*The Adelman Advantage*

PBJ – Staffing Levels and State Oversight

Another year draws to a close, and may hope and inspiration lead us all into 2019. My deepest gratitude for my friend and publisher, Chip Kessler and Extended Care Products for their ever-lasting support and confidence in me and the firm for the past several years.

This has been a year of significant transformation for our country and the health care industry. Senior housing and long-term care have encountered multiple regulatory curves to negotiate most importantly an overhaul of the Federal Regulation governing long-term care operations and management. As part of that change, we’ve discussed in this column CMS’ development of the Payroll-Based Journal (PBJ) system for facilities to submit staffing and census information. This system, since 2016, has allowed staffing and census information to be collected on a regular and frequent basis. In November 2017, CMS began posting on the *Nursing Home Compare* website the number of hours worked by nursing staff at every facility and beginning in July 2018, CMS posts for each facility the number of hours worked by both nurse aides and physical therapists. Based on this PBJ data, CMS gives each facility a staffing rating on a five-star scale.

On Nov. 30, CMS announced that it will use PBJ data to bolster state oversight of nursing homes, effective immediately. (See CMS Memo Ref: QSO 19-02-NH).

According to CMS, it is encouraged by facilities’ efforts to improve staffing. It is also concerned about some of the findings from the new PBJ data. For example, some facilities are reporting several days in a quarter without a registered nurse (RN) onsite and/or significantly low nurse staffing levels on weekends. Per CMS, “Since nurse staffing is directly related to the quality of care that residents’ experience, CMS is very concerned about the risk to resident health and safety that these situations may present.” Therefore, CMS began informing state survey agencies of facilities with potential staffing issues: **facilities with significantly low nurse staffing levels on weekends; and facilities with several days in a quarter without an RN onsite.**

Facilities identified as having low staffing on weekends: The State Operations Manual requires states to conduct at least 10 percent of the standard health surveys on the weekend or before 8:00 a.m. or after 6:00 p.m. (i.e., “off-hours”). **States shall [now be required to] conduct at least fifty percent of the required off-hours surveys on weekends using the list of facilities provided by CMS.**

Facilities identified as having reported days with no RN onsite: CMS is aiding surveyors’ investigations by identifying facilities who have higher risk of noncompliance with the RN staffing requirement. When conducting a scheduled standard or complaint survey (regardless of the type of complaint), surveyors should investigate compliance with 42 CFR 483. 35(b)(1), which is the requirement for a facility to provide the services of an RN seven days a week, eight hours a day. **If a surveyor confirms that this requirement has not been met, the facility shall be cited for noncompliance under deficiency F-tag 727**.

CMS will be sending the lists to states this month.

CMS, per the November 30 memo, also made updates to the PBJ Policy Manual, to wit:

Meal Break Policy: CMS expanded the guidance in the PBJ Policy Manual related to deducting time for meal breaks. Note: This is not a change in policy, but CMS is only providing additional details. The guidance includes information for deducting meal times for specific shifts (e.g., eight-hour shifts, twelve-hour shifts, etc.). CMS also added a Q&A to the PBJ Policy FAQs that explains the rationale for the meal break policy.

Universal Care Workers: Some facilities employ “Universal Care Workers,” who are typically certified nurse aides (CNAs) who perform additional duties outside of the nurse aide role, such as food preparation or light housekeeping services. **CMS has added language to both the PBJ Policy Manual and the PBJ Policy FAQ to instruct facilities that they must use a reasonable methodology to allocate the hours that these employees are providing CNA services and report these hours accordingly.** **Hours spent on other duties (i.e. housekeeping, cooking etc.) must not be reported as CNA hours. These hours can be reported under housekeeping or other services; however, reporting of these hours is not required.**

MDS Census Reports: CMS has also created two reports for providers to help ensure data is submitted accurately and in a timely manner. These reports use the same methodology CMS uses to calculate each facility’s census, which is then used to calculate the number of staff hours per resident per day posted on the Nursing Home Compare website. The reports are:

* The MDS Census Summary Report: Allows users to retrieve the daily MDS-based resident census (i.e., count of residents) for each day in a quarter.
* MDS Census Detail Report: Allows users to retrieve a list of the residents that the MDS-based census is comprised of on a given date or dates.

