

The Future of Long-Term Care: OIG 2017 Work Plan and New CMS Facility Rules

Kelly S. McIntosh
January 26, 2017

HOLLAND & HART 

Written Materials

- **Copy of slides**
- **OIG 2017 Work Plan**
- **Reform of Requirements for Long-Term Care Facilities Final Rule**
- **CMS Survey Group 2016/2017 Nursing Home Action Plan**

HOLLAND & HART 

Preliminaries

- Presentation will be recorded and available for download at www.hhhealthlawblog.com
- If you have questions, please submit them using chat line or e-mail me at ksmcintosh@hollandhart.com
- If you experience technical problems during the program, please contact Luke Kelly at lskelly@hollandhart.com

HOLLAND&HART 

Preliminaries

- This program offers an overview of legal issues and considerations
- Always review applicable law
 - Different application of law/process may be necessary based on type of facility, type of practitioner, your governing documents and contracts
- This program does not establish an attorney-client relationship
- This program does not constitute the giving of legal advice

HOLLAND&HART 

OIG Work Plan

Each year the OIG issues a work plan with the “new and ongoing reviews and activities that the OIG plans to pursue with respect to HHS programs and operations during the current fiscal year and beyond.”



HOLLAND&HART 

2017 OIG Work Plan

- *Nursing Home Compliant Investigation Data Brief*
 - New focus
 - OIG will review and determine to what extent State agencies investigate the most serious nursing home complaints within required timeframes
 - Timeframes: 2-days (immediate jeopardy); 10-days (actual harm)
- *Skilled Nursing Facilities- Unreported Incidents of Potential Abuse and Neglect*
 - New focus
 - OIG will assess the incidence of abuse and neglect of Medicare beneficiaries receiving treatment in SNFs and determine if reporting was done in compliance with State and Federal requirements. OIG will also examine if events were investigated and, if appropriate, prosecuted on the State level

HOLLAND&HART 

2017 OIG Work Plan

- *Skilled Nursing Facility Reimbursement*
 - New focus
 - OIG will review selected SNFs documentation to determine if it meets the requirements for each particular resource utilization group and properly using the Minimum Data Set.
- *Skilled Nursing Facility Adverse Event Screening Tool*
 - New focus
 - OIG previously released an adverse event trigger tool, the new tool in development will focus on dissemination of practical information about that tool.

HOLLAND&HART 

2017 OIG Work Plan

- *National Background Checks for Long-Term Employees-Mandatory Review*
 - Revised
 - OIG will determine the outcomes of States background check programs and if they resulted in any unintended consequences.
- *Skilled Nursing Facility Prospective Payment System Requirements*
 - OIG will review compliance with the SNF prospective payment system requirement related to a 3-day qualifying inpatient stay.
- *Potentially Avoidable Hospitalizations of Medicare and Medicaid Eligible Nursing Facility Residents*
 - OIG will review nursing homes with high rates of patient transfers to hospitals for potentially preventable conditions

HOLLAND&HART 

CMS Final Rule

The Final Rule is “targeted at reducing unnecessary hospital readmissions and infections, improving the quality of care, and strengthening safety measures for residents in these [long-term care] facilities.”



HOLLAND&HART 

CMS Final Rule

- Published in the Federal Register on October 4, 2016
- First comprehensive change to the CoP for LTCs since 1991

- Regulations effective November 28, 2016 but implementation can occur in phases
- Phase 1 – by November 28, 2016
- Phase 2 – by November 28, 2017
- Phase 3 – by November 28, 2018

HOLLAND&HART 

CMS Final Rule

- **Strengthening the rights of long-term care facility residents**
 - Prohibiting the use of pre-dispute binding arbitration agreements (more on this later)
- **Ensuring that long-term care facility staff members are properly trained on caring for residents with dementia and in preventing elder abuse**
- **Ensuring that long-term care facilities take into consideration the health of residents when making decisions on the kinds and levels of staffing a facility needs to properly take care of its residents**
- **Ensuring that staff members have the right skill sets and competencies to provide person-centered care to residents**
 - The care plans developed for residents will take into consideration their goals of care and preferences

HOLLAND&HART 

CMS Final Rule

- **Improving care planning, including discharge planning for all residents with involvement of the facility's interdisciplinary team and consideration of the caregiver's capacity, giving residents information they need for follow-up after discharge, and ensuring that instructions are transmitted to any receiving facilities or services**
- **Allowing dietitians and therapy providers the authority to write orders in their areas of expertise when a physician delegates the responsibility and state licensing laws allow**
- **Updating the long-term care facility's infection prevention and control program, including requiring an infection prevention and control officer and an antibiotic stewardship program that includes antibiotic use protocols and a system to monitor antibiotic use**

HOLLAND&HART 

CMS Final Rule

- **Care plans and care planning**
 - Emphasis on person-centered care
 - Develop and implement baseline care plan within 48 hours of admission
 - Discharge planning
 - Expansion of interdisciplinary team for care planning
- **Resident Rights**
 - No waivers of liability for losses of personal property
 - Prohibition on denture loss or damage when facility responsibility
 - Ensure discharge includes sufficient information and documentation
 - Assist with application for dental reimbursement
 - No pre-dispute arbitration agreements (more later – enjoined)

HOLLAND&HART 

CMS Final Rule

- **Assessments, Training and Physical Environment**
 - Phase 1 – facility-wide assessment
 - New requirements for facilities constructed, reconstructed or newly certified
 - Additional training for all facility employees
- **Compliance and Quality Measures**
 - Ensuring professional standards and meeting care plans
 - New elements to compliance plans
 - Infection Prevention and Control Program (IPCP)
 - Quality Assurance and Performance Improvement (QAPI) program

HOLLAND&HART 

CMS Final Rule

- Facility Services
 - Delegation of dietary orders
 - Competency requirement
 - Pharmacist regulations on psychotropic drugs
 - Dietary requirements
 - Behavioral health

HOLLAND&HART 

Pre-Dispute Arbitration Ban

- Facilities have historically favored agreements to arbitrate
 - Final and binding arbitrator decision
 - More efficient
 - Less costly



HOLLAND&HART 

Pre-Dispute Arbitration Ban

- **Federal Arbitration Act (FAA)**
 - 9 USC 1 *et seq.*
 - Agreements to arbitrate presumptively enforceable
 - Case law (including Supreme Court) found state laws prohibiting nursing home arbitration clauses contrary to the FAA

Pre-Dispute Arbitration Ban

- **Final Rule**
 - Prohibits facility from entering into or requiring any arbitration agreement as condition of admission
 - Only prospective
 - Only if the facility serves Medicare/Medicaid beneficiaries
 - Post-dispute arbitration agreements still ok with conditions

Pre-Dispute Arbitration Ban

- **Injunction**

- American Health Care Association (ACHA) and other plaintiffs filed suit challenging ban
- Sought declaratory and injunctive relief until the court can consider the merits
- Injunction issued on November 7, 2016
- Oral arguments expected in July 2017

HOLLAND&HART 

Pre-Dispute Arbitration Ban

- **Injunction**

- CMS issued a memo on December 9, 2016 that it will not enforce ban
- CMS filed Notice of Appeal on January 5, 2017

HOLLAND&HART 

Additional Holland & Hart Resources

- *Healthcare Update and Health Law Blog*
 - Under “Publications” at www.hollandhart.com.
 - www.hhhealthlawblog.com
 - E-mail me at ksmcintosh@hollandhart.com
- Future Webinars

HOLLAND&HART 

Questions?

Kelly S. McIntosh
Holland & Hart LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
(775) 327-3004
ksmcintosh@hollandhart.com

HOLLAND&HART 