

A Closer Look at the Revised Nursing Facility Regulations

Return to Facility After Hospitalization

Executive Summary

Bed hold rights are set by state law. Federal law complements state law by requiring facilities to notify residents of those rights. Notice of bed hold rights must be provided at two separate times: in advance of a hospitalization, and at the time of transfer to a hospital. The advance notification must include the resident's right to a bed hold, whether the state's Medicaid program pays for a bed hold, and the facility's bed hold policies (which must be consistent with state and federal law). The time-of-transfer notification must describe the resident's bed hold rights under the facility's policy.

Federal law also establishes a resident's right to return to the facility even if a bed hold period has been exceeded, or if the resident did not have a bed hold. The resident can return to her previous room if available, or to the next available room if the previous room is not available. The regulations specify that the resident can request a transfer/discharge hearing if the facility refuses to accept her back.

Acknowledgements

Justice in Aging, the National Consumer Voice for Quality Long-Term Care, and the Center for Medicare Advocacy created this issue brief in collaboration. This brief is the eight of a series explaining important provisions of the revised regulations.

Introduction

On September 28, 2016, the Centers for Medicare & Medicaid Services (CMS) released revised nursing facility regulations. These regulations govern most aspects of nursing facility operations, and apply nationwide to any nursing facility that accepts Medicare and/or Medicaid reimbursement.

Bed Holds

Bed Hold Basics

Bed holds may be available when a resident is hospitalized or takes an overnight visit with family or friends (such a visit is termed a "therapeutic leave"). The basics of bed hold law — whether a bed hold is required, the length of any mandatory bed hold, and the availability of Medicaid payment for a bed hold — is determined by state law, and thus varies from state to state.

As discussed in this issue brief, however, federal law requires facilities to issue certain notices regarding bed holds. Specifically, a nursing facility must give written notice of the facility's bed hold policies to the resident (or resident representative) on two separate occasions: 1) before the resident is hospitalized or takes a therapeutic leave and 2) "at the time of transfer ... for hospitalization" or at the time of taking a therapeutic leave.

Note that the Medicare program cannot cover a resident's temporary absence from the nursing

facility, due to either hospitalization or therapeutic leave. However, as discussed below, the right-to-return rule applies to residents eligible for Medicare nursing facility reimbursement.

Notice Before Transfer

The “before” notice (#1 above) generally is given “well in advance of any transfer”¹ — most commonly, during the admissions process. The notice must explain the relevant state law — specifically, any mandatory bed hold period set by state law, and the ability of the state’s Medicaid program to pay for a bed hold. (Generally, a Medicaid program will pay whatever bed hold period is required by state law.)

The notice also must include the facility’s policies, which must be consistent with state and federal law. Thus, the facility’s policies must offer at least the minimum bed hold required by state law, and also must comply with the federal law that can allow a resident to return to a facility even after a bed hold has been exceeded or when state law does not provide for bed holds. (This federal law is explained below.)

Finally, the regulations require that the notice include the “information specified in paragraph (c)(3),” which is the subsection that lists the notice that must be provided when a resident is involuntarily transferred or discharged, including the reasons why the resident is being transferred, and the resident’s right to appeal. This requirement, however, often may not make sense in the context of the “before” notice, since the notice may be given “well in advance of any transfer,” when the details of a future transfer obviously could not be known.

Notice at Time of Transfer

At the time of transfer, the facility must provide written notice that a bed hold is available up to the number of days required by state law. Ideally, the notice also would include the ability of the state’s Medicaid program to pay for such a bed hold, along with the other information included in the “before” notice.

Return to Facility Regardless of Bed Hold

Federal law also provides a right to return to a facility even if a resident’s hospitalization or therapeutic leave has exceeded the specified bed hold, if no bed hold was available, or the resident/representative chose not to request a bed hold.² This right applies to residents eligible for Medicare or Medicaid coverage of their nursing facility care, but not to residents who would be paying privately when returning from a hospitalization (or therapeutic leave). The right only applies to residents who continue to require nursing facility services.

Under this right, the resident can return to his or her previous room, if available. Otherwise, the resident must be admitted to the next available bed in a semi-private room (without requiring men and women to share rooms).

Right to Appeal When Facility Denies Right to Return

Hospitalized residents frequently face difficulties in returning to a facility from the hospital. The facility may refuse to accept the resident, claiming falsely that the facility no longer can meet the resident’s needs.

1 Surveyor’s Guideline to 42 C.F.R. § 483.15(d), Appendix PP to CMS State Operations Manual.

2 The Surveyor’s Guidelines specify that the return-to-facility provision applies when a bed hold is exceeded or a resident “does not elect to pay to hold the bed.” Surveyor’s Guideline to 42 C.F.R. § 483.15(d), Appendix PP to CMS State Operations Manual.

