

Health Care Law

Nursing Home Litigation: Fitting in the OBRA Regulations

By David Cohen

Although nearly nonexistent in New Jersey's legal landscape for quite some time, nursing home litigation has grown exponentially in the last decade. By both statute and regulation, New Jersey has maintained a core set of standards by which nursing homes must operate and the rubric in which they are litigated. Playing no small role in this arena are the Federal regulations derived from the Omnibus Budget Reconciliation Act of 1987, commonly known as OBRA. Though litigators may squabble over the particularities these Federal rules, the centrality of their importance is universally accepted. Infractions can lead to citations, fines and in more extreme cases — closure of facilities.

To appreciate the relevance of OBRA, an examination of New Jersey's nursing home statute, N.J.S.A. 30:13-1 et seq., is essential. Although case law interpreting its implementation is sparse, many of its aspects are quite clear. In this regard, the analysis begins with N.J.S.A. 30:13-3,

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“Responsibilities of Nursing Home:” Every nursing home shall have the responsibility for ensuring compliance with all applicable State and Federal statutes, rules and regulations.”

The appropriate regulations which pertain to long-term care are indisputably OBRA. Thus, not only by regulation but by statute, all long-term care facilities in New Jersey (a/k/a nursing homes) must be fully compliant with OBRA. New Jersey's statutory scheme takes the analysis one step further and provides an enabling section, N.J.S.A. 30:13-8(a), which notes:

Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation....Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action

The statutory scheme makes clear that a violation of any of those regulations gives rise to a cause of action, also providing for fee shifting, cost shifting and the potential imposition of punitive damages.

In the end, it is rarely if ever the

case that practitioners prosecute claims based on the minutiae affiliated with a minor infraction of a subsection of the code. Cases involving catastrophic injuries, such as starvation, life-threatening bedsores or crippling fractures simply cannot exist or be prosecuted without a concomitant violation of OBRA. For this reason, it is essential that practitioners be appreciative not only of the medicine and liability issues in nursing home litigation, but also understand the complex and interwoven relationship between those and the components of OBRA which lay out the responsibilities of nursing homes toward their residents.

Attorneys can address this detailed analysis with the help of their experts, but can only successfully complete the process by digging into the regulations themselves. One of the most oft-used and often misunderstood of these is 42 CFR 483.25(c) -F-tag 314 — commonly known as the bed sore F-tag — which is so significant in its scope and breadth that its use as a tool both in litigation and in the assurance that residents receive the highest quality care possible should not be underestimated. F-tag 314 compels nursing homes not to allow bedsores to develop on residents unless they can show through the use of all appropriate medical means possible that the bedsores were unavoidable. The F-tag further underscores the fact that, many years down the road, the utilization of a defense expert who may characterize the bedsores unavoidable cannot satisfy the requirements of F-tag 314. Instead, there are very specific protocols and charting responsi-

bilities which nursing homes face — only after which will potentially allow them to have skin breakdown be characterized as unavoidable.

The OBRA code is significant in size and scope. Its contents are generally worth mining for more information relevant to today's nursing home litigation. Provided below is a sample listing of a number of other significant F-tags from the OBRA code which typically are underutilized by plaintiff's attorneys and often unappreciated by the defense. All of these relate to the quality of care which residents deserve to receive in the nursing home context and are reflective of gaps involving unaddressed areas of legal rights of nursing home residents in cases which are already being litigated.

Range of motion (F-tag 317): This tag provides that facilities must ensure that residents do not experience reduction in their range of motion (contracture) unless this is clinically unavoidable. It is strongly advised that practitioners read the entirety of this F-tag in conjunction with 314 (as referenced above). The language is strikingly similar, along with the incidents of nursing home residents suffering from crippling contractures of both upper and lower extremities. In many circumstances, nursing homes simply fail to provide the active or passive range of motion therapies prescribed by physicians. These can lead to crippling injuries and further expose nursing homes to additional claims if they cannot justify such contractures as being unavoidable.

Restraints (F-tag 222): This regulation states that residents must not be physically or chemically restrained for purposes of discipline or convenience. This regulation largely pertains to abuse cases and is reflective of the fine line that nursing homes face when balancing the safety of nursing home residents along with the requirement that they receive the highest level of independence that their particular condition warrants.

Medical directors responsible for all

clinical care (F-tag 501): Facilities must employ a licensed physician to serve as medical director and coordinate medical care, provide clinical guidance and ensure implementation of all resident care policies and all medical care in the facility. Of all of the recent amendments to F-tags, 501 might be the most significant. With many nursing home owners opting not to insure their facilities, the increase in responsibility to medical directors (a mandatory post within any nursing home), may ultimately lead to an increase in volume of litigation against medical directors themselves, who now have an immense level of responsibility toward all nursing home residents and what happens to them in the facilities. Historically, nursing homes have not purchased insurance for medical directors and these same medical directors often find that their malpractice policies will not cover their activities as medical directors.

Comprehensive care plans (F-tag 279): This tag provides that facilities must timely develop, implement, and evaluate an interdisciplinary plan of care for each resident. The point of the comprehensive care plan is that it marks the very essence of the plan for protecting nursing home residents. By definition, all different disciplines must participate in the preparation of the care plan, with each of those disciplines having the appropriate level of input. Most importantly, all aspects of the plan of care must evolve as the resident's condition improves or deteriorates.

Sufficient nursing staff (F-tag 353): This tag requires adequate staffing for nursing. More and more, studies are being released to confirm that most nursing and other medical errors occur in the context of short staffing and over-fatigued care providers. This OBRA F-tag is similarly reflected in N.J.S.A. 30:13-3(c), wherein nursing homes are authorized only to admit that number of residents for which they can provide adequate and safe nursing care.

Urinary incontinence (F-tag 315): This tag requires facilities to ensure that incontinent residents are not catheterized

for staff convenience. Catheterization is acceptable only if it is medically justified.

Quality of care (F-tag 309): Additions to the interpretative guidelines of this F-tag were published on March 31, rendering F-tag 309 a powerful tool to ensure that nursing home residents receive appropriate pain management, regardless as to the source of the injury or maladies suffered by them.

Hydration (F-tag 327): This particular F-tag is particularly important, in conjunction with nutrition in investigating bedsores claims.

Nutrition (F-tag 325): This tag states that a facility must provide adequate nutrition for each resident. It is strongly recommended that attorneys carefully review the cost reports filed by nursing homes, wherein research can demonstrate how much money is actually spent per resident per day for food. Some of the figures are shocking, with many nursing homes in New Jersey spending an aggregate of well under \$5.00 a day for three meals and two snacks per nursing home resident.

Abuse (F-tag 223): This regulation requires that a resident of a nursing facility has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment and involuntary seclusion. Additionally, nursing homes are responsible under these regulations for ensuring that any injuries of unknown origin be reported to the state, in order that state surveyors and investigators can attempt to determine what happened to the resident.

There never comes a time when a nursing home litigator has mastered the OBRA regulations. Rather, they are a source of information, constantly changing, which requires re-investigation and interpretation as cases are handled. The New Jersey Nursing Home Statute makes clear that these regulations are essential to nursing home litigation and constitute a valuable tool in protecting nursing home residents. ■