

Defending Evictions from Nursing Homes and Assisted Living Facilities

ISSUE BRIEF • DECEMBER 2017

Eric Carlson, Justice in Aging

Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Since the organization's founding in 1972, we have focused our efforts on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Key Lessons

- 1. Nursing facilities are governed by federal law, while most assisted living standards are set by state law.** The federal Nursing Home Reform Law applies to any nursing facility that accepts reimbursement from Medicare or Medicaid, or both. Most assisted living standards are set by state licensure standards, although federal rules for Medicaid home and community-based services will impact some assisted living settings starting in 2022.
- 2. Transfer or discharge from nursing facilities is allowed only for specified reasons.** Federal nursing facility law allows transfer or discharge only for one of six reasons: 1) resident needs a higher level of care; 2) resident no longer needs nursing facility care; 3) resident endangers others' safety; 4) resident endangers others' health; 5) nonpayment; or 6) facility is closing.
- 3. A nursing facility must give extensive notice of a proposed transfer or discharge.** Written notice must include the reason, the proposed effective date, the location to which the resident is to be transferred or discharged, the resident's appeal rights, and contact information for agencies that could assist the resident. Notice must be given to the resident and the resident representative, generally at least 30 days before the proposed action.
- 4. A nursing facility must document the need for transfer or discharge.** The facility must document the need for transfer or discharge in the resident's medical file. If the action is based on the resident allegedly needing a higher level of care, the documentation must include the needs that allegedly cannot be met, the facility's attempts to meet those needs, and the ability of the proposed receiving facility to meet those needs. Documentation must be performed by a physician (sometimes by the resident's physician) if the action is based on the resident's care needs or on alleged endangerment of others.
- 5. A resident can challenge a transfer or discharge in an administrative hearing.** A resident has the right to introduce evidence and cross-examine adverse witnesses. Procedures to appeal a hearing decision vary from state to state.
- 6. State law often limits reasons for eviction from an assisted living facility.** State licensure laws generally specify limited reasons for eviction from an assisted living facility.
- 7. State law often provides uncertain avenues to appeal a proposed eviction.** A minority of states allow assisted living residents to appeal an eviction through an administrative hearing. A minority of states also specify that a resident has a right to the eviction protections of the state's landlord-tenant law, or can challenge an eviction by filing a complaint with the licensing agency. Frequently, however, state law

does not explicitly identify an adjudication mechanism for assisted living evictions, although residents generally should prevail with an argument that an assisted living resident nonetheless is entitled to protection under the landlord-tenant law.

8. **New federal Medicaid law requires eviction protections for HCBS-funded residential care.** When assisted living services are funded through a Medicaid home and community-based services (HCBS) program, a new federal regulation requires that a resident's protections against eviction be at least equivalent to the protections provided under the state's landlord-tenant law. States must comply with this new law by March 2022, and are currently developing transition plans to come into compliance.

Federal Law Limits Transfer or Discharge from Nursing Facilities

Transfer or discharge is allowed only for one of six reasons

The federal Nursing Home Reform Law governs every nursing facility that accepts Medicare or Medicaid, or both. In general, the law applies to every resident of a certified facility, regardless of how that resident pays for his or her nursing facility care.

Under the Reform Law, a nursing facility resident can be transferred or discharged only for one of six reasons:

1. The resident's needs cannot be met in the facility;
2. The resident no longer needs the facility's services;
3. The safety of others in the facility is endangered by the resident's presence;
4. The health of others in the facility is endangered by the resident's presence;
5. The resident has failed to pay for nursing facility services, despite notice of nonpayment; or
6. The nursing facility is closing.¹

A nursing facility must give extensive notice of a proposed transfer or discharge

A nursing facility must give written notice of a proposed discharge to the resident and the resident's representative, and the long-term care ombudsman program.² (For simplicity, this issue brief henceforth will refer to "discharge" rather than to "transfer/discharge".) The notice generally must be given at least 30 days prior to the proposed action. In certain circumstances, however, notice may be made "as soon as practicable" prior to discharge. This "practicable" notice can suffice if the resident has resided in the facility for less than 30 days or no longer needs the facility's services, or if a more immediate discharge is needed to prevent the endangerment of others' safety or health, or to protect the resident's health.³

