

Wisconsin Establishes Requirements for Assisted Living Facilities

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Practice Area: Health Law

In January, the Wisconsin Department of Health and Family Services (DHFS) issued new regulations governing assisted living facilities. A culmination of legislative efforts since 1994, the final regulations set forth detailed requirements for building structures, services, admission and retention of tenants, service and risk agreements, termination of contracts, and tenant rights.

In addition to requiring registration or certification of all assisted living facilities, the new regulations define and limit the use of the name "assisted living facility."

The regulations take effect March 1, 1997.

What is an Assisted Living Facility?

The regulations prohibit an entity that does not meet the above definition from designating itself as an "assisted living facility" or using the phrase "assisted living facility" to represent or tend to represent the entity.

Registration/Certification Requirements

Under the new regulations, all assisted living facilities must be either registered or certified by DHFS. An applicant seeking registration must submit a completed application form supplied by DHFS, together with documentation showing that the facility meets the definition and complies with all applicable federal, state, and local statutes, ordinances, rules, and regulations. DHFS may visit the facility without prior notice and the owner or operator must be able to verify compliance with the regulations. All registered assisted living facilities must provide notice to tenants through the service agreement that DHFS does not routinely inspect assisted living facilities or verify compliance with the regulatory requirements, nor does DHFS enforce contractual obligations under the service or risk agreements.

An assisted living facility may apply for certification for purposes of medical assistance reimbursement. An applicant must submit a completed application form provided by DHFS, together with approvals, permits, or other documentation that the facility is in compliance with all applicable federal, state, and local licensing, building, zoning, and environmental statutes, ordinances, rules, and regulations. If all the requirements are met, DHFS will issue the certification within 70 days after receiving the completed application and supporting documentation and completing the site visit. The facility will be required to pay an annual certification fee in an amount determined by DHFS.

Applications for registration or certification to convert a separate area of a nursing home or community-based residential facility to an assisted living facility must include the following, in addition to the completed application:

1. a description and floor plan or sketch demonstrating physical separation as required under the regulations;
2. a description of the programmatic separation as required under the regulations;
3. the number of licensed nursing home beds which the applicant agrees to delicense (under the regulations, nursing homes must agree to reduce their licensed nursing home beds by the corresponding number of living units proposed for the conversion to assisted living).

Building Requirements and Variances

The regulations specify that all living units in an assisted living facility be independent apartments with the following physical features:

1. individual lockable entrance and exit (may be a single door);
2. visually and functionally distinct kitchen area (including a stove which must be designed so that it can be disconnected for tenant safety, if necessary);
3. individual bathroom which is not accessible from another unit;
4. visually and functionally distinct sleeping and living areas (which do not have to be separate rooms); and
5. minimum of 250 square feet of floor space (excluding closets).

Upon a request in writing to DHFS, variances to meeting a requirement may be granted where the provider proposes alternative means to achieve the objective of the requirement. For example, DHFS may grant a variance to the minimum floor space requirement to reduce the floor space by not more than 10%. However, a variance may only be granted when a building or portion of a building constructed or under construction prior to the effective date of the regulations is converted to an assisted living facility and the variance does not adversely affect the ability of the facility to meet the tenants' needs or jeopardize the health, safety, and independence of the tenants.

Physical and Programmatic Distinctions

An assisted living facility must be physically distinct from the nursing home, community-based residential facility, or hospital of which it is a part. Tenants must be able to access the assisted living facility without first entering or passing through the health care facility; however, attached facilities may share a common lobby and access area and the assisted living facility may be entered by elevator from that area. The requirement of physical separation does not apply to assisted living apartments which are interspersed in the same building with non-assisted living apartment units for congregate housing, elderly housing, or other purely residential housing.

Assisted living facility services must be made available within the facility and must be programmaticaly distinct from the health care facility or community-based residential facility of which it is a part. Tenants must not be required to leave the assisted living facility to receive the services included in their service agreements. This requirement, however, does not prohibit a voluntary sharing of activities, other services, or administrative functions or sharing of space with the attached facility.

Supportive, Personal, and Nursing Services/Limitation on Hours

The regulations set forth the minimum required services that must be provided by the assisted living facility, either directly or by contract, as well as a limit on the number of hours of service. Facilities must have the capacity to provide all of the following services to tenants:

1. supportive services (meals, housekeeping, laundry, access to medical services);
2. personal services (daily assistance with activities of daily living, such as dressing, eating, bathing, grooming, toileting, mobility)
3. nursing services (health monitoring, medication administration and management)

All facilities must have a written emergency plan and the capacity to provide emergency assistance 24 hours a day.

