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WORKPLACE VIOLENCE IN HOSPITALS – A NEW CMS SURVEY FOCUS?

The Centers for Medicare and Medicaid Services ("CMS") published a recent Memo reminding hospitals and other Medicare certified health care entities of their regulatory obligation to maintain a safe setting for patients, residents and staff. CMS's action comes at a time when violence in health care settings is on the rise. Although the Memo does not create any new requirements or standards, it signals that CMS will make the prevention of violence a survey focus going forward.

WORKPLACE VIOLENCE A RECOGNIZED HAZARD IN HEALTH CARE INDUSTRY

Health care workers are uniquely and disproportionately at risk of workplace violence. Citing an April 2020 Bureau of Labor Statistics Fact Sheet, CMS notes in the Memo that health care workers accounted for 73% of all nonfatal workplace injuries and illness due to violence in 2018. More troubling is that percentage has been steadily increasing for at least the past 10 years.

According to the Occupational Safety and Health Administration ("OSHA"), the rate of serious workplace violence incidents in the health care industry was *four times* higher than in the private industry as a whole from 2002 to 2013. OSHA responded to this disproportionately high rate by developing and publishing violence prevention guidelines for health care and social services workers in 2015. The agency routinely makes workplace violence prevention a focus of hospital and long-term care facility inspections. OSHA inspectors are trained to request evidence that health care employers understand the various safety risk factors inherent in the health care industry and that they provide adequate education and training to their staff.

Congress, too, has taken notice of the rising trend of workplace violence in the health care industry. The U.S. House of Representatives passed legislation in 2021 that would require OSHA to publish a permanent standard regarding workplace violence in the health care industry. More recently, Representatives Dean and Bucshon introduced bipartisan legislation called the Safety from Violence for Healthcare Employees Act ("SAVE Act"). The SAVE Act would provide similar protections for hospital employees against assault and intimidation that airline workers currently enjoy under federal law. These measures have been applauded by the American Hospital Association.

CMS WORKPLACE-VIOLENCE-HOSPITALS MEMO

The recently published CMS Memo serves to remind Medicare certified health care entities that all patients should receive care "in an environment that a reasonable person would consider to be safe." To meet this standard, surveyors expect hospitals (i) to have a process for identifying "high risk patients" (i.e., those who are at risk for suicide or other forms of self-harm as well those who exhibit violent behaviors toward others) and (ii) to be able to explain what steps they are taking to minimize those risks.

Hospitals should also have a process for identifying environmental safety risks, including but not limited to those from "ligatures, sharps, harmful substances, access to medications, breakable windows, accessible light fixtures, plastic bags (for suffocation), oxygen tubing, bell cords, etc."

As with OSHA, CMS further expects hospitals to provide appropriate education and training to staff concerning the identification of high-risk patients and environmental patient safety risk factors as well as their corresponding policies and procedures for protecting patients and workers. Such training should be provided on a regular basis to employees, independent contractors, volunteers and others who provide clinical care.

The Memo closes with a reminder that hospitals have been cited in the past for systemic failures that put patients and staff at risk. It provides three such examples, including:

- A nurse in an understaffed behavioral health unit who was sexually assaulted by a patient who was stopped only through intervention by other patients;
- A patient who died after hospital staff and law enforcement performed an improper takedown that resulted in a hospital custodian holding the patient down on the floor with his knee against the patient's back during which the patient stopped breathing and died; and
- A patient who was acting out and shot in his hospital room by off-duty police officers following the failure of hospital staff to perform

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appropriate assessment and de-escalation of the patient.

PROACTIVE APPROACH NEEDED

Workplace violence has long been a problem for the health care industry, and the pandemic and related staffing challenges have almost certainly exacerbated the situation. In addition to risks of citations and penalties from enforcement agencies like CMS and OSHA, health care entities that are unable to demonstrate a clear commitment to protecting their staff will be more susceptible to union organizing and staff attrition—something few health care employers can afford at this time.

Beyond threats of physical violence, health care employers should be mindful that they are legally obligated to protect their employees from workplace harassment. This extends beyond unlawful harassment by employees and includes harassment by visitors, patients and residents. Failure to take reasonable preventative and corrective actions in this area can result in significant liability under state and federal employment discrimination laws.

PRACTICAL TAKEAWAYS

Hospitals and other health care employers face many challenges today, but none are more important than providing a safe setting for patients and staff. Now is the time for health care employers to assess their policies and procedures in this area to ensure they are aligned with CMS and OSHA expectations. Making a firm, genuine and visible commitment to a culture of safety for patients and staff will significantly reduce legal risks. It will also very likely enhance patient satisfaction, improve patient care, boost employee morale and reduce staff attrition.

For questions or more information, please contact:

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