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INFORMATION MEMO
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Eye on Nursing Homes: Responding to Leaves and Discharges during COVID-19

Due to the COVID-19 health crisis, many nursing homes are seeing increased requests from residents and family for therapeutic leaves and resident-initiated discharges. This is a refresher on the importance of following applicable regulations and guidance in conjunction with all such leaves and discharges. Although there have been certain waivers of regulatory standards for hospital transfers and related admissions, the rules on leaves and resident-initiated discharges have not been changed.

Leaves of absences are not the same as a "discharge". As such, this refresher will outline discharge issues first and then outline the requirements for leaves of absence, followed by common concerns regarding leaves/discharges which may be against medical advice. Also, there are no COVID-19 waivers with regard to obtaining appropriate consent by competent residents and the need to ensure that representatives are legally authorized to make decisions on the resident's behalf, such as health care agents, surrogates or guardians.

Formal Discharge from the Facility

Federal regulations and guidance from the Centers for Medicare & Medicaid Services (CMS) distinguish between two types of discharges, namely "resident-initiated" discharges and "facility-initiated" discharges. A facility-initiated discharge is one that the resident "objects to, did not originate through a resident's verbal or written request, and/or is not in alignment with the resident's stated goals for care and preferences." (CMS State Operations Manual, Appendix PP, F622 (2017)).

On the other hand, a resident-initiated discharge is where a resident with capacity – or a duly appointed representative who has the authority to make health care decisions for a resident who lacks capacity – has provided verbal or written notice of intent to permanently leave the facility. Note that this does not arise where there is only a "general expression of a desire to return home" or where a resident with cognitive impairments has eloped from the facility. (See, CMS State Operations Manual, Appendix PP, F622 (2017)).

There are significant differences in the protocols that should be followed depending on whether the discharge is facility-initiated or resident-initiated. Primarily, where there is a facility-initiated discharge, substantial due process rights apply, including prior notice, reasons for discharge, and, potentially, on-site hearings. The facility must provide a discharge summary in accordance with 42 C.F.R. § 483.21(c)(2) and the resident must be discharged to a safe setting. Among other things, this requires that an appropriate "post-discharge" plan be created and provided to the resident. Residents, representatives, and facilities should be mindful of this whenever a discharge is contemplated, in order to make sure that the resident's discharge is safe and appropriate.

For resident-initiated discharge, due process rights are not needed since there is no adverse determination (in other words, discharge is done on consent of the resident). However, this does not mean that there are no obligations with regard to the discharge. Primarily, facilities must ensure that a post-discharge summary is provided to the resident and family. The medical record should contain documentation or evidence of the resident's or representative's verbal or written notice of intent to leave the facility, a discharge care plan and documented discussions with the resident or resident representative (as appropriate), containing details of discharge planning, and arrangements for post-discharge care. If the resident-initiated discharge is against medical advice, there must be informed consent which ensures that the resident and authorized representative understand the risks of going to a lower level of care at home or in the community. This must be documented.

Therapeutic/Temporary Leave of Absence

Federal regulations encourage residents to take therapeutic leave, which the SOM defines only as an "absence for purposes other than required hospitalization." A therapeutic leave of absence must be: (1) consistent with the resident's goals for care; (2) assessed

by the comprehensive assessment; and (3) incorporated into the comprehensive care plan. CMS State Operations Manual, Appendix PP, F625 (2017). Under New York regulations, a therapeutic leave is a leave of absence. "A recipient is on leave of absence when he or she is absent from the medical institution overnight to visit friends or relatives or to participate in a medically acceptable therapeutic or rehabilitative plan of care." (18 NYCRR § 505.9(d)(7)(i)). The term "medically acceptable" indicates that the leave is referenced in the plan of care.

State and federal regulations do not specify an exact limit on the duration of the leave (except perhaps for certain reimbursement purposes). Nevertheless, residents who take a therapeutic leave must be allowed to return to the facility for care and treatment, unless an appropriate resident-initiated discharge or facility-initiated discharge occurs while the resident is on therapeutic leave.

Leaving Against Medical Advice

Residents or their authorized representative may decide at any time that they wish to leave the facility. This is especially true during the current COVID-19 crisis. However, the analysis and the process for the leave or resident-initiated discharge remain the same. The same discharge assessment for safe placement must be done and the resident and/or the representative must be fully apprised of the resident's condition and needs when away from the facility.

Of special note are instances where the facility determines that the residents' proposed leave or discharge is not appropriate. For example, there may be times when, in assessing the resident's needs and developing a proper discharge/leave plan, it is determined that the resident-requested discharge or leave is contraindicated or unsafe in terms of the resident's condition and healthcare needs. In such cases, the facility must document their efforts at explaining that the discharge or leave is "against medical advice" (or AMA) and obtained what essentially would be informed consent.

Where the resident and/or representative indicates that the resident is taking a leave of absence for an indeterminate time (which includes many COVID-19 requested leaves) the process can become more complex. Depending on the resident's medical condition, arrangements should be encouraged for care at home and promoting contact with facility on a regular basis during the leave. This can be covered in a consent acknowledgment signed at the time of leave or any resident-initiated discharge that is AMA. And, while the length of the leave may be unknown, there should be a discussion of what subsequent facts or circumstances may result in a facility-initiated discharge.

In such situations it is important to consider a facility's obligations in providing a bed if and when the resident may decide to return. It should be noted there are a number of factors to consider: the resident's right, if any, to priority placement; assessment as to whether the resident requires the services provided by the facility at the time of return (dependent on length of time safely cared for in the community); eligibility for Medicare skilled nursing facility or Medicaid nursing facility services; and the need for testing or quarantine upon return to the facility.

Again, these AMA discharges/leaves give rise to a number of legal considerations, many of which are fact-specific and depend on the circumstances of the resident and the nature of the departure.

For more information on these and related issues impacting nursing homes, please contact Mark Mainello, John Darling, any of the attorneys in our Long Term Care practice, or the attorney in the firm with whom you are regularly in contact.

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