Facilities are prohibited under the regulations from providing more than 28 hours per week of supportive, personal, and nursing services to each tenant through its own employees or agents. A tenant is free to contract independently with outside providers for any and all services, including supportive, personal, and nursing services beyond the scope of services agreed upon in the service agreement, provided the tenant informs the facility and agrees to include the arrangements in the risk agreement. However, the facility has the right, under the regulations, to limit the total amount of supportive, personal, and nursing services a tenant receives from all paid providers to 28 hours per week, subject to the following: a facility is not permitted to limit (1) the number of hours of recuperative or rehabilitative care services a tenant receives, provided such care will not raise the total level of supportive, personal, and nursing services above 28 hours per week for more than 90 days; (2) the amount of any unpaid services provided by the tenant's family and friends; and (3) the amount of hospice care a tenant receives. No limit exists on the type or amount of other services, activities, or amenities that a facility may provide.

The purpose of the hours limitation and hours computation is for examining and determining whether a person can appropriately reside in an assisted living facility. Facilities should have a written policy concerning hours computation and the number of hours of supportive, personal, and nursing services beyond 28 hours per week, if any, the facility will permit a tenant to receive, subject to the limitations identified above.

Service and Risk Agreements

The facility and the tenant are required to enter into a mutually agreed-upon written service agreement and a jointly negotiated risk agreement, signed prior to the date of occupancy. Specifications for these agreements are detailed in the regulations and briefly described below.

The service agreement must document the amount of services supplied either directly or under contract to a tenant. A comprehensive assessment of the tenant's capabilities, needs, and preferences, initially performed prior to admission and reviewed at least annually, serves as the basis for developing the service agreement. Among other requirements, the agreement must include the facility's policies with respect to tenants' rights and the mechanism for dispute resolution.

The jointly-negotiated risk agreement must specify any situation or condition which is or should be known to the facility to put the tenant at risk of harm or injury where the tenant chooses a course of action contrary to the practice or advice of the facility. For instance, a general risk, such as stairs, should be covered in the risk agreement and should include the tenant's preference on how the specific risk is to be handled and the possible consequences. The risk agreement must also address any unmet needs identified in the tenant's comprehensive assessment which will not be provided for by the facility.

The assisted living facility is required to establish written policies regarding tenant rights which include all the rights detailed in the regulations. Neither a service nor risk agreement may waive a provision of the regulations nor a right of a tenant.

Admission and Retention of Tenants

Assisted living facilities are subject to certain restrictions on admitting or retaining tenants. For example, a person who has a court appointed guardian or who has an activated power of attorney for health care, or who has been found by a physician or psychologist to be incapable of recognizing danger, summoning assistance, expressing need, or making care decisions, may only be admitted if the person shares the apartment unit with a competent spouse or other person who has legal responsibility for the individual.

An assisted living facility may retain a tenant who subsequently falls into one of those categories, provided the facility ensures the following:

1. adequate oversight, protection and services are provided for the tenant;
2. the tenant has a guardian appointed pursuant to Wis.

Stat. Ch. 880 or has an activated power of attorney for health care under Ch. 155, or a durable power of attorney under § 243.07, or both; and

3. both the service agreement and risk agreement are signed by the guardian and by the health care agent or the agent with power of attorney.

Termination of Contract

The regulations are very specific as to the procedures for termination of the assisted living service agreement. The facility must provide 30 day advance notice of termination to the tenant, including the grounds for termination and information on how to file a grievance. Some conditions which are grounds for termination are: the tenant's condition requires the immediate availability of a nurse 24 hours a day; the tenant's behavior or condition poses an immediate threat to the health or safety of the tenant or others; the tenant refuses to cooperate to determine his or her health or mental status for purposes of assessing appropriateness for retention or termination; or the tenant's fees have not been paid upon reasonable notice and opportunity to pay.

Facilities are not permitted to terminate a contract where a tenant has arranged for needed services from another provider and the risk agreement is updated to reflect any unmet needs and potentially unsafe situations. This provision, however, is subject to the facility's right to limit the total supportive, personal, and nursing services to 28 hours per week, as discussed above.

State Funding to Medicaid Recipients

"Assisted Living" is expected to become a category eligible for reimbursement as a Medicaid service under the Community Integration Program and/or the Community Options Program. DHFS submitted a waiver request in January to the federal Health Care Financing Administration for Medicaid coverage of assisted living and expects to receive the waiver in April or May. Once the waiver is received, certified assisted living facilities may begin to bill DHFS for covered services.

Summary

The new regulations on assisted living facilities are very specific and detailed with respect to tenants' rights, building structures, services, and facility-tenant service and risk agreements, among others. Because this update is not all-inclusive of the requirements set forth in the regulations, we recommend that clients who are operating or preparing to operate assisted living facilities review the final regulations for compliance.

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