

SHORTS

ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP



CMS's Recovery Audit Contractors Appear Poised to Audit Facilities With Ultra High Therapy RUGs

by Ken Burgess



Recovery Audit Contractors (RACs) in some parts of the U.S. have begun requesting documentation from certain skilled nursing facilities (SNFs), which suggests that the Centers for Medicare and Medicaid Services (CMS) may be ready to unleash the RACs on SNFs with designated levels of High Therapy RUGs utilization. Under the federal Recovery Audit Contractors program, the RACs are permitted to audit providers only on CMS-approved issues. To date, the Ultra High Therapy Resource Utilization Groups (RUGs) issue is not on the CMS-approved list of audit topics.

However, CMS now permits the RACs to also request records and to audit up to 10 "test claims" to determine if CMS, based on the results of the test audit, should add a new audit focus to its approved list. At least one RAC has begun issuing documentation requests to SNFs on this issue. The RAC at issue does not cover North Carolina. However, once an audit focus is on the CMS-approved list, any RAC can audit that issue, so it's important to know what RACs in other parts of the country are doing.

In its letter to the affected provider, the RAC at issue stated that the Office of Inspector General (OIG) of the U.S. Department of Health & Human Services has found an overwhelming majority of errors in assignments by providers under the RUGs categorization system to Ultra High Therapy RUGs, resulting in overpayments to SNFs. It further stated that "the OIG identified that errors in the sample could be traced to the providers' therapy minutes recorded on the Minimum Data Set not matching the minutes recorded in the medical record and the patient's care and resource needs."

These contentions are based on a 2010 OIG report that generally alleged that SNFs are increasingly billing for higher-paying therapy RUGs, even though the patient characteristics of SNF

residents are largely unchanged; for-profit SNFs are more likely than nonprofit SNFs to bill for higher-paying RUGs; and a number of SNFs have questionable billing for therapy services. Anecdotal, we are hearing that SNFs who report between 10% and 15% of their resident census as being in the Ultra High Therapy RUGs category are subject to receiving RAC requests for documentation to support those numbers.

The types of documents a RAC can request in connection with one of these therapy audits often include face sheet, discharge summary, history and physical, emergency room records and ER nursing notes, SNF nursing notes, physician orders, therapy treatment plans, physician progress reports, lab reports, and radiology reports, among others.

Should your facility receive such a request for supporting documentation, be aware that until such time as CMS approves this issue for audit, the RACs are not permitted to recover claims already paid; they can simply report these findings to CMS. Providers are required, however, to comply with RAC requests for documentation on these "test issues," even though the issue is not currently on the CMS-approved audit list. Once CMS approves this issue (and presumably CMS will since the

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U.S. Department of Labor Focuses Enforcement Efforts on North Carolina Residential Care Facilities

On December 1, 2011, the United States Department of Labor (DOL) announced a new “enforcement initiative” focused on residential care facilities in North Carolina. The DOL’s press release announcing this new initiative says its investigators will be visiting residential care facilities throughout the state to interview employees and review their pay practices and records for compliance with minimum wage, overtime and record-keeping requirements of the Fair Labor Standards Act (FLSA). For purposes of the DOL’s new enforcement effort, residential care facilities include group homes, long term care facilities, and other businesses in North Carolina that provide residential care for children, the aged and other individuals with limited self-care abilities.

In announcing the new initiative, the DOL cited the track record of its Raleigh district office in investigating 120 residential care facilities in North Carolina since 2006 and recovering more than \$980,600 in back pay for over 1,000 employees of such facilities. Examples of FLSA violations by employers in North Carolina’s residential care industry, which the DOL says were found during these investigations and will be the focus of its enforcement initiative in North Carolina, include:

- Failing to pay workers for work performed outside an employee’s scheduled shift or time spent attending required staff meetings and employer-sponsored training
- Deducting time or pay for sleeping periods for employees on duty for less than a 24-hour period
- Deducting a set amount of time or pay for lunch periods (e.g., 30 minutes or an hour) when employees are working through such automatically deducted lunch periods
- Paying nonexempt employees a flat salary without regard to overtime

by *Louis Meyer*

- Making unlawful deductions for uniforms and other items that cause an employee’s wages to fall below the federal minimum wage of \$7.25 per hour

The DOL’s press release says its investigators will be assessing compliance with FLSA requirements among facility owners, operators, third-party management companies and other businesses associated with North Carolina residential care facilities, especially independently owned group homes where findings of FLSA violations have been most widespread. The DOL’s announcement states that the goals of its enforcement initiative are “to remedy systemic violations, educate employers about their legal responsibilities and promote sustained compliance throughout the industry” and emphasizes the DOL is also providing FLSA compliance assistance and education to employers and industry associations.

In announcing this initiative, the DOL also reminded employers that they can be subject to corrective action for any FLSA violations, including litigation, civil money penalties and liquidated damages, to recover employees’ wages and ensure compliance with the FLSA. Employers in North Carolina’s residential care industry should review their pay practices, and consult with employment law counsel if necessary, to make sure they are paying employees for all time worked in a given work shift, workday, and workweek.

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Employing Individuals Excluded From Federal Health Care Programs: A Follow-up to Last Month's Article

by Ken Burgess

Our story in last month's *Shorts* on the risks of employing or contracting with individuals who have been excluded from the Medicare, Medicaid or other health care programs prompted a number of questions from readers. This month, we'll answer the most frequently asked questions.

What are the penalties for employing or contracting with an excluded individual? Providers who employ or contract with an excluded individual can be fined up to \$10,000 for each claim submitted that involved an excluded individual or entity, plus three times the amount actually claimed for reimbursement and, in extreme cases, the provider itself can be excluded from federal health care program participation. A "claim" can be a bill for therapy services or it can be the amount of money received each day under a prospective payment (PPS) or per diem system for every resident whose care involved, even remotely, the excluded person.

What is the OIG's "voluntary disclosure program?" The voluntary disclosure program allows providers who discover that they have employed or contracted with an excluded individual or entity to "self report" that violation to the OIG and work out a settlement and appropriate fines with the OIG, rather than risking being "caught" by the OIG later.

Why would a provider ever use the voluntary disclosure program? Fines are generally substantially less than for providers who are discovered by OIG to have violated the regulations prohibiting the hiring of excluded persons. For nursing homes in particular, since they are paid under a PPS system, the OIG will normally accept a fine that is computed as follows: 1) the full amount of the excluded individual's salary and benefits for the entire time he or she was employed while excluded; 2) multiplied by the facility's average Medicaid and Medicare census (this is designed to recoup only that portion of the employee's salary that relates to federal health care program dollars); 3) times a multiplier of somewhere between 1.25% and 2% (and this could be higher depending on aggravating factors). So the longer a provider employs or contracts with an excluded individual or entity, the larger the fine and length of employment

while excluded directly drives the size of the civil money penalty. This underscores the importance of checking the OIG's List of Excluded Individuals and Entities for all new hires and contractors, and periodically (at least annually) thereafter.

If I self-disclose, I'll be fined for sure. If I discover I've hired an excluded person, aren't I better off taking my chances that I won't get caught? Not necessarily. The odds a provider will "get caught" are not small. If and when the employee or contractor at issue reapplies for readmission to the Medicaid, Medicare or any other federal health care program, he or she is required on the application to provide, under oath, all of the places he or she has worked during the exclusion, all educational courses taken and all periods of unemployment – in other words, a complete history of what they've been doing while excluded. This includes the name of any health care provider for which he or she has worked or had contracts during the exclusion period AND each provider's Medicare provider number, address and Universal Provider Identification Number (UPIN). Armed with this information, the OIG then knows which providers, if any, hired that person and can find them quickly. That employee, probably without even realizing it, leads the OIG to all employers for which he or she worked while excluded. At that point, it's too late for the provider to self-disclose and limit its exposure for civil money penalties and other sanctions. You should assume all employees who want to work in health care will reapply for readmission. Otherwise, they are extremely limited in health care jobs they can hold. This is not a small risk for providers.