This refusal puts the resident in a predicament, since it can be time-consuming to force the facility to accept the resident back and, in the meantime, the hospital may be pressuring the resident to leave.

The revised regulations address this problem in a new provision that requires the facility to comply with transfer/discharge procedures when a facility refuses to accept a resident after a hospitalization. Specifically, the transfer/discharge procedures are required “[i]f the facility ... determines that a resident who was transferred with an expectation of returning the facility cannot return to the facility.”³ CMS explains that “the resident is effectively discharged from the facility” when the facility refuses to accept the resident back after a hospitalization.⁴ As a result, the facility must comply with transfer/discharge requirements at that time.

Consistent with these requirements, CMS’s preexisting Surveyor’s Guidelines explain that a facility must allow a resident to return even if the resident owes money to the facility. The proper course of action is for the facility to allow the resident to return and then, if the facility chooses, to initiate the transfer/discharge processes based on alleged nonpayment.⁵ The same is true for any case where a facility believes that it has grounds for an involuntary transfer/discharge — the resident should be allowed to return, with the facility having the right to initiate the transfer/discharge process, and the resident having the right to appeal.

Effective Dates

The bed hold and return-to-facility provisions became effective on November 28, 2016.

Finding the Regulations

The bed hold and return-to-facility provisions are found at subsections 483.15(d) and (e) of Title 42 of the Code of Federal Regulations.

3 42 C.F.R. § 483.15(e)(1)(ii).

4 81 Federal Register 68,688, 68,735 (2016).

5 Surveyor’s Guideline to 42 C.F.R. § 483.15(e), Appendix PP to CMS State Operations Manual.

Tips for Residents and Advocates

Insist on the right to return when facilities fail to give adequate notice of bed hold rights.

Nursing facilities frequently fail to give the bed hold notice required by federal law. This is particularly true of the notice required at the time of transfer to the hospital. Such failures should be an independent reason requiring a facility to allow a resident to return after a hospitalization, whether or not the resident requested a bed hold. If a resident is not notified of bed hold rules and policies, she should not be penalized for failing to request a bed hold.

Assert the right to return to the same or next available room. Nursing facilities often are fixated on bed holds without being adequately familiar with the right under federal law to return to the same or next available room. This is a broad right that is not dependent upon the length of a bed hold, and applies to every resident who is eligible for Medicaid or Medicare reimbursement when returning to the facility from the hospital.

Be prepared to wait the facility out when seeking to return. In some cases, a facility may claim that there is no available room when a resident is seeking to return from a hospitalization. This claim may or may not be true. Be clear to the facility that the resident is not going away, and will be seeking to return on every subsequent day until a room is available. If a facility understands that a resident will be persistent, the facility will be less likely to play games regarding room availability.

Request an appeal when a facility claims that it no longer can meet the resident's care needs.

Too many facilities see a hospitalization as an opportunity to cut ties with Medicaid-eligible residents who may be seen as undesirable for having relatively heavy care needs, or for being perceived as “difficult” for one reason or another. Facilities have refused to allow such residents to return from a hospitalization, claiming that the facility cannot meet the residents’ care needs. These claims almost always are inaccurate — the hospital and the physician have approved transfer back to the nursing facility. The revised regulations clearly state that a resident has a right to appeal when a facility refuses to honor either a bed hold or the resident’s right to return. Residents should not hesitate to initiate such appeals when a facility essentially abandons them at the hospital.

Act quickly and seek assistance. A resident faces significant pressures when a nursing facility refuses to take her back after a hospitalization. Most obviously, the hospital will not be willing to house the resident indefinitely. The hospital may be willing to retain the resident for a few extra days, but after that is more likely to be willing to transfer the resident to any nursing facility that has agreed to accept the resident.

To get ahead —and stay ahead — of this pressure, the resident should challenge the facility’s actions by filing both a transfer/discharge appeal and a complaint with the state agency responsible for licensing and certifying nursing facilities. In most states, this is a division within the state’s health department (or public health department). Ideally, the state agency will take quick, decisive action that compels the facility immediately to accept the resident. Such quick administrative action is hardly guaranteed, however and, if possible, a resident should consult with an attorney to consider filing a request with a local court for an order requiring the facility immediately to accept the resident.

In some cases, the hospital can be a useful ally. The nursing facility will have an interest in maintaining good relations with the hospital, and a hospital will not appreciate being “stuck” with a resident essentially abandoned by a nursing facility.

At all stages of these disputes, the resident can benefit from consulting with the local long-term care ombudsman program. Contact information is available at ltcombudsman.org.