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Long-Term Care Newsletter

Nebraska Implementing QIS Process by Kevin McManaman

In the last issue of this newsletter, we discussed the Nebraska Department of Health and Human Services developing a paperless survey system. Well, on a somewhat related matter, Nebraska is moving toward implementing the QIS (Quality Indicator Survey) process. Nebraska is part of the second group of states CMS is doing this with, along with Colorado and New York. Nebraska will begin implementing the QIS process beginning August 2010.

Compared to the current, traditional surveying system, which has information documented on paper throughout the process, each CMS team member will use a tablet PC to document findings.

These findings will then be electronically synthesized, organized, and loaded to the CMS. When doing onsite preparation, QIS team members will analyze alphabetical resident censuses with room numbers and units in addition to a list of new admissions over the last thirty days. There will also be substantial changes to onsite preparation, the initial tour process, sample selection, and to various other aspects of the survey process.

QIS surveys will involve two stages. Each stage will involve three steps. Step one will be "computer generated sampling". Step two will be "investigation". Step three will be "synthesis". The first stage involves a preliminary investigation of regulatory areas

and stage two involves an in-depth investigation into deficiencies identified during stage one.

The system will be implemented in phases across the state, using "teams" to do one area of the state at a time. This will take two to two and a half years to implement fully. Because this process will be more objective, driven by MDS data, and feature larger sample sizes, it will likely result in a higher rate of deficiencies in places of any "FYI" comments surveyors presently give.

More information regarding the QIS process may be found at the Nebraska Department of Health and Human Services website: <http://www.dhhs.ne.gov/crl/lrc/certification.htm>.

New Reporting Requirements Now Include Independent Contractors by Kevin R. McManaman

Nebraska employers should now perform new hire reporting when hiring independent contractors. Effective January 1, 2010, the definition of "employee" under the Nebraska New Hire Reporting Act, for the first time, expressly includes "independent contractors." Nebraska law now requires all employers to report any newly hired or rehired employees and independent contractors. Reporting includes listing the employee or independent contractor's name, address, social security number, and date of hire or rehire. The report must be made within 20 days of the date of hire or rehire. This is required regardless of how little money is involved because there is no *de minimis* standard like the \$600 threshold for 1099-MISC. Also, independent contractors who are paid after January 1, 2010, need to be reported, re-

gardless of how long the employer has done business with the contractor in the past.

For reasons unknown, the Nebraska amendment adding "independent contractor" to the definition of "employee" did not include a definition of the term "independent contractor" itself. Other states have expressly adopted such a definition. Nebraska's website, www.nenewhire.com, describes an independent contractor using the definition used by other states as "an individual who provides goods or services to an employer under terms specified in a contract or within a verbal agreement for compensation that is reported as income other than wages and who is an individual, the sole shareholder of a corporation, or the sole member of a limited liability company." However, *Nebraska did*

not adopt that language in its statute and there are no current regulations addressing this oversight. Therefore, the language of the law requires broad reporting, and employers must report hiring or rehiring any contractor providing goods or services for compensation since nothing in the law expressly limits the definition of independent contractor to individuals, sole proprietors, or single member corporations or LLC's.

Submitting a copy of an employee's W-4 form with a notation of the date of hire or rehire, is typically sufficient for the requirements of this Act. However, employers may now want to use the new federal Form W-9 which has been revised to now require such independent contractor service providers to list their first and last names, and FEIN or SSN.

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Reporting Requirements
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Importantly, employers need to submit their reports using the social security number of self-employed individuals, even if they operate with a company having an FEIN. Therefore, while employers should ask independent contractors to complete the new Form W-9, if the individual's social security number is still not known after reviewing the W-9, the employer should ask the independent contractor for it. If refused, the employer is probably better off declining to hire the independent contractor. Employers are advised to seek advice from their attorney on how to proceed given the myriad of unanswered questions arising from this amendment.

Smoking Policies Should Be Followed
By Kevin R. McManaman

A Texas skilled nursing facility recently was sued for failing to follow its own rules on smoking, or to assess ability to follow established guidelines. In that case, the facility's policies reportedly prohibited the resident's roommate from having a lighter inside the nursing home which the roommate allegedly used to start a fire, causing third-degree burns and eventual death. The allegations were that the Defendant nursing home knew or should have known that failure to

monitor and assess the roommate's adherence to smoking policies posed a serious threat to disabled residents. Facilities should periodically review their smoking policies, and assure that they are being followed. Additionally, the allegations in this case indicate that a specific assessment about a resident's ability to comply with those policies and restrictions may be necessary, or else liability may result.

Other Than Medical Records, What Should a Facility Keep? By Jeanelle R. Lust

Nebraska law requires facilities to keep various records in addition to medical records. Under Title 175 Chapter 12-006.16E of the Administrative Code, facilities must "...maintain records pertaining to resident personal funds accounts as applicable, financial matters, resident possessions, and statements of resident rights and responsibilities." In addition, facilities must inventory resident possessions at the time of admission, update as necessary, and account for all possessions upon discharge. Facilities must also maintain chronological resident registers. If kept on computers, registers must be reproducible and safeguarded from destruction. Registers must include:

1. Name of resident;
2. Date of admission;
3. Date of birth;
4. Social Security number;
5. Admission number;
6. Gender;
7. Names of medical practitioner and dentist; and
8. Date of discharge and destination.

Finally, facilities must maintain various additional records. These records include:

1. Daily Census Record: A

count of residents must be taken at the same hour each day, and must be noted and totaled at the end of 365 days. The total represents the number of "individual care days for the past 12 months."

