

# Regulatory and Liability Issues

With Staffing in Long-Term Care Facilities

---

---

---

---

---

---

---

---

- ## Objectives
- Review existing regulations related to staffing in LTCs;
  - Recognize theories of liability and potential exposure for LTCs associated with staffing; and
  - Implement strategies to mitigate staffing risks.

---

---

---

---

---

---

---

---

# Federal and State Regulation

---

---

---

---

---

---

---

---

## Sources of Federal and State Regulation

- Nursing Home Reform Act (NHRA) or Omnibus Budget Reconciliation Act of 1987 (OBRA), 42 USC §§1395i-3, 1396r
- CMS Requirements for States and Long-Term Care Facilities, 42 CFR §483
- Long Term Quality Health Care Act, Ala. Code §§ 22-6-20, *et seq.*
- Alabama Department of Public Health (ADPH) Regulations, Ala. Admin. Code §420-5-10
- Alabama Medicaid Agency (AMA), Ala. Admin. Code §560-x-10

---

---

---

---

---

---

---

---

---

---

## Medical Director

- NHRA
  - Medical care of residents under supervision of physician, or at State option, under care of a non-employed NP, PA or CNS in collaboration with a physician
- CMS Requirements for State and Long-Term Care Facilities, ADPH Rules on Nursing Facilities
  - Must designate a physician as medical director to:
    - Implement resident care policies
    - Coordinate medical care
- Alabama Medicaid Agency Rules on Long-Term Care
  - Medical Director responsibilities
    - Written bylaws, rules and regulations, including those on attending physician responsibilities
    - Coordination of medical care
    - Surveillance of health status of employees
    - Execution of resident care policies

---

---

---

---

---

---

---

---

---

---

## Physician Services

- NHRA
  - Medical care of residents under supervision of physician, or at State option, under care of a non-employed NP, PA or CNS in collaboration with a physician
  - Physician available to provide emergency medical care
  - Maintain clinical records, including plan of care and resident assessment
- Alabama Medicaid Agency Rules on Long-Term Care
  - Physician certification
    - Physician must perform specific physician services required by federal law

---

---

---

---

---

---

---

---

---

---

## Physician Services

- CMS Requirements for State and Long-Term Care Facilities, ADPH Rules on Nursing Facilities
  - Physician must personally approve in writing recommendations for admission
  - Residents must remain under physician care and have alternate physician supervise medical care when attending unavailable
  - Arrangements for 24-hour physician care in case of emergency
  - Physician must review program of care, write and sign progress notes and orders at each required visit (exception for flu and pneumococcal vaccines)
  - Visit frequency – 1 visit every 30 days for first 90 days of stay, 1 visit every 60 days thereafter
  - 10 day grace period for required visits
  - Physicians can alternate with a PA, NP or CNS after the first visit
  - Physicians may delegate tasks other than those required by rule to be performed personally to PA, NP or CNS pursuant to protocol if under physician supervision

---

---

---

---

---

---

---

---

---

---

## Nursing Services

- NHRA, CMS Requirements for States and Long-Term Care Facilities, ADPH Rules on Nursing Facilities
  - 24-hour licensed nurse services sufficient to meet the needs of residents
    - Services of RN at least 8 consecutive hours, 7 days a week
      - Unless federal (SNF) or State (NF) waiver
- CMS Requirements for States and Long-Term Care Facilities, ADPH Rules on Nursing Facilities
  - Must designate a licensed nurse as "charge nurse" for each tour of duty
  - Must ensure staff have specific competencies and skill sets for resident needs
  - Unless waived, must designate an RN as Director of Nursing on full-time basis
  - Director of Nursing can only be charge nurse if facility has average daily occupancy of 60 or fewer
  - 24-hour "other nursing personnel" to include nurses aides

---

---

---

---

---

---

---

---

---

---

## Waiver of Nursing Requirements

- SNF Federal Waiver
  - Rural area without sufficient licensed nurses
  - 1 full time RN working 40 hours/week
  - Residents certified by physicians as not needing nursing services for up to 48 hours or arrangements made for RNs and/or MDs to provide necessary services when RN off duty
  - Secretary of HHS notifies State long-term care ombudsman
  - Facility notifies residents and families
- NF State Waiver
  - Unable to recruit appropriate personnel despite diligent efforts
  - State determines no danger to health and safety of residents
  - RN or physician available to respond to telephone calls when no licensed nurse services available
  - State notifies State long-term care ombudsman
  - Facility notifies residents and families
  - HHS reserves right to take over State waiver authority if State shows pattern and practice of granting waiver without evidence of diligent efforts to comply with law

