

Department of Justice Launches National Nursing Home Initiative

May 08, 2020

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On March 3, Attorney General William Barr announced that the Department of Justice (DOJ) has launched a National Nursing Home Initiative (Initiative) to investigate and bring enforcement actions against nursing homes and skilled care professionals providing “grossly substandard care” to their residents.^[1] While DOJ likely conceived of the Initiative prior to the appearance of COVID-19, the Initiative has already moved to include investigations into circumstances where COVID-19 has had an outsized impact on a facility’s residents. Recent media reports on the devastation caused by COVID-19 in certain nursing homes and skilled care facilities virtually guarantee that the DOJ Initiative will investigate allegedly inadequate responses to COVID-19.

The Initiative will use civil and criminal enforcement tools to pursue nursing homes failing to provide proper medical care or maintaining unsanitary living conditions, or with other unsafe or grossly substandard practices. While the Initiative is initially focused on nursing homes around the country with some of the most egregious conditions (including investigations into approximately 30 individual nursing facilities), as well as those that have been particularly hard hit by the COVID-19 pandemic, we believe the Initiative will ultimately expand its scope to include facilities that are the subject of whistleblower complaints, media reports, and private lawsuits. In addition to the DOJ Initiative, owners and operators should be ready for COVID-19 preparedness inquiries and audits from the Department of Health and Human Services (HHS) and state regulators.

The Initiative’s Priorities

The Department has made clear that the Initiative is currently focused on pursuing the most problematic nursing facilities in the industry, especially those that put the health or safety of residents at risk. As Attorney General Barr stated, “Over the past few years, the Department has uncovered horrifying examples of certain nursing facilities, where seniors are being mistreated, undernourished, and neglected the Department has encountered nursing homes where the residents are literally being eaten away by scabies, where patients are left with bedsores down to the bone, where prescribed medication is not being provided, and patients are left screaming in pain for hours on end. We have found facilities unfit for living, plagued by filth, mold, insects, and rodents.”^[2]

The DOJ's National Nursing Home Initiative will be spearheaded by the Elder Justice Initiative (EJI). The DOJ formed the EJI in 2016 as a partnership with HHS, state attorneys general, and other local authorities to focus on elder abuse and financial fraud against seniors. Attorney General Barr made clear that the Initiative should not be taken as an indictment of the entire assisted-living industry, but rather as an effort to eliminate the "really bad apples" purporting to be in the business of providing housing and health care to seniors. He also issued a stern warning for operators that jeopardize the health of residents, saying, "Mark my words: The Initiative will bring to justice those owners and operators who put profits before patients."^[3]

Impact of COVID-19 on the DOJ Nursing Home Initiative

Nursing homes and assisted-living operators should expect the Initiative to focus resources on facilities with significant and uncontrolled outbreaks of COVID-19. Numerous state enforcement agencies have already begun to scrutinize how nursing homes prevent and contain outbreaks of the virus within their facilities. The DOJ has initiated at least one investigation into a nursing home, which may have taken insufficient measures to screen and isolate infected residents at its facility, resulting in numerous infections and fatalities. In addition to post-outbreak DOJ investigations, operators should be ready for COVID-19 preparedness inquiries and audits from HHS and state regulators. HHS has already added COVID-19 planning topics to its annual workplan.

Federal Enforcement Authority

Whistleblowers and Potential False Claims Act Liability

The involvement of federal enforcement authorities in the senior housing and skilled nursing industry has traditionally been limited to financial fraud against senior citizens and False Claims Act (FCA) violations linked to Medicaid and Medicare funds. State regulators and attorneys general have typically been left to investigate and prosecute issues related to the conditions of facilities and quality of care provided. The FCA, however, has been used as a tool to recover government funds from nursing homes for such things as billing for services never actually provided, employees providing and charging for unnecessary treatments, and false certifications that residents were eligible for reimbursable services. The FCA is a particularly significant source of risk because of the ability of private citizens to file qui tam actions on behalf of the government as "relators." Relators are entitled to receive a percentage of recoveries obtained by the government, which provides an added incentive for residents, family members, or current and former employees to report alleged misconduct and file suit.

