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Risk Management...An Oxymoron?

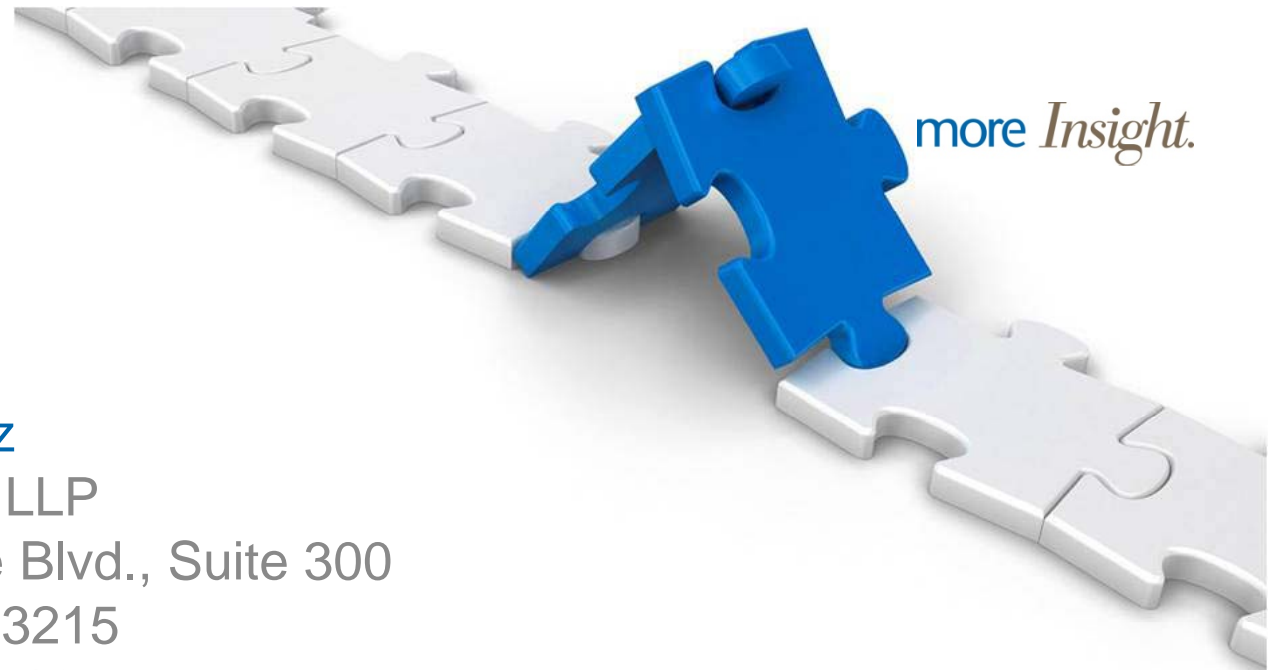
Ohio Health Care Association

LTC Refresher Course

December 6, 2012

Discussion on Various Topics

Dinsmôre



more *Insight.*

Presenter

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Criminal Records Check

General Requirement

A facility considering an applicant for a position that involves providing direct care to an older adult (60 years of age or older) must request a criminal records check from the Bureau of Criminal Identification and Investigation (BCII). If an applicant for a direct care position has been convicted of a disqualifying crime, the law prohibits a health care facility from employing that applicant unless he/she meets personal character standards, which are defined in rule.

Application

A. Health care facilities subject to this law include:

- Nursing Homes/Homes for the Aging/Ohio Veteran's Home
- Residential Care Facilities
- Adult Care Facilities
- County and District Homes

Application (cont)

A. Health care facilities subject to this law include:

- Home Health Agencies – that are Medicare certified
- Hospice Care Programs
- Adult Day-Care programs operated on the same site as a Nursing Home, Resident Care Facility, County/District Homes, Ohio Veteran's Home
- PASSPORT Agencies (Meals on Wheels, homemaker services)

Application (cont)

