

# The National Nursing Home Initiative in a COVID-19 World

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# Agenda

- Background on the Department of Justice's Nursing Home Enforcement Initiative
- Enforcement Tools
- Interplay with COVID-19
- Measures to Take Now to Avoid an Inquiry
- What to Do if the DOJ Does Come Knocking

# National Nursing Home Initiative

- Announced by Attorney General Barr on March 3, 2020 (though likely developed pre-COVID)
- Seeks to:
  - “Coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard care to their residents”
  - “Bring justice to those owners and operators who have profited at the expense of their residents”
- Currently focused on “some of the worst nursing homes around the country”
- Coordinated by the DOJ Elder Justice Initiative and U.S. Attorneys’ Offices
- Will also support enforcement efforts of state and local prosecutors, law enforcement, and other elder justice professionals
- As of March 3, approximately 30 nursing facilities in 9 states were already under investigation by the DOJ as part of the Initiative

# National Nursing Home Initiative

- Examples:
  - Failing to provide adequate nursing staff
  - Failing to adhere to basic protocols of hygiene and **infection control**
  - Failing to provide residents with enough food to eat
  - Withholding pain medication
  - Using physical or chemical restraints when not indicated

# Enforcement Tools

- Federal Enforcement Authorities
  - The False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733
  - The Anti-Kickback Statute (AKS), 42 U.S.C. § 1320a-7b(b)(2)(A)
  - The Health Care Fraud Statute, 18 U.S.C. § 1347
  - Mail and Wire Fraud, 18 U.S.C. §§ 1341, 1343
  - Nursing Home Reform Act and Medicare/Medicaid Conditions of Participation
- State Enforcement Authorities
  - Licensing requirements
  - State false claims act laws
  - State anti-kickback laws

# Enforcement Tools

- Pre-Initiative Enforcement of Substandard Care
  - Primarily driven by state regulators for violations of state licensing requirements
  - DOJ has not been successful prosecuting nursing homes for violations of the False Claims Act in recent years (possible reason for the Initiative?)
- Post-Initiative Enforcement of Substandard Care
  - Expect an increased use of federal enforcement authorities, particularly the FCA

# Enforcement Tools

- False Claims Act
  - A false claim is a claim for payment of services that were not provided specifically as presented, or for which the provider is otherwise not entitled to payment
  - A person who knowingly submits a false or fraudulent claim to the government, or makes a false statement to get such a claim approved, or knowingly conceals or avoids an obligation to pay money to the government is liable for both damages and penalties
  - Provider must have demonstrated knowledge, deliberate ignorance, or reckless disregard
    - Do not need proof of specific intent to defraud
  - Penalties:
    - \$11,463 to 23,331 for each false claim
    - Treble the amount of the government's damages
    - Possible criminal charges
    - Possible exclusion from federal healthcare programs (e.g., Medicare and Medicaid)
    - Potential charges under other federal laws (e.g., AKS, Health Care Fraud Statute, Mail and Wire Fraud)

# Enforcement Tools

- Examples of potential false claims related to substandard care:
  - Claims for services not provided
  - Claims for “worthless services”
  - Claims for higher level of service than was actually provided
  - Claims for services that were not medically necessary
  - Claims for services by unlicensed individuals



# Interplay with COVID-19

- “Failing to adhere to basic protocols of infection control”
- 42 C.F.R. § 483.80: “The facility must establish and maintain an infection prevention and control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of communicable diseases and infections.”
  - Includes new requirements to report certain COVID-19 data to HHS
- Numerous audits, investigations, inquiries initiated by federal and state regulators and legislators

# Measures to Take Now to Avoid an Inquiry

- “There is no user manual for this”
- Compliance does not go away during a pandemic
- Facility guidance from a distance
- What can you do to help the facility?
  - Clinical documentation review for missing links
  - Case management of resident care
  - Use telehealth when necessary and appropriate
- Encourage use of the hotline

# Measures to Take Now to Avoid an Inquiry

- Risk management is the key
- DOCUMENT, DOCUMENT, DOCUMENT
  - Be sure you can defend your facility by “telling the story”
  - Assess whether policies and procedures are up to date and appropriate in light of current guidance; update as needed
  - Provide updated training to staff on new and modified policies and procedures
  - Monitor guidance from CDC, FDA, CMS, state agencies, etc. that require new or modified policies and procedures (and save copies of all guidance)
  - Document facility actions and implementation plans
  - Keep logs on your efforts to procure and secure PPE
  - Conduct periodic risk assessments
  - Provide anonymous reporting hotline for whistleblowers
  - Investigate complaints regarding substandard care or conditions and promptly remediate
  - Save documentation to support government financial disbursements regarding the CARES Act, or any state-imposed financial assistance

# What to Do if the DOJ Does Come Knocking

- Take a deep breath and do not do anything impulsive or without thinking through the consequences
- Work with legal counsel to determine if you (and your facility) are a subject or target of an investigation
- Gather documents and data, preserve all relevant material, and then start to assess the situation
- Consider whether immediate action at the facility is necessary or beneficial
- Do not fire anyone immediately without managing the process appropriately
- Start an internal investigation (covered by privilege) to ascertain the scope of what DOJ is investigating and how best to defend against it
- Adhere to any contractual requirements regarding notification of an investigation or receipt of a subpoena
- Cooperate with the DOJ or other agencies when possible



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