CMS's Recovery Audit Contractors (continued from page 1)

requests for approval are coming from the OIG), claims that are not supported by appropriate documentation can be recouped by the RAC.

In the meantime, providers claiming reimbursement for between 10% and 15% of their residents in the Ultra High Therapy RUGs category should consider self-auditing their internal records to ensure that minutes of therapy recorded on the Minimum Data Set match those recorded in residents' medical records, and that the medical records of residents support the amount of therapy provided. All providers should consider such an audit, but the focus, at least for now, appears to be on providers providing that level of Ultra High Therapy in their facilities.

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Meet the Winners: North Carolina Activity Professionals Headed to Nicaragua

by *Ken Burgess*

In the October issue of *Shorts*, we announced our first-ever competition for long term care providers and asked you to nominate “the best of the best” North Carolina activity professionals to travel for free with us to Nicaragua in January 2012, to initiate the very first activities program for elders in Nicaragua and probably in all of Central America. Thanks so much to each of you who nominated a candidate for the scholarship to Nicaragua — we received incredible nominations.

We found a winner – but had a big problem. We were offering one \$1,500 scholarship for one activity professional. But the nominations were so great that we couldn’t choose just one. Many of the nominators talked about how their candidates had changed the lives of seniors and always knew how “to do more with less.” So we picked up on that theme, scrounged around and found enough money for a second \$1,500 scholarship.

But we still couldn’t pick just one additional winner. So we reached out to the employers of our tied second runners up, Liberty Healthcare and Rehabilitation Services and the Avante Group, and we asked them, “If we pay a half-scholarship, will you match the rest?” They both immediately said yes and thanked us for asking (how cool is that?). We are so grateful. Now we have a team of three stupendous activity professionals for the trip.

The winners are:

Brenda Zimmerman, Lutheran Home of Salisbury (nominated by her friend Onie Bodenheimer, director of operations for Woodland Place Assisted Living Community in Greensboro)

Jamie Phillips, Avante at Wilkesboro (nominated by her administrator, John Walder)

Erica Johnson, Liberty Commons Rehabilitation Center in Wilmington (nominated by her administrator, George Rallis)

We are SO excited. We leave on Sunday, January 15, 2012, for a long, hard, rewarding week at the five centers in Nicaragua that our host, the Jessie F. Richardson Foundation in Oregon, supports. I’ll be joining the team — along with Carron Suddreth, owner of Wilkes Senior Village and JFR Foundation Board member, and Angie Bunton, RN, who works with Carron — and we’ll meet up with our JFR colleagues in Managua. Our goal is to work with residents, of course, but to mainly work with local center staff to teach them the importance of activities for elders and to train them in simple activities programs they can sustain, and hopefully grow, once we are gone. The Foundation’s goal, in everything we do, is always sustainability and replicability. Our winners, now a team, have already started planning the programs they will develop for Nicaragua, locating demonstration supplies, identifying what supplies can be found locally in Nicaragua and generally getting ready to embark on the trip of a lifetime.

If the excitement, enthusiasm and energy these three ladies have shown so far is any indication, this is going to be an amazing trip. In the March issue of *Shorts*, we’ll profile the winners, their trips and their stories... stay tuned. In the meantime, I want to offer a heartfelt thanks to every North Carolina long term care provider and professional who has supported our work in Nicaragua over the past five years — and there are many of you. I want to thank the Avante Group and Liberty Healthcare for helping us “do more with less” and making it possible for us to choose three winners, not just one. And I want to thank Onie, John and George for nominating these incredible professionals.

Finally, I just want to say to our winners and Nicaragua team members, as they say in the Bud Light commercial, “OKAY LADIES, HERE WE GO!”

Ken’s Quote of the Month

“Every choice has a price.
The question is, are you willing to pay it?”
-Anonymous