B. Applicants/Employees subject to this law:

- Full-time; part-time; permanent; and temporary employees
- Person paid directly by health care facility
- Person who contracts as an independent contractor to provide care on behalf of the health care facility
- Person who provides *direct care* on behalf of the health care facility pursuant to a contract between the health care facility and business entity
- Person referred to the health care facility by an employment service, temporary employment service or staffing pool

Application (cont)

C. Direct Care means:

- Coordination of, direct supervision of, or provision of personal care, nursing, or health related services;
- Routine contact, such as face-to-face, hands-on physical assistance, verbal cueing, reminding, standing by or monitoring activities;
- Activity that requires the person to be routinely alone with older adults or to routinely have access to older adults' personal property; and
- Any routine service or activity designated as direct care by the Administrator

Application (cont)

D. Conditional Hire

- The law allows a provider to conditionally hire an applicant while waiting for the results of the criminal records check under specified conditions.
 - May conditionally hire person for 30 days if:
 - Send background check request within 5 business days of when person starts working

Application (cont)

D. Conditional Hire

- Must terminate conditional if:
 - You have not received BCII results (other than FBI check) at end of 30 days from submitting fingerprinting care; or
 - Receive results with conviction or disqualifying crime (unless individual meets “personal character standards”)

Personal Character Standards

- A health care facility may employ an applicant who has been convicted of or pleaded guilty to a disqualifying offense if all of the following standards are met:
 - Applicant is not a repeat theft related offender
 - Applicant is not a repeat violent offender
 - The offense is not a sexually oriented offense
 - The offense is not a violation of aggravated murder, murder, voluntary manslaughter, patient abuse and neglect, adulteration of food.

Personal Character Standards (cont)

- The offense is one of violence other than aggravated murder, murder, voluntary manslaughter, patient abuse and neglect, and adulteration of food, and the victim was not an older adult, and five years have elapsed since the applicant was fully discharged from imprisonment, probation and parole.
- The offense is not one of violence and the applicant provides proof that all conditions *regarding fulfillment of sentencing requirements* are being met.

Personal Character Standards (cont)

- The applicant's character is such that it is unlikely that the applicant will harm an older adult. The rule lists 11 factors to consider, including but not limited to, applicant's age at time of offense, age and mental capacity of victim, nature and seriousness of the offense, applicant's employment record, and applicant's efforts at rehabilitation.

Confidentiality of Records (cont)

- A. The criminal records check is not a public record and may be available only to:
- Individual who is subject to the criminal records check or the individual's representative
 - The administrator or representative requesting the records check
 - The administrator or any other health care facility that provides direct care to older adults and is owned or operated by the same entity that owns or operates the health care facility requesting the records check
 - Any court, hearing officer or other necessary individual involved in cases of dealing with the denial of employment of the applicant.

Confidentiality of Records (cont)

B. Personnel Record

- Facility must maintain criminal records report in a confidential manner sealed within or separate from personnel record

Confidentiality of Records (cont)

C. Facility must maintain an applicant log separate from the personnel record which shall be accessible to surveyors and contain:

- Name of each applicant
- Application date
- Date the applicant starts work
- Date the criminal records request is submitted to BCII
- Types of records checks requested (BCII, FBI or both)

Confidentiality of Records (cont)

- Dates records checks are received
- Date the report is completed by BCII (“Date of original record check”)
- Whether the applicant was hired pursuant to personal character standards
- Final disposition of applicant
- Whether the applicant was terminated and why (i.e. conditional hire exceeded 30 day time limit, disqualifying offense; or applicant attempted to deceive health care facility)
- Keep these records for seven years

OAC 3701-13 *et seq.*
(Nursing Facilities)

OAC 3701-60-06
(Home Health Agencies)

OAC 5101:3-45-07
(Administered Waiver Service Providers)

Website

www.ohioattorneygeneral.gov/services/business/webcheck

Exclusion Program

- www.oig.hhs.gov/exclusions/index.asp
- Must check for each new hire and vendor contract
- Must be checked frequently to see if current employee or vendor is excluded
- No payment will be made for items or services furnished, ordered, or prescribed by an excluded individual or entity

Admission & Liability

Avoid liability by setting the expectations
of what your
customer should expect
from the start.