Health Care Fraud, Mail and Wire Fraud, and the Anti-Kickback Statute

Both the tenor and substance of Attorney General Barr's announcement indicate that the DOJ is ready to aggressively utilize all of the weapons in its arsenal. In addition to the expected increase in FCA claims, it is very likely that individual U.S. Attorneys Offices may begin aggressively utilizing health care fraud,^[4] mail and wire fraud,^[5] and the Anti-Kickback Statute,^[6] which prohibits providing payments or other consideration for patient referrals for federally funded health care programs, against nursing homes

and their operators that they deem to be “bad apples.” Individuals and entities facing charges on these counts can expect those charges to be accompanied by conspiracy^[7] and money laundering^[8] charges whenever the government is able to bring them. In addition to holding corporate entities liable, we expect the DOJ to focus on holding to account individual owners, officers, directors, and senior managers.

Steps for Nursing Homes and Skilled Care Providers to Consider

The DOJ’s announcement did not cite the standards or factors it would assess when determining whether a facility was providing “grossly substandard care.” This fact alone should concern any facility that must deal with any internal complaints or civil suits relating to the care and services provided to its residents. Notwithstanding the fact that “grossly substandard care” is somewhat vague, Attorney General Barr elucidated a few conditions that are currently under investigation and unquestionably deplorable, such as rodent infestations and residents in serious unmedicated pain. Operators should not assume these examples set the floor or will serve as a standard that the Initiative will use to hold facilities liable.

We recommend that operators take a number of steps to ensure they remain compliant with industry standards and the DOJ’s expectations, and are prepared for regulatory investigations or a DOJ inquiry, including the following:

- *Compliance with the Nursing Home Reform Act (NHRA), other Medicaid and Medicare requirements, and state licensing requirements:* The NHRA applies to nursing facilities receiving federal funds through Medicaid or Medicare. These facilities must abide by numerous requirements related to resident and patient care, such as a patient bill of rights, personnel staffing requirements, individualized patient care plans, and the appropriate provision of medication.
- *Compliance with all relevant state laws and regulatory guidance:* While these requirements are typically similar to those in the NHRA, they apply regardless of Medicaid or Medicare participation and may have other, more particular obligations.
- *COVID-19 Preparedness:* Incorporate a COVID-19 preparedness and outbreak response plan into existing protocols and ensure staff have adequate training and resources to enact those procedures.
- *Internal Reporting:* Evaluate the sufficiency of internal reporting and tracking mechanisms. Internal reports of misconduct are the first step toward a potential FCA claim, and nursing home operators should ensure that adequate internal procedures exist to collect, investigate, and, where necessary, remediate wrongdoing.
 - Nursing homes that participate in Medicaid or Medicare are required to have an established grievance procedure for resolving internal complaints. State licensing laws also typically require similar protocols.
 - Best practices encourage the availability of anonymous hotlines (including phone operated, email, and hard copy options) for both residents and employees to report wrongdoing.

- Review of complaints should not be handled by those involved with the reported conduct, or whose objectivity could be called into question.
- Every internal complaint does not require a full-fledged internal investigation supported by outside counsel. However, whether the compliance system is adequate for the size and scope of the business will be a focal point of any government investigation.
- Relevant senior management and the board of directors should receive compliance reporting, including notice of whistleblowers.
- Allegations of wrongdoing indicating the involvement of senior staff or management, systemic or widespread issues, or allegations that internal policies or procedures are being evaded should be given additional attention and, where appropriate, involve outside counsel.
- *Revise or develop an enforcement response plan:* Before the authorities show up to execute a search warrant at a facility or discretely speak with company employees, having a plan in place with clear lines of reporting for these circumstances will ease the pain and may put you in a better position with the government. Part of any response plan should include policies and training for employees on what to do if the government knocks on the door.

Not only will these steps help prevent problems, but even in the face of a developing situation, the DOJ takes the existence of an effective compliance program into account when deciding whether to prosecute a company.

[1] DOJ, Press Release, *Department of Justice Launches a National Nursing Home Initiative* (Mar. 3, 2010), <https://www.justice.gov/opa/pr/department-justice-launches-national-nursing-home-initiative>.

[2] DOJ, *Attorney General William P. Barr Announces the Results of the Department of Justice's 2020 Elder Fraud Sweep and New Nursing Home Initiative* (Mar. 3, 2020), <https://www.justice.gov/opa/pr/department-justice-launches-national-nursing-home-initiative>.

[3] *Id.*

[4] 18 U.S.C. § 1347.

[5] 18 U.S.C. §§ 1341, 1343.

[6] 42 U.S.C. § 1320a-7b(b)(2)(A).

[7] 18 U.S.C. § 371.

[8] 18 U.S.C. § 1956.