The Role of Home Health Care Services in Assisted Living

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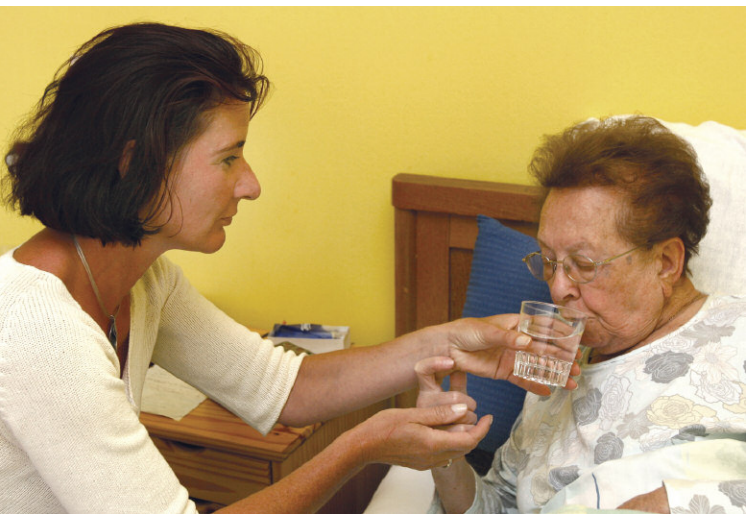
Seniors seek assisted living (AL) services as they age and require supportive services or when living at home may not be an option because of the demands of meal preparation and home upkeep. For those who do not require around-the-clock skilled nursing care, AL can be the ideal solution because they can receive meals, housekeeping services, support with personal care, health status monitoring, and social and recreational opportunities.

However, as these individuals age and their circumstances change, some residents may require additional services not provided by the facility. For instance, an individual who has had back surgery may be recuperating at "home"—the AL facility where he or she resides. Skilled nursing care is not required on a continual basis, but the dressing on the incision must be changed and the individual's physician may have prescribed a course of physical therapy during the recovery period. Although the AL facility can provide the usual personal-care services, the facility may not be licensed to provide the higher-acuity services. In such a situation, a viable alternative is for the individual (not the facility) to engage a home care agency to provide the services. By contracting with the home care agency, the individual is able to receive the required level of services at the facility (ie, his or her home). In more routine circumstances, an AL resident may require ongoing, long-term assistance with certain needs such as insulin injections or nebulizer treatments that cannot be provided by facility staff. In such circumstances, the resident may contract with a home health agency to provide the services.



When home care services are rendered to AL residents, the potential for violation of certain laws exists if the parties are not vigilant. This article discusses the various models of AL in New York State, the laws that can be implicated when home care services are provided to AL residents, and ways to avoid violating the laws.

Adult Care Facilities

Adult homes and enriched housing programs are types of adult care facilities (ACFs), licensed and inspected by the New York State Department of Health.[1] They provide room and board, housekeeping, supervision, case management, activities, and personal care (such as assistance with personal hygiene, dressing, and feeding; and nutritional support).[2] Adult care facilities are for people who are unable to live completely independently.[3] However, ACFs have some significant limitations: they are not intended for persons who are in need of continual nursing or medical care. Unlike nursing homes, they are not staffed with nurses, a medical director or other doctors, or specialists for therapies.

Regulations governing ACFs mandate that an operator may not accept or retain a resident who is in need of continual medical or nursing care; has a medical condition that is unstable and requires continual skilled observation of symptoms and reactions or skilled recording of such skilled observations; is chronically bedfast, chairfast, and unable to transfer; chronically requires the assistance of another to transfer; chronically requires assistance of another person to walk or climb or descend stairs (unless on a ground floor); has chronic unmanaged incontinence; or is dependent on certain types of medical equipment.[4]

A resident in the ACF who requires health services in addition to those services an ACF is authorized to provide must arrange for such services by contracting with an appropriate provider. As noted previously, required services are frequently provided by a home care agency, either a Medicare-certified home health agency (CHHA) or a licensed home care services agency (LHCSA).

Assisted Living Residences

An assisted living residence (ALR), as defined in the New York Assisted Living Reform Act passed in 2004,

must be licensed as an ACF (either adult home or enriched housing program) and must also be licensed as an ALR.[5] The term *assisted living* or any derivation thereof cannot be used in marketing or advertising or any other facility materials unless the facility is licensed as an ALR.[5] Assisted living residences must comply with existing rules for ACFs[6] and new regulations for ALRs.[7]

Certain special certifications are available to ALRs. Enhanced Assisted Living Residence (EALR) certification allows residents to "age in place" (in accordance with their residency agreement with the facility) beyond ACF retention standards for ambulation, transfer, medical equipment, and unmanaged incontinence.[8] Special Needs Assisted Living Residence (SNALR) certification allows the facility to serve individuals with "special needs" such as dementia or cognitive impairments.[9] The facility must submit to the Department of Health a special needs plan that demonstrates how the special needs of such residents will be safely and appropriately met.