What do these changes mean? Stay very aware of staffing levels and how data is reported. As we’ve reported, the data is easily misinterpreted and erroneous entries can create risk not only in litigation (where PBJ data is used as evidence of understaffing) but also for your state surveys. These changes, along with the HHS OIG announcement that it will be launching a probe into the way skilled nursing facilities maintain their staffing records — with a focus on the CMS’ oversight of those requirements, - creates increased responsbility and accountability in your operations. That OIG report is to be released late next year. Challenges hiring and retaining staff may become even greater as the staffing requirements and scrutiny are increased. The focus will be on maintaining continuity in staffing levels and accurate reporting to avoid the potential pitfalls of the PBJ and recent changes.

As a final sign-off for 2018, I’ll share the wonderful editorial “Is There A Santa Claus” from the September 21, 1897 New York Sun. For those of you who have or have not enjoyed this piece, it restores my belief every year!

***“We take pleasure in answering thus prominently the communication below, expressing at the same time our great gratification that its faithful author is numbered among the friends of The Sun:***

***Dear Editor—***

***I am 8 years old. Some of my little friends say there is no Santa Claus. Papa says, "If you see it in The Sun, it's so." Please tell me the truth, is there a Santa Claus?***

***Virginia O'Hanlon***

***115 West Ninety Fifth Street***

***Virginia, your little friends are wrong. They have been affected by the skepticism of a skeptical age. They do not believe except they see. They think that nothing can be which is not comprehensible by their little minds. All minds, Virginia, whether they be men's or children's, are little. In this great universe of ours, man is a mere insect, an ant, in his intellect as compared with the boundless world about him, as measured by the intelligence capable of grasping the whole of truth and knowledge.***

***Yes, Virginia, there is a Santa Claus. He exists as certainly as love and generosity and devotion exist, and you know that they abound and give to your life its highest beauty and joy. Alas! how dreary would be the world if there were no Santa Claus! It would be as dreary as if there were no Virginias. There would be no childlike faith then, no poetry, no romance to make tolerable this existence.***

***We should have no enjoyment, except in sense and sight. The external light with which childhood fills the world would be extinguished.***

***Not believe in Santa Claus! You might as well not believe in fairies. You might get your papa to hire men to watch in all the chimneys on Christmas Eve to catch Santa Claus, but even if you did not see Santa Claus coming down, what would that prove? Nobody sees Santa Claus, but that is no sign that there is no Santa Claus. The most real things in the world are those that neither children nor men can see. Did you ever see fairies dancing on the lawn? Of course not, but that's no proof that they are not there. Nobody can conceive or imagine all the wonders there are unseen and unseeable in the world.***

***You tear apart the baby's rattle and see what makes the noise inside, but there is a veil covering the unseen world which not the strongest man, nor even the united strength of all the strongest men that ever lived could tear apart. Only faith, poetry, love, romance, can push aside that curtain and view and picture the supernal beauty and glory beyond. Is it all real? Ah, Virginia, in all this world there is nothing else real and abiding.***

***No Santa Claus! Thank God! He lives and lives forever. A thousand years from now, Virginia, nay 10 times 10,000 years from now, he will continue to make glad the heart of childhood.”***

Have a blessed holiday season. See you in 2019!

**SAVE THE DATE!!!! The annual, complimentary long-term care conference I host along with Horne Rota and Kaufman Borgeest & Ryan is in its 7th year and not to be missed! Please save the dates April 3-4, 2019 for The National Long-Term Care Defense Summit (love our new conference name!) in Memphis! Education, networking, blues and BBQ! Please contact me for more information and stay tuned for details.**



Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm, established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm’s practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca’s insurance defense practice includes representation of insurance companies and long‐term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation. Contact Rebecca at rebecca@adelmanfirm.com and visit [www.adelmanfirm.com](http://www.adelmanfirm.com) and [www.rebeccaadelman.com](http://www.rebeccaadelman.com).