

Should They Stay or Should They Go? The Assisted Living Involuntary Discharge

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In New Jersey, assisted living facilities are increasingly facing a circumstance where, for one reason or another, they cannot meet the level of care required for the resident or the resident poses a danger to him/herself or others in the facility. New Jersey, like most states, requires a safe discharge, following adequate written notice to the resident or the responsible party (absent emergent circumstances).

When there is no one capable of making the decision, either by incapacitation or when there is no guardian or agent for the resident, or the family is unwilling to transfer the resident, the assisted living facility is left in a quandary. In that circumstance, the facility must take the proper steps to effectuate a safe discharge. When appropriate, it is the right thing to do.

Why Should I Seek an Involuntary Transfer?

Failure by a facility to involuntarily discharge a resident, when appropriate to do so, creates risk or harm to the resident for whom the facility should be discharging, other residents of the facility, staff and visitors. These risks may result in liability to the facility should the facility take the appropriate action to discharge a resident.

What Criteria Must Be Met to Involuntarily Discharge a Resident?

In New Jersey, regulations guide the involuntary discharge of residents. Generally speaking, if a resident's condition meets one or more of the following conditions, he or she may be involuntarily discharged from the assisted living facility:

1. The resident requires 24-hour, seven day a week nursing supervision;
2. The resident is bedridden for more than 14 consecutive days;
3. The resident is consistently and totally dependent in four or more of the following activities of daily living: dressing, bathing, toilet use, transfer, locomotion, bed mobility, and eating;
4. The resident has a cognitive decline severe enough to prevent the making of simple decisions regarding activities such as bathing, dressing and eating and cannot respond appropriately to cueing and simple directions;
5. The resident requires treatment of a stage three or four pressure sore or multiple stage two pressure sores. However, a resident who requires treatment of a single stage two pressure sore shall be retained and a plan of care developed and implemented to stabilize the pressure sore and the condition which caused it;
6. The resident requires more than "assistance with transfer";
7. The resident is a danger to self or others; or
8. The resident has a medically unstable condition and/or has special health problems, and a regimen of therapy cannot be appropriately developed and implemented in the assisted living environment.

It is important to note that the regulations do not **mandate** the involuntary discharge of residents who meet any of the above criteria. The regulations require that assisted living facilities be equipped to provide nursing home level of care. However, the regulations permit facilities to rely on their resident agreement as grounds for mandating the involuntary discharge. As such, it is important that all facilities outline the regulations and provide for the involuntary discharge in the discretion of the facility if the criteria above are met.

Even if your resident agreement does not mandate the involuntary discharge if one or more of these criteria are met, you may be permitted to involuntarily discharge a resident if the resident requires specialized care that cannot be provided by the facility or if the resident poses a substantial risk to him/herself or other.

Is Notice Required?

In order to lawfully effectuate the involuntary discharge, the facility must give thirty (30) days written notice and advise the resident/responsible party of his or her right to appeal. A copy of the written notice must be provided to the Ombudsman for the Institutionalized Elderly. In certain circumstances, as specifically outlined in the regulations, residents may be involuntarily transferred without notice. Generally, danger to the resident or others is required and the State should be notified.

What State Agencies are Involved?

Any time an assisted living facility seeks to involuntarily discharge a resident, the facility should be in communication with the Ombudsman for the Institutionalized Elderly and the Department of Health.

What Happens When the Resident is Incapacitated or the Responsible Party Refuses a Transfer?

In a circumstance where the resident is incapacitated or the responsible party (agent/attorney-in-fact) refuses to transfer the resident to an appropriate care setting, the facility can file a petition seeking the appointment of a guardian. If the resident faces the risk of substantial harm, the court may appoint a temporary guardian to make medical decisions on behalf of the resident. If there are no suitable family members, the New Jersey Office of the Public Guardian may be appointed by the court to act as the guardian.

Who Mandates the Involuntary Discharge?

If a family member continues to refuse the discharge to an appropriate care setting, the court can order the discharge. Frequently, this will be upon the recommendation of the guardian and following examinations by two physicians. Generally, an examination by two licensed physicians is required before a permanent guardian is appointed.

If your assisted living facility has a resident who either exceeds the level of care that the facility can provide or poses a danger to him/herself or others, it is imperative that you seek to involuntarily discharge the resident. In the appropriate circumstances, the involuntary discharge is in the best

interests of the resident and is vital for the health, safety and well-being of the resident him/herself, other residents, staff, visitors and the facility. Assisted living facilities should consult with an experienced assisted living management attorney when faced with the involuntary discharge.