The written notice must include the reason for the proposed discharge, the proposed effective date, and the location to which the resident is to be discharged. The notice also must include the resident's appeal rights, along with contact information for the state's long-term care ombudsman program.⁴

Under the language of the statute and the regulation, notice must be provided for any discharge, whether voluntary or involuntary.⁵ To limit the notice requirements somewhat, federal guidance applies the notice requirements only when a discharge is "facility-initiated." If, for example, a resident affirmatively decides to

1 42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i).

2 42 C.F.R. § 483.15(c)(3)(i).

3 42 U.S.C. §§ 1395i-3(c)(2)(B)(ii), 1396r(c)(2)(B)(ii); 42 C.F.R. § 483.15(c)(4).

4 42 U.S.C. §§ 1395i-3(c)(2)(B)(iii), 1396r(c)(2)(B)(iii); 42 C.F.R. § 483.15(c)(5).

5 42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i).

move out of nursing facility and back to an apartment, the discharge is considered “resident-initiated” and notice is not required. CMS defines “resident-initiated” as meaning that the resident or representative “has provided verbal or written notice of intent to leave the facility.”⁶

A nursing facility must document the need for discharge

The facility must document the purported need for discharge in the resident’s medical record. If the discharge is based on endangerment of others, the documentation must be performed by a physician. If, on the other hand, if the discharge is based on a need for more care, or on an improved condition that no longer requires nursing facility care, the documentation must be performed by the *resident’s* physician.⁷ It makes sense to require assent of the resident’s physician in these cases, since such discharges are supposedly for the resident’s benefit.

To limit a facility alleging an inability to meet a resident’s needs, the federal regulations require additional documentation for such allegations. The facility must document “the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).”⁸

A resident can challenge a discharge in an administrative hearing

A resident has the right to request an administrative hearing to contest a facility’s proposed discharge.⁹ The facility cannot go forward with a discharge while a resident is awaiting a hearing or a hearing decision.¹⁰

The hearing generally is held in the nursing facility. The resident or representative has the right to introduce evidence and testimony, and to cross-examine adverse witnesses.¹¹

In the event that the resident wishes to appeal an adverse hearing decision, appeal procedures differ from state to state. In some states, a resident has an appeal right within state government. In other states, the appeal is made to a court.

Assisted Living Eviction Procedures Vary From State to State

State law often limits reasons for eviction from an assisted living facility

As a condition of licensure, many states limit the reasons for eviction from an assisted living facility. In general, these laws tend to be fairly deferential to facilities. Some licensure laws, for example, authorize eviction for a resident’s noncompliance with a facility rule or with the terms of an admission agreement.¹²

Most commonly, evictions tend to be brought under a facility’s claims that it no longer can meet a resident’s needs. When brought by a nursing facility, such a claim almost always is unfounded, since nursing facilities are required to provide a broad level of services. When brought by an assisted living facility, however, the resident’s advocacy task is complicated by the fact that the assisted living law may be less than specific about what level of service an assisted living facility is required to provide. Some state licensure standards may allow the level of service to be set to a certain extent by the admission agreement or by a facility’s pre-admission disclosure statement. Sometimes state law sets forth certain types of care as options for a facility.¹³

6 Surveyor’s Guideline to 42 C.F.R. § 483.15(c) (Tag F622), Appendix PP to CMS State Operations Manual.

7 42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(2).

8 42 C.F.R. § 483.15(c)(2)(i)(B).

9 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3); 42 C.F.R. §§ 483.15(c)(5)(iii), 483.204.

10 42 C.F.R. § 483.15(c)(1)(ii). The regulations make an exception if retention of the resident would endanger the health or safety of others in the facility.

11 42 C.F.R. §§ 431.242, 483.204.