Identifying the “customer”

- ▶ The customer is the resident, and the resident’s family
- ▶ Remember ... the majority of all lawsuits are brought by sons and daughters

Know your facility.

What Services Does Your Facility Provide?

Example:

- ▶ Potential resident is on a ventilator
- ▶ We wish to go above & beyond what “typical” nursing home provides
- ▶ Checking on the resident
 - ▶ Standard in the industry
 - ▶ What we will do
- ▶ Observing the resident
 - ▶ What is reasonable
 - ▶ What we will do

Admission Materials

- ▶ Avoid guarantees
- ▶ Be careful with choice of language, e.g., “Falls prevention program”
- ▶ Identify risks of daily living
- ▶ Identify actual staff and care time available
- ▶ Identify responsibilities

Ensure consistency in the messages that are delivered at admission.

Review your admission package.

- ▶ Admission Agreement
- ▶ Authorizations (documents that need to be signed)
 - ▶ Assignment of benefits
 - ▶ Professional services
 - ▶ Personal funds
 - ▶ Resource assessment notice
 - ▶ Notice of acknowledgement

Does your admission agreement discuss:

- ▶ Risk Management
 - ▶ Detail of what services provided-not provided
 - ▶ One on one care
 - ▶ Private duty personnel
 - ▶ Refusal of care
 - ▶ Video cameras
- ▶ Payment Issues
 - ▶ Responsibilities under Medicare, Medicaid
- ▶ Documents/Policies
 - ▶ Advance directives
 - ▶ Resident rights
 - ▶ Notice of privacy practices
 - ▶ Grievances
 - ▶ Alcohol & smoking
 - ▶ Government & advocate contact information
 - ▶ Transfer & discharge
 - ▶ Privacy Act Statement

Arbitration Agreement

- ▶ Don't make arbitration a condition of admission
- ▶ Allow for cancellation of the arbitration agreement within a certain time frame after signing, e.g., 30 days
- ▶ Design consistent admission policies
- ▶ Don't limit remedies available under law
- ▶ Carve out administrative resident right processes

- ▶ Make it reciprocal in all respects (except accounts receivable matters)
- ▶ Consider paying filing fees (at least initial fee)
- ▶ Address confidentiality of proceedings and decision
- ▶ Get liability insurer sign off on the agreement prior to adoption
- ▶ Be careful in selecting organization to conduct arbitration

Collections

- ▶ 2 Track Process
 - ▶ Discharge
 - ▶ Fair Debt Collection Act

❑ Discharge

- ▶ Patient Bill of Rights
 - ▶ O.R.C. Section 3721.13(A)(30)(e)
 - ▶ Medicaid pending/appeal

❑ Fair Debt Collection Act

- ▶ Written notice to Debtor
- ▶ 30 days to dispute amount
- ▶ File civil complaint
- ▶ Potential counterclaim for negligence

Discharge

Resident Discharge Notice

- ▶ 30-day notice in advance of discharge
 - ▶ In writing to resident
 - ▶ Resident's sponsor – certified mail return receipt requested
 - ▶ Copy to ODH

Resident Discharge Notice

- ▶ 30-day notice in advance of discharge does not apply
 - ▶ Resident in home less than 30 days
 - ▶ Safety of individuals is endangered
 - ▶ Health of individuals is endangered
 - ▶ Medical needs necessitate a more immediate transfer or discharge
 - ▶ You still must provide a written notice

Resident Discharge Notice

- ▶ Notice must include
 - ▶ Reasons for transfer or discharge
 - ▶ Proposed date
 - ▶ Proposed location
 - ▶ Notice must include that resident and resident's sponsor may choose another location

Resident Discharge Notice

- ▶ Notice must include
 - ▶ Right to impartial hearing (must be in BOLD letters)
 - ▶ Resident will not be transferred or discharged before the proposed date unless home and resident agree to an earlier date
 - ▶ Address of the ODH legal services office
 - ▶ Name, address and telephone number of the ombudsman

Regulatory Enforcement

What Triggers Monetary Penalties?

