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Involuntary Discharge: Rules, Regulations, and Strategy

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Overview

- Federal and State Regulatory Requirements
- Involuntary Discharge Appeals and Appeal Process
- Best Practice Tips & Scenarios

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Preface

- This presentation is meant to provide an overview of some key issues related to involuntary discharges and provide tips for handling these difficult situations.
- This presentation is for educational purposes only. It does not constitute legal advice, and it is not intended to take the place of legal advice.
- When involuntary discharge situations arise, it is best to consult an attorney with expertise in this area prior to effectuating the discharge.

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Regulatory Requirements

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Circumstances Permitting Discharge

- Generally, facilities, including assisted living facilities, must permit residents to remain in the facility and may not transfer or discharge residents from the facility (without their consent) unless:
 - The resident's welfare and the resident's needs cannot be met in the facility (inability to meet needs);
 - The resident's health has improved sufficiently so the resident no longer needs the services by the facility;
 - The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident (unsafe environment);
 - The health of individuals in the facility would otherwise be endangered;
 - The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility;
 - The facility ceases to operate.
- See 42 C.F.R. § 483.15(c)(1)(i)(A)-(F); § 19 C.S.R. 30-82.050(2)

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Circumstances Permitting Discharge Continued...

RSMo. § 198.088.2

- (2) Policies relating to admission, transfer, and discharge of residents shall assure that:
 - (a) Only those persons are accepted whose needs can be met by the facility directly or in cooperation with community resources or other providers of care with which it is affiliated or has contracts;
 - (b) As changes occur in their physical or mental condition, necessitating service or care which cannot be adequately provided by the facility, residents are transferred promptly to hospitals, skilled nursing facilities, or other appropriate facilities; and

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Notice Requirements

- **Prior to** a transfer or discharge, a facility must provide notice to the resident and the resident's representative(s) of the transfer or discharge and the reasons for it in writing and in a language and manner that they understand.
- The facility must also send a copy of the notice to the Ombudsman.

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Notice Requirements Continued...

- The notice must include:
 - The reason for transfer or discharge;
 - The effective date of the proposed transfer or discharged;
 - The location to which the facility proposes to transfer or discharge the resident;
 - The resident's right to a hearing to contest the transfer or discharge within thirty days of receipt and the procedure to do so;
 - That a request for a hearing should be sent to Department of Health and Senior Services Appeals Unit, P.O. Box 570, 912 Wildwood Drive 3rd floor, Jefferson City, Missouri 65102-0570, by fax to (573) 751-0247, or by email to DHSS.Appeals@health.mo.gov, and the phone number for the appeals unit is (573) 522-1699;
 - That filing an appeal will allow the resident to remain in the facility until the hearing is held unless a hearing officer finds otherwise;
 - The contact information for the Ombudsman; and
 - For residents who are mentally ill or developmentally disabled, the contact information for the Missouri Protection and Advocacy Agency (925 S. Country Club Dr. #2, Jefferson City, MO 65109; (573) 893-3333)

See 42 C.F.R. § 483.15(c)(3); § 19 C.S.R. 30-82.050(4)

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Notice Requirements Continued...

- Generally, a facility must give at least 30 days' notice before a transfer or discharge.
- A facility, including assisted living facilities, may give less than 30 days' notice, but must give notice as soon as practicable, when:
 - The safety of individuals in the facility is endangered;
 - The health of individuals in the facility is endangered;
 - The resident's health improves sufficiently to allow a more immediate transfer or discharge;
 - An immediate transfer or discharge is required by the resident's urgent medical needs; or
 - A resident has not resided in the facility for 30 days
- See 42 C.F.R. § 483.15(c)(4); § 19 C.S.R. 30-82.050(5)

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Documentation Requirements

- Facilities must document the transfer or discharge in the medical record prior to the discharge and communicate appropriate information to the receiving provider.
- Documentation in the Medical Record relating to the transfer/discharge:
 - The documentation must include the applicable basis for the transfer or discharge.
 - When applicable, the documentation must include the specific resident need(s) that cannot be met, facility attempts to meet the resident's need(s), and the service(s) available at the receiving facility to meet the need(s).
 - When the discharge is due to an inability to meet the resident's needs or due to resident improvement, the *resident's physician* must document.
 - When the discharge is due to an unsafe environment, *a physician* must document.
- See 42 C.F.R. § 483.15(c)(2); § 19 C.S.R. 30-82.050(3)-(4)
- Note: assisted living facilities are not required to have physician documentation in cases where the *safety* of other residents is endangered, but are when the *health* of other residents is endangered.
- The Facility Administrator or the Facility Director of Nursing must document in all cases.

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Documentation Requirements, Cont'd...

