

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Advocacy Strategies When Nursing Facilities Won't Allow Residents to Return After Hospitalization

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January 30, 2024

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Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency.

Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
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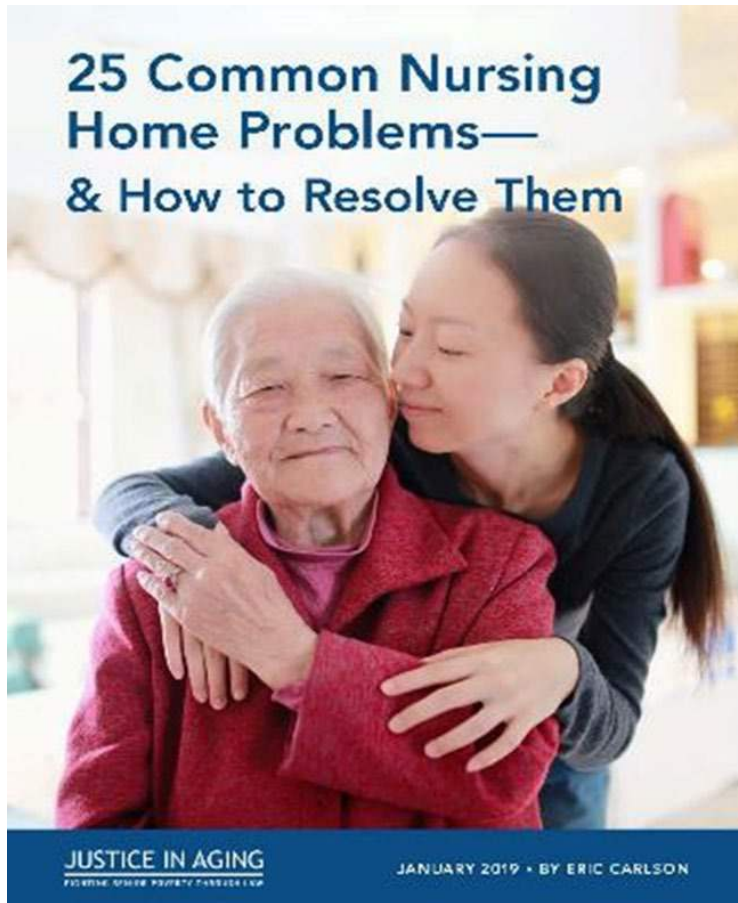
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Justice in Aging's Commitment to Advancing Equity

To achieve Justice in Aging, we must:

- Advance equity for low-income older adults in economic security, health care, housing, and elder justice initiatives.
- Address the enduring harms and inequities caused by systemic racism and other forms of discrimination that uniquely impact low-income older adults in marginalized communities.
- Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, and economic class.

Two Justice in Aging Resources



- [Nursing Facility Eviction Defense Toolkit](#), including
 - Issue spotting guides.
 - Sample administrative hearing briefs.
 - Sample court documents.

[Access the guide here](#)



Relevant Federal Law

Bed Hold v. Right to Return to Facility

- Bed Hold
 - Room/bed is held vacant for resident.
- Right to Return
 - Room/bed is not held vacant, but resident has right to return to facility's next vacancy.
 - Cheaper to require and implement because neither Medicaid nor resident has to pay for vacant room/bed.

Applicability of Law Governing Bed Holds and Right to Return

- Federal law on bed holds and right to return applies to any Medicaid-certified facility.
- Right to return applies to residents seeking to return under Medicare and/or Medicaid reimbursement.

State Bed Hold Laws

- State bed hold laws generally will apply to all residents.
 - But, of course, state will pay for bed hold only for residents under Medicaid reimbursement.
- Common to require 7, 10 or 14 days.
- Some states condition bed holds on high occupancy rate, based on the reasoning that paying to hold a vacant room is unreasonable if facility has many vacancies.

Also Consider Contractual Bed Holds

- Resident paying out-of-pocket may have claim to bed hold even without relevant state law.
- Resident likely has paid for the days already, by paying for a month in advance.

Finding Relevant Federal Law

- United States Code, Title 42, section 1396r(c)(2)(D).
- Code of Federal Regulations, Title 42, section 483.15(d), (e).
- Surveyor's Guidelines to section 483.15(d), (e), Appendix PP to CMS State Operations Manual, F-Tags F625, F626.

What Is “Therapeutic Leave”?

- “Therapeutic leave” = “Absences for purposes other than required hospitalization.”
 - Surveyor’s Guideline to 42 C.F.R. §483.15(d), F-Tag F625.
- So these laws apply to ANY absence from nursing facility because (as we will discuss) relevant law applies to hospitalizations and therapeutic leave.