- ▶ Findings of
 - ▶ Actual Harm
 - ▶ What you pay, when you pay, etc., is determined by you
 - ▶ Substandard Quality of Care
 - ▶ Immediate Jeopardy
- ▶ When given an opportunity to correct
 - ▶ Failure to correct all deficiencies before date certain

What Triggers Other Remedies?

- ▶ When all deficiencies not corrected
 - ▶ 90 days: Automatic denial of payment for Medicare & Medicaid admissions
 - ▶ 180 days: Automatic termination

When Do Fines Start?

- ▶ When you have an opportunity to correct
 - ▶ If found not to be in compliance on date certain during revisit, then any fines begin on the **date of exit** – not the revisit date.
- ▶ When you do NOT have an opportunity to correct
 - ▶ Fines begin to run on the date of exit (or earlier)

Timing is Very Important

- ▶ Fix deficiencies ASAP
 - ▶ Remember fines may be running before you receive your 2567
- ▶ Do you provide NATCEP?
 - ▶ If your fine is greater than \$5000, then you automatically lose your right to train nurse aides for 2 years

Timing is Very Important (cont)

- ▶ Allege compliance ASAP
- ▶ Danger of failing revisit
 - ▶ Not only do you have to fix all deficiencies cited, but you must not have any new citations on revisit or your noncompliance (and penalties) continue
 - ▶ This includes life safety citations!

Plans of Correction

- ▶ You must create a POC even if you disagree with the citation (you are going to fight it through IDR)
- ▶ Use “disclaimer” language
- ▶ Do not make admissions
- ▶ Do not overpromise
- ▶ Compliance will be judged by POC on revisit
- ▶ Consider using affirmative language

Care Issues

Focus on the areas where
you are most likely to get
sued or cited

When High Risk Exists

- ▶ Unusual incident notification
- ▶ More careful documentation
- ▶ Internal plan of correction
- ▶ Immediate chart audit
- ▶ Involvement of legal counsel

Tip

Frequent education for high risk areas

Frequent chart audits of “problem” residents

Key Areas of Risk

- ▶ Falls
- ▶ Pressure Sores
- ▶ Elopements
- ▶ Abuse and Neglect

Fall Issues

- ▶ Giving investigation information to surveyors
- ▶ Unrealistic or inappropriate care plans
- ▶ Not changing or using ineffective interventions
- ▶ Not conducting neuro checks after a head injury
- ▶ Not following the care plan
- ▶ Failing to document resident choice not to be restrained

Pressure Ulcer Issues

- ▶ Failing to document hospital or home acquired sores
- ▶ Classifying non-pressure wounds as pressure ulcers
- ▶ Not automatically padding beds, chairs, oxygen, tubing, casts & heels
- ▶ Failing to document or making inaccurate skin assessments & sore measurements on residents with breakdown
- ▶ Physician not documenting clinical unavailability where appropriate
- ▶ Failing to document resident noncompliance

Elopement Issues

- ▶ Unnecessary reporting
- ▶ Failure to have extra observation during the first 72 hours
- ▶ Failure to test alarms & batteries
- ▶ Failure to assess risk on admission
- ▶ Ignoring predictors
- ▶ Care planning 15 or 30 minute checks
- ▶ Excursions: AMA

Abuse & Neglect Issues

- ▶ Criminal v. civil investigations
- ▶ Investigating injuries or unknown origin
- ▶ Protecting the resident pending investigation
- ▶ Taking aggressive resident behaviors seriously
- ▶ Overuse of words “neglect” & “negligent” – and unnecessary reporting of neglect
- ▶ Understanding when to report abuse