- Information from skilled nursing facilities provided to receiving provider must include at least:
 - Contact information of the practitioner responsible for the care of the resident;
 - Resident representative information, including contact information;
 - Advance Directive information;
 - All special instructions or precautions for ongoing care, as appropriate;
 - Comprehensive care plan goals;
 - All other necessary information, including a copy of the resident's discharge summary, and other documentation to ensure a safe and effective transition of care.
- See 42 C.F.R. § 483.15(c)(2)

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Safe, Effective, Orderly Discharges

- Skilled Nursing Facility Requirements:
- A facility must ensure that documentation for the discharge contains the information necessary, including a copy of the resident's discharge summary, to ensure a safe and effective transition of care.
- The discharge summary must include, but is not limited to, a recap of the resident's stay, a final summary of the resident's status, reconciliation of all medications, a post-discharge plan of care, which must indicate where the individual plans to resident, any arrangements that have been made for follow-up care, and any post-discharge services.
- The facility must communicate appropriate information to the receiving health care provider.
- A facility must provide and document sufficient preparation and orientation to residents to ensure *safe and orderly transfer or discharge* from the facility.
- 42 C.F.R. § 483.15(c), § 483.21(c)

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Notes from Regulatory Guidance for skilled nursing facilities

- Facilities are required to determine their capacity and capability to care for the residents they admit. Therefore, facilities should not admit residents whose needs they cannot meet based on the facility assessment.
- Resident transfers to an acute care setting are considered facility-initiated transfers, NOT discharges, because the resident's return is generally expected.
 - In a situation where the facility initiates discharge while the resident is in the hospital following emergency transfer, the facility must have evidence that the resident's status at the time the resident **seeks to return to the facility** (not at the time the resident was transferred for acute care) meets one of the allowed criteria.
- It is the responsibility of the facility to notify the resident of changes in payment status, and the facility should ensure the resident has the necessary assistance to submit any third-party paperwork (if paperwork has been submitted and a decision is pending, that is not considered nonpayment status).
- CMS, SOM, Appendix PP (F622); available at: <https://www.cms.gov/files/document/appendix-pp-guidance-surveyor-long-term-care-facilities.pdf>

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F-Tags and A-Tags

- F622 - Transfers & discharges
- F623 - Notice before transfer or discharge / A8015
- F624 - Orientation for transfer or discharge
- F625 - Bed-holds
- F626 - Permitting residents to return
- A8017 - Discharge appeal rights

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Appeals

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Right to Appeal

- The facility must assist the resident in completing any appeal forms and submitting the appeal hearing request.
- Facility may **not** transfer or discharge the resident while the appeal is pending, unless the failure to do so would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.
 - Note: State regulation requires the facility to file a 'Motion to Set Aside the Stay' to show good cause for discharging a resident prior to a hearing decision. Filing this may result in an earlier, separate, hearing.
- Note: the contact information for the Appeals Unit has changed!
 - The new contact information is: Department of Health and Senior Services Appeals Unit, P.O. Box 570, 912 Wildwood Drive 3rd floor, Jefferson City, Missouri 65102-0570, fax: (573) 751-0247, email: DHSS.Appeals@health.mo.gov, phone: (573) 522-1699
 - The appeal form can be obtained online here: <https://health.mo.gov/seniors/ombudsman/pdf/580-2639.pdf>
- See 42 C.F.R. § 483.15(c)(1), (5); § 19 C.S.R. 30-82.050(4), (8)

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Appeal Procedures

- Facilities owned by an entity registered with the Secretary of State (*e.g.*, an LLC) must be represented by an Attorney at the discharge hearing.
- The hearing notice is typically issued promptly after the appeal is filed with a hearing set ~ 30-60 days out. Continuances may be granted.
- Exhibits and witness lists are due *seven business days* in advance of the hearing.
 - Typically, at minimum, the Administrator, DON, and Social Worker should attend the hearing.
- A hearing on a Motion to Set Aside Stay *may be* consolidated with the discharge hearing.
- The burden of showing that the facility has complied with all requirements for appropriate discharge of the resident is on the facility.
- Decision times vary. The facility cannot discharge the resident without the written decision (unless the resident consents).
- See § 19 C.S.R. 30-82.050

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Appeals of Decision & Enforcement

- The hearing officer's written decision can be appealed to circuit court under RSMo. § 536.110 within thirty days of the decision.
- Enforcement of the hearing officer's written decision:
 - Survey Deficiencies
 - Continued findings of non-compliance
 - Additional legal remedies may be available (*e.g.*, injunctive relief at circuit court)

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Best Practice Tips & Scenarios

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Best Practice Tips

- The Admission Decision – it is assumed by regulators that facilities can care for residents that they choose to admit.
- Document, Document, Document prior to the discharge!
 - Care Plan (should be revised to reflect resident changes and interventions)
 - Progress Notes (should detail resident behaviors **and attempts to address them**, should include basis for transfer/discharge by Administrator)
 - Physician Documentation (should be detailed and supportive of the discharge)
 - Physician Order (should be obtained prior to the discharge)
- Communications with Resident and Family
- Alternate Placement Efforts
- Consider the *best interests* of the Resident

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Scenario #1

A resident with a mental illness demonstrates unsafe behaviors at the facility (destruction of property, assaulting staff, threatening other residents); interventions aimed at stopping the behaviors have failed; alternative placement has not been found despite multiple referrals.

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Scenario #2

A resident with dementia resides in the facility's memory care unit. In the last several months, the resident's behaviors have worsened. He/She wanders in and out of other residents' rooms, which upsets them. At times, he/she is sexually inappropriate (*e.g.*, attempts to hold hands or kiss other residents without their consent, thinking at the time that the other residents are his/her spouse). His/her family frequently complains about the facility and threatens to sue, but also say that they do not want the resident moved to another facility and they have not consented to the facility sending out referrals.

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Questions???
Thank You!



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