---

---

---

---

---

---

---

---

---

---

## Non-licensed Nursing Services

- NHRA, CMS Requirements for States and Long-Term Care Facilities, ADPH Rules on Nursing Facilities, Alabama Medicaid Agency Rules on Long-Term Care
  - Nurses aides
    - Excludes licensed healthcare workers, registered dieticians and volunteers
    - Cannot be employed longer than 4 months without completing a competency evaluation program approved by the State
    - Retraining required if 24 months since completion of program with no nursing care
    - Regular in-service education required
    - Competency requirements apply to temporary employees also
- CMS Requirements for States and Long-Term Care Facilities, ADPH Rules on Nursing Facilities
  - Nurses aides
    - Must have registry verification that nurse aide has met competency requirements

---

---

---

---

---

---

---

---

## Statutory and Regulatory Penalties

- For non-compliance with statutory and regulatory staffing requirements
  - Extended or additional surveys
  - Plans of correction
  - Notice to residents, licensing boards, state long-term care ombudsman
  - Suspension or revocation of facility license
  - Civil money penalties (not to exceed \$10,000 per day federal)
  - Denial of payments and termination of participation
  - Closure of facility

---

---

---

---

---

---

---

---

## Litigation

Staffing-Based Theories of Liability

---

---

---

---

---

---

---

---

## Liability Theories

- Medical negligence
  - Governed by state medical liability act, with specific requirements:
    - Statute of limitation
    - Notice requirements
    - Specific pleading
    - Expert witness testimony
- Non-medical negligence
  - Theory: Staffing issues are administrative, not directly related to care, but can still lead to resident injury
  - Sometimes called "corporate negligence"
  - If successful, can avoid specific requirements of medical liability act
- Private right of action for violation of statute or regulation

---

---

---

---

---

---

---

---

## Alabama

- Facts
  - Resident of skilled nursing facility (SNF) who was unable to feed himself asphyxiated after being fed by his untrained wife.
  - Lawsuit filed against SNF owner/operator and management company employed by SNF, alleging breach of standard of care under the Alabama Medical Liability Act (AMLA) and a "failure to staff according to appropriate levels of care."
  - Trial resulted in \$750,000 verdict against defendants, and defendants appealed

---

---

---

---

---

---

---

---

## Alabama

- Issues
  - Expert testimony
    - Defense claim
      - Plaintiff's standard of care expert was not qualified to testify against management company defendant because no evidence of managerial experience - not "similarly situated"
    - Testimony from another plaintiff's experts regarding other acts and omissions of defendant prohibited by AMLA and admitted in error

---

---

---

---

---

---

---

---

## Alabama

### • Supreme Court analysis

- AMLA defines "similarly situated health care provider" when that healthcare provider alleged to have breached standard of care does not have a specialty to have the following characteristics:
  - Licensed by appropriate regulatory board
  - Trained and experienced in same school or discipline
  - Practiced in same school or discipline in year preceding alleged conduct
- Plaintiff's expert met criteria to be "similarly situated" – RN, CNA, licensed nursing home administrator
- Plaintiff's expert only gave testimony on resident/patient care, and did not provide opinions outside realm of healthcare services

---

---

---

---

---

---

---

---

## Alabama

### • Supreme Court analysis

- Defendants claimed expert testimony about care of other residents/patients of facility violated AMLA prohibition against offering evidence on any other act or omission other than what is alleged in complaint
  - Defendants "opened the door" for such evidence when asking about observations of care of other patients/residents in cross-examination
  - On redirect, when expert asked, "Did you ever see patients go unfed?" defendants did not object to question to preserve error for appeal
- Judgment for plaintiff affirmed

---

---

---

---

---

---

---

---

## Tennessee

### • Facts

- Elderly resident with history of high blood pressure, dementia, coronary artery disease and bypass surgery entered a nursing facility after immobilizing stroke
- Developed a pressure wound on foot a month after entering facility
- Wound became infected, led to an above the knee amputation, and death 4 months later
- Resident's daughter sued nursing home, and various related corporate entities, alleging negligence, medical malpractice, breach of contract, violations of Tennessee Adult Protection Act (TAPA), and wrongful death
- Result at trial was \$30 million (\$1.9 million for negligence, \$129,000 for TAPA violation, \$0 for medical malpractice, and \$28 million in punitive damages) verdict for plaintiff
- Defendants appealed based on alleged errors in verdict forms and in admission of witness testimony, and excessiveness of punitive damage award

---

---

---

---

---

---

---

---

## Tennessee

### • Evidence

- Records indicated improper care following discovery of wound
  - Consultations with wound specialists and dieticians delayed
  - Recommendations from specialists not timely implemented
  - Resident not receiving properly prescribed pain medications
- Employees testified the following issues were caused by understaffing
  - Residents not properly turned
  - Residents left sitting in their own urine and feces
  - Complaints about understaffing made to facility were "covered up" or concealed for state surveys