As is the case with ACF residents, ALR residents who require health services beyond those that can be provided by the facility also must arrange for the services by contracting individually with an appropriate service provider.

Assisted Living Programs

New York's AL programs (ALPs) are a combination of adult home (or enriched housing program) services and home care services to provide residential supportive services to individuals who would otherwise require nursing facility placement. To be licensed as an ALP, both an ACF license and a LHCSA license are required.[10]

Residents who are appropriate for ALP admission have the following three characteristics[11]:

- They have no suitable home in which to live, or home care services cannot be safely provided in the home.
- They need more supervision than can be provided economically through home care, but nursing home services are not a necessity.
- They have little complex medical need.

To be eligible for ALP admission, the resident must[11]:

- Require more care than an ACF provides
- Be medically eligible for nursing home placement
- Otherwise require placement in a nursing home because of factors that may include, but need not be limited to, lack of a home or home environment in which to live and receive services safely; and
- Be able to be appropriately cared for in an ALP.

A resident's payment options for ALP services are either private pay or, if the individual is income-qualified, Social Security Income (SSI) for residential services and Medicaid for health care services. A Medicaid capitated per diem payment is made to the ALP for health services provided to residents by the LHCSA component of the ALP. In return for the payment received from Medicaid, an ALP is obligated to provide a resident with the following services[12]:

- Personal care services that are reimbursable under Medicaid
- Home health aide services
- Personal emergency response services
- Nursing services
- Physical therapy
- Occupational therapy
- Speech therapy
- Medical supplies and equipment not requiring prior authorization
- Adult day health care in a program approved by the Commissioner of Health

The ALP program is the only type of AL service in New York in which a Medicaid funding stream is available to a resident. Only a limited number of ALP slots have been allocated by the Department of Health, and ALP licensure is strictly controlled.

Legal Pitfalls in Home Care/Assisted Living Relationships

Frequent involvement of home care agencies in services to AL facility residents may present legal danger for both home care agencies and AL facilities. The laws that affect the role of home care in AL are discussed here.

Anti-Kickback Laws

Home care agency/AL facility relationships may be particularly vulnerable to violations of the health care fraud and abuse laws. For instance, a home care agency may offer free or reduced-cost services or items to an AL facility as a mechanism for generating referrals from the facility. This is likely to constitute a violation of the federal anti-kickback statute,[13] which prohibits the knowing and willful offer, solicitation, payment, or receipt of any remuneration in any form, directly or indirectly, to induce referrals of any item or service for which payment may be made under a federal health care program such as Medicare or Medicaid. The law is written in very broad terms and is interpreted liberally by the government. A violation of the statute is punishable by a prison term of up to 5 years and a maximum fine of $25,000.[13] Both parties to a prohibited arrangement are candidates for prosecution. The Balanced Budget Act of 1997 added a civil monetary penalty that

can result in a $50,000 fine for each act and treble damages.[13] Despite the breadth of the anti-kickback statute, federal "safe-harbor" regulations set forth criteria that, if met, insulate certain specific types of arrangements from a finding of a violation of the law.[14]

New York has its own anti-kickback law, which closely follows the language of the federal law, but applies only to items and services reimbursed by Medicaid.[15] New York's law incorporates by reference the safe-harbor regulations that apply to the federal anti-kickback law.[16]

An AL facility can be very attractive to an agency providing home care services because of the ready access to a group of elderly people likely to need the agency's services. While giving incentives to a referral source is an accepted practice in settings outside of the health care industry, the federal and New York State anti-kickback laws restrict this tool for business generation among health care providers when the items or services are ultimately paid for by Medicare, Medicaid, or any other federally funded health care program. In AL settings, programs that provide Medicaid-reimbursable services are directly impacted. But even those programs whose residents are strictly private pay must exercise caution because the anti-kickback statute implicates both the party that gives remuneration intended to induce referrals and the party that accepts the remuneration. Both parties to a prohibited arrangement are candidates for prosecution if the items or services involved are reimbursed by a federal health care program. If a home care agency has an arrangement with an AL facility, care should be taken to ensure no anti-kickback law violations exist and, if possible, the arrangement meets "safe-harbor" criteria set forth in federal regulations.

