

# PUBLICATION

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## What Will Surveyors Look for on Their Next Visit to Your Nursing Home? What You Need to Know

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Last month, Lewis Morris, Chief Counsel to the Inspector General, testified before a subcommittee of the U.S. House of Representatives on the topic: “In the Hands of Strangers: Are Nursing Home Safeguards Working?” We can learn valuable lessons about what the OIG will be focusing on in the upcoming year from this testimony. Here are some key issues for which your nursing home should keep a lookout.

### **Nursing Home Screening of Employees**

Chief Counsel Morris found that nursing homes currently depend on a patchwork of data sources to identify persons posing possible threats of elder abuse in nursing homes. All nursing homes should screen their staff and prospective staff against the OIG's List of Excluded Individuals and Entities. Screening staff against the LEIE helps ensure that a nursing home does not employ an excluded person and that it does not bill federal health care programs for any excluded persons' work. Additionally, Morris advised that nursing facilities should screen prospective nurse aides and other non-licensed care staff through the use of state nurse aide registries. Federal regulations prohibit facilities from employing individuals who have been found guilty of certain offenses or who have had findings entered into the registry for abuse, neglect or mistreatment of residents or misappropriation of their property. Each state is required to establish and maintain a registry of nurse aides and should include this information.

In a July 2005 report, the OIG found that although most facilities check their nurse aide registries prior to employing an individual, they do not routinely check the registries in other states, thereby potentially jeopardizing the safety of their residents. Additionally, while most states require criminal background checks, the scope of these checks varies widely. Although some of the nursing facilities sampled conducted more comprehensive checks than required by their state laws, about half of the background checks performed were too limited in scope, for example, limited to one state. To reduce the potential risk, the OIG has recommended that the Centers for Medicare & Medicaid Services seek legislative authority to create a national nurse aide registry and to consider developing a federal requirement for comprehensive criminal background checks.

**Lesson Learned:** We can expect the Feds to place more focused scrutiny on criminal background checks and to perhaps expand national requirements. Therefore, take a look at your internal background checks and ask how you can make them better.

### **Prosecuting Providers of Substandard Care**

In 2007 alone, the OIG worked 534 cases jointly with state Medicaid fraud control units to prosecute nursing homes on criminal and civil fraud theories alleging that (1) medically unnecessary services were provided and (2) improper care was given. During 2007, OIG settled cases of two nursing home chains resulting in quality of care Corporate Integrity Agreements covering all of the facilities within those chains. One case resulted in a \$1.25 million settlement and the other case resulted in a \$2.5 million settlement. In yet a third prosecution, the corporate defendants were convicted and fined and entered into a false claims act settlement of \$1.2 million where the primary owner was convicted of a false statement misdemeanor offense and sentenced to two

months incarceration. Additionally, the CEO was sentenced to 18 months of incarceration. Most disturbing, in 2002, a Pennsylvania nursing home was ordered to pay a \$490,000 fine and the owner/operator was sentenced to five years in prison for falsifying medical records to conceal the nursing home deficiencies.

**Lesson Learned:** Poor surveys can lead to more than state and federal fines. They can also lead to civil and criminal prosecutions and imprisonment under the Federal False Claims Act.

### **Establishing Accountability/Corporate Structures**

Morris further testified that in investigating and resolving cases which are false claims cases, law enforcement officers often struggle to determine who in the organization's management should be held responsible for the poor care. The OIG identified a growing trend toward corporate restructuring. The techniques identified as being used included: (1) creating a holding corporation to own the entire chain of nursing homes; (2) creating limited liability companies to manage the operations of the individual home; (3) creating LLCs for the real estate holdings (the facility and the grounds), usually referred to as a Real Estate Investment Trust; and (4) creating an affiliated corporation to lease all the properties from the REITs and then sublease those properties to the facility's specific entity which operates the individual homes. The OIG encountered nursing home facilities that had as many as 17 LLCs that played a role in the operation of the facility. It is Chief Counsel Morris' opinion that such complex structures dilute accountability, greatly complicate law enforcement investigations, and delay implementation of essential corrective actions. The testimony did not include a provision as to what the OIG expected to do to solve this perceived problem.

**Lesson Learned:** Take a look at the corporate structure of your nursing home and ask whether it is unnecessarily complicated. In order to be defensible, it should be a logical and defensible structure correctly reflecting the individuals who actually operate the nursing home.

### **Encouraging Adoption of Voluntary Compliance Programs**

The OIG frequently provides guidance to health care providers regarding how to establish compliance programs. These suggestions are referred to as Compliance Program Guidances. The OIG originally published a CPG for nursing home facilities in 2000. Since that time, the OIG perceives that there have been significant changes in the way nursing homes deliver services and therefore in April 2008, OIG published draft Supplemental Compliance Program Guidance for nursing facilities. The OIG is currently soliciting public comments on this draft. The draft addresses major Medicare and Medicaid fraud and abuse risk areas, including quality of care, accurate claims submission, and kick-backs. The Supplemental CPG focuses particular attention on inadequate staffing, poor care plan development, inappropriate use of psychotropic medications, lack of proper medication management, and resident neglect and abuse.

**Lesson Learned:** Nursing homes should focus compliance efforts on the five topics the OIG has focused on in the Supplemental CPG and provide public comment on this draft.

Nursing homes should place increased scrutiny on these issues, since it is clear that the OIG will be placing increased scrutiny on them. Nursing homes provide a heroic and valuable service to our country and our communities. They deserve the best support possible from the federal government, both financially and otherwise.