What to Report

- ▶ All alleged violations involving
 - ▶ mistreatment
 - ▶ neglect
 - ▶ abuse
 - ▶ injuries of unknown source
 - ▶ misappropriation of resident property

When to Report

- ▶ Immediately report allegations to the administrator and ODH
 - ▶ “Immediately” = as soon as possible after the incident, but not later than 24 hours
- ▶ Within 5 working days of the incident report results of investigation to administrator (or designated representative) and to ODH

How to Report

- ▶ Initial allegation
- ▶ Investigative conclusions
 - ▶ ODH Report Form

Advance Directives

Requirements for LTC Facilities

▶ NF Requirements of Participation:

- ▶ **42 CFR §483.10(b)(4) – F155:** The resident has the right to refuse treatment...and to formulate an advance directive.
- ▶ **42 CFR §483.10(b)(8) – F156:** The facility must comply with the requirements ...relating to maintaining written policies and procedures regarding advance directives...(including) provisions to inform and provide written information concerning the right to accept or refuse medical or surgical treatment and, at the individual's option, formulate an advance directive.

▶ Nursing Facilities

- ▶ **OAC 5101:3-3-16-2:** A NF operator shall establish and maintain written policies and procedures concerning advance directives

▶ Residential Care Facilities

- ▶ **OAC 3701-17-57:** Prior to admission or upon the request, the facility shall provide a copy and explain the contents of the facility's policy regarding advance directives and an explanation of the rights of the resident under state law concerning advance directives. A residential care facility may not require an execution of an advance directive as a condition for admission.

Living Wills

▶ Definition

- ▶ A living will allows a person to make an advance decision regarding whether life-sustaining treatment should be given, continued, or withdrawn in the event that the person is in a “terminal condition” or “permanently unconscious state” and can no longer make informed health care decisions.
- ▶ An adult of sound mind may voluntarily execute a living will or declaration governing the use, continuation, withholding, or withdrawal of “life-sustaining treatment.” The living will must be signed and dated by the patient or another individual at the patient’s direction, and must be properly witnessed or acknowledged by a notary.

Living Wills

▶ When Does a Living Will Become Operative?

Assuming the living will is properly executed (signed, dated, and witnessed or notarized), it becomes operative when all of the following occur:

1. It is communicated to the attending physician;
2. The attending and a consulting physician* determine that the patient is in a terminal condition or the patient has been in a permanently unconscious state; and

Living Wills

▶ When Does a Living Will Become Operative?

3. The attending physician determines that the patient no longer is able to make informed decisions and will not regain the capacity to do so.

* In the case of a permanently unconscious patient, the consulting physician must have the experience or training necessary to determine whether the patient is in a permanently unconscious state.

Durable Power of Attorney for Health Care (DPAHC)

▶ Definition

A DPAHC allows a competent adult to voluntarily designate a person (“attorney-in-fact”) to make health care decisions for them in the event the adult has lost the capacity to make health care decisions for him or herself.

A DPAHC is effective regardless of whether the patient is in a terminal condition or in a permanently unconscious state.

Operative – has lost the capacity to make health care decisions for him or herself.

Case Law

- ▶ *Transition Healthcare Associates v. New London Healthcare*, 2012 Ohio App. LEXIS 3005 (2012);
- ▶ *Tedeschi v. Atrium Centers*, 2012 Ohio App. LEXIS 2560 (2012);
- ▶ *Conkin v. CHS-Ohio Valley, Inc.*, 2012 Ohio App. LEXIS 2467 (2012);
- ▶ *Harter v. Chillicothe Long-Term Care, Inc.*, 2012 Ohio App. LEXIS 2153 (2012);
- ▶ *Wood v. Harborside Healthcare*, 2012 Ohio App. LEXIS 141 (2012);
- ▶ *Doe v. Canton Regency*, 2011 Ohio App. LEXIS 34 (2011);
- ▶ *Metrohealth Center for Skilled Nursing Care v. Parnell*, 2012 Ohio App. LEXIS 4132 (2012)

Questions?