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Lease Arrangements and the Anti-kickback Laws

Frequently, a home care agency occupies space on the premises of an AL facility and does business out of that space. If an incentive for referrals is built into a lease arrangement (eg, the rental paid by the home care agency to the facility is in excess of fair market value), the enforcement authorities may scrutinize the arrangement to determine whether the excess amount was intended as a payment to the facility to induce it to refer residents to the home care agency in violation of the kickback prohibition. However, if the arrangement meets the following "safe-harbor" regulatory requirements for leases, the arrangement will be protected[17]:

- The lease agreement is set out in writing and signed by the parties.
- The lease covers all of the premises leased between the parties for the term of the lease and specifies the premises covered by the lease.
- If the lease is intended to provide the lessee with access to the premises for periodic intervals, rather than on a full-time basis for the term of the lease, the lease specifies exactly the schedule for such intervals, their precise length, and the exact rent for such intervals.
- The term of the lease is for not less than 1 year.
- The aggregate rental charge is set in advance, is consistent with fair market value in arms-length transactions, and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare, Medicaid, or other federal health care programs.
- The aggregate space rented does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental. The regulation states that the term *fair market* value means the value of the rental property for general commercial purposes, but shall not be adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property as a result of its proximity or convenience to sources of referrals or business otherwise generated for which payment may be made in whole or in part under Medicare, Medicaid, and all other Federal health care programs.[17]

When a home care agency occupies space in an AL facility but does not pay any rental amount, using the space free of charge, the arrangement could trigger government concerns if the agency is in a position to make referrals to the facility. The free rent could be viewed as remuneration from the facility given to the agency in return for referrals to the facility. Caution must be taken to analyze such a situation for potential kickback law violations.

Duplicate Payment for Services

Duplicate Medicaid payment for services in ACF and ALP settings is getting attention from the Department of Health and New York's new Office of Medicaid Inspec-

tor General. Both are focused on provider audits to determine if payments for the same services are being made to both an AL facility and a home care agency.

A Department of Health audit in such a case was challenged by the home care agency provider being audited. In First to Care Home Care, Inc.,[18] the Department determined the home care agency, a non-profit CHHA, received overpayments in the amount of $420,017 because the agency billed the Medicaid program for home health aide services to residents of an ACF located in Brooklyn that either duplicated or supplanted personal-care services that were required to be provided by the ACF. The Department took the position that the ACF was required by law to provide the services and payment the ACF received from its residents covered the cost of the services. The agency contended the services it provided were not being provided by the ACF because the aides were providing "total assistance" with personal care to the residents and not simply "some assistance," as these terms are defined in 18 N.Y.C.R.R. § 505.14(a)(2). After an administrative law judge found for the Department in an appeal made by the agency, the agency brought an Article 78 proceeding in the Appellate Division, First Department, to challenge the administrative law judge's (ALJ's) determination. The Appellate Division upheld the administrative determination, stating the ACF was statutorily obligated to provide the housekeeping and personal-care services the agency provided and billed for, and that the ALJ's determination the agency provided "some assistance" with personal care needs, and not "total assistance," was supported by the record in the administrative proceeding.[19]

When a home care agency occupies space in an AL facility but does not pay any rental amount, the arrangement could trigger government concerns.

Audits of a similar nature are likely to follow, if the Office of the Medicaid Inspector General's (OMIG's) Work Plan for 2008/2009[20] is any indication. The Work Plan, specifically referencing the First to Care Home Care, Inc. decision, states the OMIG will review billings of home care agencies for services to ACF residents.[20] The Work Plan notes "tens of millions of dollars" of home health services are being provided in ACFs and billed to the Medicaid program.[20] The OMIG also states in its Work Plan that it will review payments to home care agencies for personal-care services to determine whether the criteria set forth in 18 N.Y.C.R.R. § 505.14 have been met.[20] This audit initiative could very well include services home care agencies provide to ACF residents.

The OMIG's 2008/2009 Work Plan also highlights its intention to review Medicaid payments for services provided to ALP residents to determine if claims were improperly reimbursed for items included in the ALP's per diem rate.[20] As noted previously, the ALP Medicaid rate includes payment for a variety of services, as set forth in 10 N.Y.C.R.R. § 494.5(b). Services that are covered by the per diem rate but for which a home care agency bills are likely to result in overpayment determinations.

Conclusion

The combination of AL and home care services is likely to continue to develop as a means of providing elderly residents with the community-based supportive services they require as they age. Care must be taken to ensure that the relationships between home care agencies and AL providers do not overstep legal boundaries. ALC

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3. 18 N.Y.C.R.R. § 485.2(a).
4. 18 N.Y.C.R.R. §§ 487.4, 488.4.
5. Public Health Law § 4650.
6. 18 N.Y.C.R.R. Parts 485, 486, 487, and 488.
7. 10 N.Y.C.R.R. Part 1001.
8. Public Health Law § 4651.
9. Public Health Law § 4655.
10. Social Services Law § 461-l.
11. 18 N.Y.C.R.R. § 494.4.
12. 10 N.Y.C.R.R. § 494.5(b).
13. 42 U.S.C. § 1320a-7b(b).
14. 42 C.F.R. § 1001.952.
15. Social Services Law § 366-d.
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