "*one time*" contract for a particular resident, instead of a generic Hospice Services contract. There are legal issues which the one time contract generates. One of those issues impacts the requirement that the written contract is signed by authorized representatives prior to initiating Hospice Services. It may be problematic to obtain authorized signatures timely.

3. *Contract Provisions* - § 483.75(t)(2)(ii)(A-K) sets forth eleven requirements that must be in the written contract between the LTC and the Hospice. Many of these requirements are identical to the Hospice contract requirements found at § 418.112(c).

4. *Hospice Services* - § 483.75(t)(2)(ii)(A) and § 418.112(c) require a description of the services the Hospice will provide. § 483.75(t)(2)(ii)(H) and § 418.112(c)(6) both require a delineation of Hospice responsibilities including medical direction and management of the patient, nursing, counseling, social work, medical supplies, DME, medications, and all other services needed for the palliation of pain and symptoms of the terminal illness and related conditions. Existing contracts should already comply with both regulations under Hospice Responsibilities provisions.

5. *Plan of Care* - § 483.75(t)(2)(ii)(B), (t)(3)(i) and § 418.112(d) both require that the Hospice is responsible to determine the appropriate Hospice plan of care, and there be collaboration. The plans of care must state which provider is responsible for performing the respective functions agreed upon and identified in the Hospice plan of care; ensuring participation of the patient, family, and LTC to the extent possible; and any changes in plan of care must be discussed with patient, representative, LTC and approved by the Hospice.

6. *LTC Services* - § 483.75(t)(2)(ii)(C) requires the contract to describe the services the LTC facility will continue to provide based on each resident's plan of care. Both § 483.75(t)(2)(ii)(G) and § 418.112(c)(4) are more specific. The LTC regulation requires that the LTC continue to furnish 24-hour room and board; meet the resident's personal care and nursing needs in coordination with the Hospice representative; and ensure that the level of care is appropriate based on the resident's needs. The Hospice regulation is worded a little differently, but has the same end result. It requires that an LTC facility provide personal care and nursing needs that would have been provided by the primary caregiver at home at the same level of care provided before Hospice care was elected. Current contracts should contain provisions that comply with this Hospice regulation. Recommend that if the LTC facility will provide other services based on each resident's plan of care, then those services should also be described under LTC Responsibilities provisions.

7. *Communication Process* - § 483.75(t)(2)(ii)(D) and § 418.112(c)(1) both require a communication process between the LTC and the Hospice to ensure that the needs of the resident are met 24 hours per day and documented. The LTC regulation requires that the process include how the communication will be documented.

8. *Mutual Notifications* - § 483.75(t)(2)(ii)(E) and § 418.112(c)(2) are almost identical, except that now an LTC facility must notify the Hospice if the resident has to be transferred for any reason, not just a condition related to the terminal illness and

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About Arent Fox LLP

Arent Fox LLP, founded in 1942, is internationally recognized in core practice areas where business and government intersect. With more than 350 lawyers, the firm provides strategic legal counsel and multidisciplinary solutions to clients that range from Fortune 500 corporations to trade associations. The firm has offices in Los Angeles, New York, San Francisco, and Washington, DC.

Rankings

- Recognized by *US News & World Report* and *Best Lawyers* as a leading national health care practice in 2013
- Recognized by *Chambers USA* as leading health care practice in 2013
- Recognized by *Legal 500 USA* as leading health care practice in 2012

related conditions. Under both regulations, the LTC has to notify the Hospice if there is a significant change in the patient's status, a need to alter the plan of care, or the resident dies.

9. *Level of Hospice Care* - § 483.75(t)(2)(ii)(F) and § 418.112(c)(3) are identical. Both require the Hospice to assume responsibility for determining the appropriate level of Hospice care or any changes in the level.

10. *LTC Personnel Administering Therapies* - § 483.75(t)(2)(ii)(I) and § 418.112(c)(7) are almost identical. Both regulations permit the LTC facility personnel, authorized under state law, to administer prescribed therapies in the Hospice plan of care. The Hospice regulation has the limitation that the LTC facility personnel could only be used to the extent that a Hospice would routinely use the services of the patient's family in implementing the plan of care. However, the LTC regulation does not have a similar limitation.

11. *Reporting Alleged Violations* - § 483.75(t)(2)(ii)(J) and § 418.112(c)(8) require the LTC to report to the Hospice Administrator, and the Hospice must report to the LTC Administrator, if there is an alleged violation of mistreatment, neglect, or verbal, mental, sexual, and physical abuse, injuries of unknown source and misappropriation of patient property. One difference in the regulations is that the LTC must report to the Hospice immediately, whereas the Hospice must report to the LTC within 24 hours of becoming aware of the alleged violation. The other difference is that the LTC must report to the Hospice misappropriation of funds by Hospice personnel, whereas the Hospice must report to the LTC misappropriation of funds by anyone unrelated to the LTC.

12. *Bereavement Services* - § 483.75(t)(2)(ii)(K) and § 418.112(c)(9) both require the Hospice and the LTC to provide bereavement services to LTC staff.

13. *Coordination of Services* - § 483.75(t)(3) and § 418.112(e) have similar coordination of services requirements. Both regulations require that each provider designate a member of their respective Interdisciplinary Team (LTC) or Group (Hospice) to provide overall coordination of Hospice care to the LTC resident. Mutual requirements include: communication to ensure quality of care; and communication between Hospice IDG and LTC Medical Director, and between LTC facility and Hospice Medical Director, attending physician and other physicians to coordinate care. The LTC must receive from the Hospice the most recent Hospice plan of care, election form, physician certification of terminal illness, name and contact information of Hospice personnel involved in Hospice care of each patient, instructions on accessing Hospice 24 hour on call, Hospice medication information, and Hospice physician and attending physician orders. The LTC regulation § 483.75t(3)(i) echoes the Hospice regulation at § 418.112(d) in requiring that the LTC facility collaborate with Hospice in developing the Hospice plan of care. The LTC regulation added the requirement that the designated LTC Team member have a clinical background, or have access to someone who, within the State scope of practice act, has skills to assess the resident.

14. *Cross Orientation* - § 483.75(t)(3)(v) and § 418.112(f) both require the Hospice and LTC to orient each others staff in their own policies, procedures, patients' rights, forms, and record keeping. Hospice must also train LTC staff about hospice philosophy and principles on death and dying.

Both providers must comply with their respective Medicare conditions of participations and other requirements. The patient is both an LTC resident and a Hospice patient.