12 See, e.g., Ark. Code R. & Regs. 016 06 001, § 602.1(h).

13 See, e.g., 40 Tex. Admin. Code 92.4 (different types of assisted living licensure); Wash. Rev. Code § 18.20.300 (disclosure of

One defense for a resident is to argue that a facility is discriminating in violation of the Americans with Disabilities Act when it refuses to provide a type of care that could be provided under its license. Such defenses require more legal work and sophistication but may be an attractive option in situations where the state's licensing law is vague on a facility's required level of services.¹⁴

State law often provides uncertain avenues to appeal a proposed eviction

Although state law generally limits the reasons for eviction from an assisted living facility, it is less likely to specify an appeals mechanism. A minority of states provide for an appeal through an administrative hearing.¹⁵ Another small group of states provides for appeal through the state's landlord-tenant law.¹⁶

In many states, state assisted living law does not specify an appeals procedure, but a resident is not necessarily without a remedy. The resident may well be able to argue that the assisted living unit qualifies for protection under the state's landlord-tenant law. Usually the law extends protection to any residence qualified as a "dwelling" (or similar term), while excluding hotels, hospitals, nursing facilities, and comparable residential settings. Under such a definition, an assisted living unit generally will qualify for tenant-type protection.¹⁷

Even if an assisted living resident has a less-than-explicit claim for protection under a state's landlord-tenant law, the practical realities of the eviction process are likely to make the resident's claim more viable. Assume, for example, that a facility tries to force a resident out without any type of legal process and, in response, the resident seeks an injunction in state court. In opposing an injunction, the facility likely will have to argue that the assisted living law limits the reasons for eviction, but that state law gives residents no appeal rights whatsoever. That type of argument has several holes—how can there be limited reasons for eviction, but no mechanism by which a resident can assert those rights? Also, why should apartment tenants be entitled to an eviction trial, while assisted living residents can (allegedly) be evicted without any sort of legal process?

ADVOCACY TIP

Assisted living residents should not assume that they have no appeal rights. Even if a state's assisted living licensing law provides no explicit appeal right, the resident likely has a colorable right to protection through the state's landlord-tenant law. If threatened with an improper eviction, the resident generally can challenge the eviction simply by staying put and asserting his or her right under landlord-tenant law. The onus then is on the facility either to file an eviction action or let the matter drop. In many cases, the facility indeed will abandon eviction efforts at that point. If the facility instead files an eviction action, the resident then has the opportunity to defend himself or herself in court.

New federal Medicaid law requires eviction protections for HCBS-funded residential care

In March 2014, the Centers for Medicare and Medicaid Services (CMS) released regulations governing the settings in which Medicaid home and community-based services (HCBS) are provided.¹⁸ These regulations provide for a five-year transition period, so full compliance by states and providers was required by March

services).

14 See Eric Carlson, Long-Term Care Advocacy § 5.10 (Lexis Publishing 2017).

15 See, e.g., Conn. Gen. Stat. § 19a-535a.

16 See, e.g., N.Y. Soc. Serv. Law § 461-h.

17 See, e.g., *Arcadia Mgt. v. Schillan*, 883 N.Y.S.2d 881 (N.Y. Dist. Ct. 2009) (resident's licensor-licensee relationship was analogous to landlord-tenant relationship).

18 42 C.F.R. §§ 441.301(c)(4)-(6) (HCBS funded through HCBS waiver), 441.530(a) (HCBS funded through Community First Choice Option), 441.710(a) (HCBS funded through state plan amendment). These three provisions are essentially identical, although they apply to different HCBS funding streams. For simplicity, all further citations to the HCBS settings requirements will reference only section 441.301, since an HCBS waiver is a more common funding mechanism than the Community First Choice Option, or HCBS funded through a state plan).

