The Assisted Living Resident Agreement

December 26, 2019 | by Timothy Ford

As published in the December Issue of Provider, Long Term and Post-Acute Care, Special Features, by ProviderMagazine.com, on December 26, 2019.

Health care professionals in the assisted living arena are well aware that the resident agreement is the single most important document, setting the expectations of both the resident and facility and outlining those services that will and will not be provided. It is vital that administrators make certain that resident agreements are updated, signed, and stored. Otherwise, the results can be devastating to the facility.

Perhaps the only thing worse than a poorly drafted resident agreement is not having one at all. Moreover, if the facility does not have a signed copy, from a legal perspective, it doesn't actually have one at all.

Uniqueness Key

When it comes to resident agreements, one size does not fit all. Every facility is unique. Different facilities offer varying services and may have a unique community of residents. As a result, the resident agreement should be tailored to the specific services and needs of the community.

For example, different levels of care offered (such as dementia care) bring about particular challenges, requiring carefully crafted language that may not be suitable for facilities that do not provide such specialized care.

To Each State Their Own

Often, companies that operate in multiple states utilize the same resident agreement across the board. Although that standard agreement may provide a framework, it must be customized for each state in which the organization has operations. Every state has different regulations, including for example, parameters as to the level of care that will and will not be provided, the amount and maintenance of security deposits, personal needs allowances, and specifications about admission and residency relating to the resident's particular medical and wellness needs.

Of course, all assisted living operators are keenly focused on the business and management of the facility, and therefore the levels of occupancy are always in consideration. Those levels vary across the country due to regional trends and local competition, along with the growth of the home-care market. Strategic decisions regarding staff and training, marketing communications, diversifying the services offered, and relationships with hospitals and other referral sources can help plan for the ebb and flow of supply and demand.

Also critical to these decisions is a review of the situations that would cause a resident to leave, including for example, a major health change requiring a move to another type of facility, failure to pay, or mental health issues involving the resident's safety.

With a long-term financial outlook in mind and analysis of available metrics of the types of discharge that occur (voluntary, involuntary, death), facilities must craft favorable yet fair termination provisions while ensuring compliance with the myriad state statutes and regulations.

Keeping Discharge in Mind

It is axiomatic that the two primary reasons for discharge are non-payment and level-of-care issues. With that being said, administrators and marketers must perform due diligence prior to a resident signing the agreement to move in. Answers to the following questions can help a facility determine risk and occupancy, for example: Does the resident have the assets to pay for the services? Are those assets liquid or tied up in real estate? Are there potential limitations on eligibility? Is there an anticipated penalty period for Medicaid? Can the facility provide for the level of care required? How long can management anticipate being able to provide that level of care?

Virtually all states require written resident agreements and formal notice of involuntary discharge. However, if a resident or a family member of the resident refuses to leave voluntarily or there is no payer source (private funds exhausted and ineligible for Medicaid), the facility may need to involve counsel to navigate the involuntary discharge and the potentially contentious discussions with the resident and/or family.

Agreements and Disputes

In many cases of involuntary discharge disputes, the Ombudsman (or state equivalent) will get involved, and litigation may be necessary to ultimately discharge a resident. Regulators and judges will often look to the terms of the signed resident agreement to determine whether the facility is in fact entitled to the relief that it seeks.

Dispute resolution comes in many forms. Therefore, all resident agreements should include a provision about dispute resolution, detailing alternatives such as jurisdiction for litigation or arbitration, in compliance with prevailing laws. It is important to stay informed about rule changes issued by the Centers for Medicare and Medicaid Services (CMS) as well as any changes enacted on a state-by state level, with particular attention to how a state defines facility-based care.

In July of 2019, the CMS formally rescinded the ban on pre-dispute arbitration agreements with long term care residents, and, effective September 16, 2019, long term care facilities can enter into binding pre-dispute arbitration agreements as long as they meet certain requirements. The agreement must provide residents with a right to rescind the agreement within 30 days of signing it, and the agreement cannot require any resident to sign a binding arbitration agreement as a condition of admission.

As a result of this recent change in the law, all assisted living facilities should review their dispute resolution provision to not only select the manner in which they want to resolve disputes, but also to ensure they are doing so in a manner that complies with state and federal law.

Keeping Up With Changes

With laws changing at both the federal and state levels, facilities should not rely on the same agreement year after year without making any changes. As the law changes and the industry evolves, the facility's administrators should carefully review the resident agreement and make changes that will eliminate ambiguity in all categories, from level of care and services provided, to fees, discharge, dispute resolution, and the resident's rights and responsibilities. Failure to comply with laws can result in litigation and financial losses, as well as damage to the facility's reputation and brand. Administrators should regularly audit all resident files and while in the process of doing so, make sure the current agreements in the file are signed and updated if needed.

Although this is by no means an exhaustive list of issues to look out for with resident agreements, it highlights many of the recurring and challenging issues that administrators face. Remember, one size does not fit all. The resident agreement is the single most important document for the facility and must be treated as such.

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