Notice of State Bed Hold Rights

- Law requires facility to provide written notice of bed hold rights (if any) to resident or resident representative.
 - Duration of bed hold under state policy.
 - State Medicaid's bed hold payments, if any.
 - Nursing facility's policies on bed holds and rights to return (which must be consistent with federal law).
 - Information on resident's right to return under federal law.

When Notice Given

- Bed hold notice must be given “[b]efore a nursing facility transfers a resident to a hospital or the resident goes on therapeutic leave.”
- Many nursing facilities give this notice during admission, along with the admission agreement and other notices.

Notice#2: At Time of Transfer

- Nursing facility must give written notice “[a]t the time of transfer of a resident for hospitalization or therapeutic leave”:
 - To resident or resident representative;
 - Notifying of rights (if any) to hold bed and to return to facility.

“Right to Return” Under Federal Law

- “Right to Return” if hospitalization or therapeutic leave exceeds bed hold period, if there was no bed hold period, or resident chose not to hold bed.
 - *See Surveyor’s Guidelines, F-Tag F625.*
- Resident must
 - *Need nursing facility services, and*
 - *Be eligible for Medicare or Medicaid payment of nursing facility expenses.*

Generally Return to Same Room

- Resident returns to:
 - Previous room if available or, if not;
 - “[I]mmediately upon the first availability of a bed in a semi-private room.”

Facility Can't Decide Unilaterally to Deny Resident

- “When a facility does not allow the resident to return, the facility has initiated a discharge, and the facility must comply with Transfer and Discharge Requirements The resident must be permitted to return and resume residence in the facility while an appeal of the discharge is pending.”
 - Surveyor’s Guidelines, F-Tag F626.

Must Do Honest Evaluation of Resident's Current Condition

- “The facility must not evaluate the resident based on his or [her] condition when originally transferred to the hospital.”
- Facility must communicate with hospital to determine resident's current care needs.
 - Surveyor's Guidelines, F-Tag F626.

Right to Return Even If Owing Money

- Surveyor's Guidelines state that residents have right to return even with "outstanding Medicaid balances."
 - Surveyor's Guidelines, F-Tag F626.



Advocacy

Make Clear Requests

- Communicate with nursing facility ASAP to:
 - Request bed hold and/or
 - Declare intention to return under federal law.
- Support oral request with subsequent written request.
- Don't worry about any difficulty in proving that facility has vacancy – important point is that resident wants next available spot.

Initial Advocacy Steps If Facility Does Not Comply

- Advocate with facility representative such as administrator or director of nursing.
 - Cite federal and (as relevant) state bed hold law).
 - Enlist assistance of long-term care ombudsman program.

Options If Facility Resists

1. File well-documented complaint with inspection agency,
2. File transfer/discharge appeal to seek administrative hearing, and/or
3. Request immediate relief from state court.

Considerations in Choosing Advocacy Strategy

- High priority for quick action.
 - Hospital is doubtlessly pressuring resident to leave ASAP.
 - Without promise of relatively quick resolution, resident likely will give in to pressure and accept transfer to some other nursing facility.

Pros and Cons on Complaint to Inspection Agency

- Inspection agency option makes more sense if you have reason to think that agency will take quick, effective action.
- But agency can also harm cause by issuing weak or wrongheaded ruling that facility will cite against resident in court or administrative hearing.

Pros and Cons on Requesting Transfer/Discharge Appeal

- The resident will get a hearing but probably not for a week or two.
- Only a viable option if resident can afford to wait for administrative hearing decision.
- May be best option if resident's situation is unsympathetic for some reason.

What If Facility Tries to Ignore Agency Ruling?

- Federal regulation requires that state agency must “provide for admission or readmission of an individual to a facility if ... [t]he hearing decision is favorable to the applicant or beneficiary.”
 - Code of Federal Regulations, Title 42, section 431.246(a); *see also* Statement of Interest of the United States, *Anderson v. Ghaly*, Case No. 15-cv-5120 (N.D. Cal. Sept. 3, 2021).

Pros and Cons of Filing Court Action

- Biggest problem is difficulty of finding representation and (for private bar) the significant expense.
- Pros include:
 - Likelihood of judge recognizing need for due process and treating situation as wrongful eviction.
 - Binding effect of court order.

Court Action Resources

- See Justice in Aging toolkit for sample documents.
 - **Complaint based on state-court causes of action:**
 - Violation of state consumer law for unlawful or unfair business practices.
 - Breach of contract as third-party beneficiary to facility's Medicaid provider agreement with state.
 - Infliction of emotional distress.
 - **Petition for injunctive relief order requiring facility to allow resident to return.**

Other Strategies

- Exert social pressure against nursing facilities that refuse to allow residents to return.
 - Education on issues within local aging network.
 - Pressure against nursing facilities by hospital discharge planners.



Questions?

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