2019.¹⁹ The federal government recently extended the deadline: now, a state will be required to have a transition plan approved by CMS by no later than March 2019, but full implementation will not be required until March 2022.²⁰

Under the federal regulations, community integration is key. The setting must support “full access” by the HCBS recipient to the “greater community.”²¹ Choice also is an important component of a non-institutional environment. Specifically, the setting must “[f]acilitate[] individual choice regarding services and supports, and who provides them.”²² This choice includes the setting itself, as the regulations require that the setting be selected by the HCBS recipient from options that include non-disability-specific settings and (for residential care) an option for a private unit.²³

Residential settings present particular risk of an institutional environment, since the HCBS recipient is living with other service recipients, and in constant contact with HCBS staff. To address this greater risk, the regulations establish additional standards specifically for these residential settings.²⁴

One component of these additional standards is reasonable protection from eviction. At a minimum, the resident must have protections equivalent to those provided to the state’s rental tenants. If the state’s landlord-tenant law does not apply to the setting, the setting and resident must enter into a written agreement that establishes equivalent protections.²⁵

At this time, states are developing their transition plans to implement the federal law. As discussed in more detail in a recent Justice in Aging issue brief,²⁶ most states are leaning towards simply incorporating the federal eviction protection language. Some states are incorporating the federal language into state regulations or into administrative materials such as policy manuals. Other states are incorporating the language into model agreements to be used by facilities.²⁷

As explained by the issue brief, each of these incorporation strategies may be inadequate to protect residents. The federal regulatory language is relatively vague; as a result, incorporation of the language does not give adequate guidance. Specifically, what does it mean for a resident to have “the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city or other designated entity”?²⁸ Both residents and facility operators would benefit from more specificity as to what process and protection is required. Absent such specificity, the burden falls heavily on individual residents to resist eviction and to advocate on a case-by-case basis for specific rights and procedures.²⁹

The issue brief recommends that states establish appropriate standards for evictions from assisted living facilities, along with administrative law proceedings to adjudicate contested evictions. Simply referencing landlord-tenant law is insufficient. First, a state’s landlord-tenant law will not address a resident’s care needs and other similar issues that often arise in assisted living eviction disputes. Second, courtrooms are a poor venue in which to discuss and evaluate a resident’s care needs and actions.³⁰

19 79 Fed. Reg. 2,948, 2,979 (2014).

20 CMS, CMCS Informational Bulletin, Extension of Transition Period for Compliance with Home-and Community-Based Settings Criteria (May 9, 2017).

21 42 C.F.R. § 441.301(c)(4)(i).

22 42 C.F.R. § 441.301(c)(4)(vi).

23 42 C.F.R. § 441.301(c)(4)(ii).

24 42 C.F.R. § 441.301(c)(4)(vi).

25 42 C.F.R. § 441.301(c)(4)(vi)(A).

26 Eric Carlson, How States Can Prevent Evictions When Implementing Federal HCBS Regulations (Justice in Aging Aug. 2017).

27 *Id.* at 6-9.

28 42 C.F.R. § 441.301(c)(4)(vi)(A).

29 *Id.* at 9-10.

30 *Id.* at 9-10.

Conclusion

Residents of nursing facilities and assisted living facilities are particularly vulnerable to eviction, given the unfamiliarity of most residents with the relevant law, and the power dynamics of eviction being threatened by an entity (the facility) that provides personal assistance as well as room and board. Resident representatives and advocates should be both vigilant and aggressive in pushing back and defending residents against inappropriate evictions. Particularly in nursing facilities, the relevant law is favorable towards residents, and should be cited to enable residents to remain in their chosen residences.

Additional Resources

- Eric Carlson, Justice in Aging, ecarlson@justiceinaging.org
- Federal Nursing Facility Laws: 42 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. §§ 483.5- 483.95
- Federal HCBS Settings Requirements: 42 C.F.R. §§ 441.301(c)(4)-(6) (HCBS funded through HCBS waiver), 441.530(a) (HCBS funded through Community First Choice Option), 441.710(a) (HCBS funded through state plan amendment)
- Centers for Medicare & Medicaid Services website, [medicaid.gov](https://www.medicare.gov)
- Justice in Aging Resources, justiceinaging.org/keep-older-adults-home-community

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

This Issue Brief was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration for Community Living, Department of Health and Human Services, Washington, D.C. 20201.