2. Written policies and procedures that govern all services provided by the facility. Policies and procedures must address the following areas but are not limited to:
 - a. Admission of residents to facility which ensure that only individuals whose needs can be met by the facility or by providers of care under contract to the facility are admitted;
 - b. Transfer and discharge;
 - c. Methods the facility uses to receive complaints and recommendations from its residents and ensuring facility response;
 - d. Clinical record protection;
 - e. Care and services provided by facility staff and contracted services; and
 - f. All areas identified in 175 NAC 12-006.10 (Administration of Medicine), and 12-006.12 (Pharmacotherapy Services).
3. Written Disaster Plan.
4. Records of each orientation and in-service or other training program, including names of staff

attending, subject matter of the training, names and qualifications of instructors, dates of training, length of training sessions and any written materials provided.

5. Current employment records for each staff person. Information kept in the record must include information on the length of service; orientation; in-service; licensure, certification, registration, or other credentials; performance; health history screening; and previous work experience.
6. Contracts with outside resources to furnish required facility services not provided directly by the facility.
7. Records regarding operation and maintenance of the facility.

There are several additional rules which contain record-keeping requirements for nursing facilities in the state of Nebraska. "A facility must complete and maintain documentation of pre-employment criminal background and registry checks on each unlicensed direct care staff member." "A facility must assign overall supervisory re-

sponsibility for the medical record service to a full-time employee of the facility, and must maintain sufficient supporting personnel competent to carry out the functions of the medical record services" and "[a] facility must inform residents of their rights in writing." In addition, "[a] facility must conduct initially and periodically a comprehensive, accurate, and reproducible assessment of each resident's functional capacity to identify the resident's abilities and needs." Finally, each resident must have an individual medication administration record, which must include:

1. The name of the facility;
2. The name of the resident;
3. The room and bed number of the resident;
4. Resident identification number;
5. The name of the medication prescribed;
6. The strength of the individual dose;
7. Directions for administration of the medication;
8. Name of physician; and
9. Drug allergies and sensitivities.

PPACA, Subtitle B and Who Must Now be Disclosed
By Tammy Schroeder

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act. The Act contains ten titles and Title VI, "Transparency and Program Integrity" contains provisions that are similar to legislation that Senators Chuck Grassley (R-IA) and Herb Kohl (D-WI) have been trying to get passed for a couple of years now. Subtitle B looks to improve the transparency of and access to nursing home information in order to improve nursing home accountability. The following will identify what disclosures are to be made under Subtitle B as well as some definitions for certain terms used. The transparency provisions of the PPACA requires facilities to report information to the Secretary of the Department of Health and Human Services (HHS), the HHS Inspector General, the facility's state and in some instances, the state's ombudsman. There are 4 things the facility is required to

report: 1) the identity of each member of the governing body; 2) each officer, director, member, partner, trustee or managing employee; 3) each additional disclosable party; and 4) the organizational structure of each additional disclosable party to the facility and the relationship of each to one another. So what does "additional disclosable party" mean? Additional disclosable party includes any entity that "a) exercises operational, financial, or managerial control over a facility or part of a facility, or provides policies and procedures or financial and cash management services for its operations; b) leases or subleases property to the facility, or owns a whole or part interest of at least 5% of the value of the property (including a mortgage, deed, note or other obligation that is secured by the entity or any of the property or assets); or c) provides management or administrative services, management or clinical consulting services, or accounting or financial services." (PPACA §6101(a)(5)(A)(i)-(iii) Under this definition, a nursing facility is

required to disclose a wide variety of third parties, especially consultants and advisors which would include accountants, payroll services and bookkeeping companies. Subtitle B defines "organizational structure" as a) a corporation and its officers, directors and shareholders who have at least a 5% ownership interest; b) a limited liability company and its members and managers, including their percentage of ownership interest; c) a general partnership and its partners; d) a limited partnership and partners with at least a 10% ownership interest; e) a trust and the trustee of said trust; f) an individual and that individual's contact information; and g) any other person or entity that the HHS requires. (PPACA §6101(a)(5)(D)(i)-(vii) (2010). Within a year of the final regulations being published in the Federal Register, the HHS Secretary must make this information available to the public.



Accountability and other Requirements Under PPACA, Subtitle B By Tammy Schroeder

One of the main purposes behind Senators Grassley's and Kohl's push for the Nursing Home Transparency and Improvement requirements in Subtitle B of the PPACA is to hold accountable not only the nursing home but its owners, operators and any other individuals or entities considered an "additional disclosable party" and making them vulnerable to litigation. One of the results of this could be that parties who have no ability to monitor or control what goes on in a facility being held liable in lawsuits. The PPACA will require organizations who own 5 or more facilities to have a formal compliance and ethics program along with written policies and procedures that all employees are to follow. HHS will have to have established standards for quality assurance and

performance improvement of nursing homes published by December 31, 2011, and then a year after that, nursing homes must turn in to the HHS their own plans for meeting those requirements. Under PPACA, the Nursing Home Compare website will be required to have data regarding staffing, links to state inspection reports, a standardized complaint form and information regarding a facility's complaints and violations. The staffing data must include easy to understand explanations of what everything means and how to read the data. Disclosure of adjudicated criminal violations is required as well. The Nursing Home Compare website will now have to include a consumer rights page which gives publicly available information regarding nursing facilities, tips on

choosing a facility, information on consumer rights, the survey process and services provided by the state's ombudsman. Facilities will be required to report how much is spent on wages and benefits to direct care staff and will need to be broken down into RN's, LPN's, CNA's and other medical and therapy staff. HHS then will categorize the amounts into money spent on direct care, indirect care, administrative services and capital assets. Another provision of the PPACA will be that facilities must submit to HHS their direct care staffing information. This information will have to indicate the type of work a certified employee does, include resident census and resident case mix data, have regular report schedule and provide employee turnover, tenure and hours of care.