---

---

---

---

---

---

---

---

## Tennessee

### • Issues

- Witness testimony
  - Defendants claimed a "summary witness" forensic accountant for the plaintiff was impermissibly allowed to testify as to opinions as an expert and only summarized information helpful to the plaintiff's case
  - Defendants also claimed testimony from former employees about understaffing was unfairly prejudicial and should not have been admitted without giving defendants an opportunity to offer evidence as to bias in cross-examination

---

---

---

---

---

---

---

---

## Tennessee

### • Court analysis

- Tennessee Rules of Evidence allow for summary evidence and case law from other jurisdictions has established that "summary witnesses" are allowed to offer "assumptions and conclusions" on information summarized without becoming expert witnesses
- Summary witness' testimony did not cross the line from assumptions to opinions, and even if it did, defendants had opportunity to and did cross-examine witness regarding any information not used in witness conclusions
- Testimony from former employees was probative, and while naturally prejudicial to defendants, was not unfairly prejudicial; Defendants did not specify which witnesses the excluded bias evidence would affect, and therefore, exclusion was harmless
- Judgment upheld, except for several defendants found to be no more involved in resident care than "investors" – because liability of these defendants affected the punitive damages amount, case was remanded to redetermine punitive damages

---

---

---

---

---

---

---

---

## West Virginia

- Facts
  - 87 YOF admitted to nursing home with numerous health problems, but ambulatory, hydrated and well-nourished
  - Health declined severely in 19 days in nursing home, dying shortly after stay with severe dehydration noted as cause of death
  - Resident's son sued nursing home, and various related corporate entities, alleging medical negligence, corporate negligence, violation of state nursing home act, and breach of fiduciary duty
  - Trial resulted in \$91 million (\$11.5 million compensatory and \$80 million punitive) verdict for plaintiff
  - Defendants appealed, alleging that medical liability act should have been sole source of remedy for plaintiffs

---

---

---

---

---

---

---

---

## West Virginia

- Evidence of understaffing
  - Numerous complaints from residents, families, and employees about chronic understaffing
  - One employee reprimanded for complaining and complaint removed from nursing home records
  - Surveys by West Virginia Health & Human Services revealed understaffing and personnel record issues
- Issue
  - Defendants argued on appeal that the MPLA was SOLE remedy and punitive damages verdict was excessive

---

---

---

---

---

---

---

---

## West Virginia

- Court analysis
  - Breach of fiduciary duty claim dismissed for lack of evidence
  - Nursing home act claim dismissed because of procedural flaw in verdict form
  - MPLA and corporate negligence
    - Defendants argued the MPLA was SOLE remedy
    - Plaintiff argued that allegations related to budgeting and staffing against non-healthcare providers did not fall under the MPLA, and could be alleged as corporate negligence
    - Court agreed with plaintiff's argument and allowed corporate negligence - this point later abrogated when WV's MPLA amended to apply to allegations related to care and treatment and those closely linked to care and treatment
  - Punitive damages verdict was excessive and due for remittitur
  - Verdict on breach of fiduciary duty (\$5 million) and NHA claims (\$1.5 million) reversed and punitive damages subject to remittitur, reducing original verdict to \$48 million

---

---

---

---

---

---

---

---

## Pennsylvania

### • Facts

- Elderly male developed multiple Grade III and Grade IV pressure ulcers in ischial and sacral areas, and both feet while a resident at nursing facility, and later died
- Family sued the nursing facility alleging corporate negligence and vicarious liability, with one specific allegation that nursing home "mismanaged or reduced staffing levels below necessary level to provide adequate care and supervision to patients"
- Trial court granted defendant's motion to dismiss for insufficient evidence, and plaintiff appealed

### • Issues

- Did the allegations related to understaffing meet the Pennsylvania test for corporate liability?
- Were the allegations in the complaint sufficient for vicarious liability?

---

---

---

---

---

---

---

---

---

---

## Pennsylvania

### • Court analysis

- Did the allegations meet the Pennsylvania test for establishing corporate negligence?
  - Prior case law established a 5-part test to determine "non-delegable duties" owed to patients/residents of hospitals or nursing homes for purposes of corporate negligence claims, and trial court held allegations relating to budgeting and staffing were beyond the scope of any previously delineated duties
  - Appellate court, noting trial court did not apply the 5-part test, did so and established that budget and staffing did give rise to non-delegable duties, and therefore met the test for corporate negligence

---

---

---

---

---

---

---

---

---

---

## Pennsylvania

### • Court analysis

- Did the allegations in the complaint meet the test for vicarious liability?
  - Trial court held they did not because plaintiffs did not name specific individual actors alleged to have done wrong
  - Appellate court, relying on prior case law, held that specific named individuals did not have to be named to prove vicarious liability
- Trial court motion to dismiss reversed, and case remanded

---

---

---

---

---

---

---

---

---

---

## North Carolina

### · Facts

- Defendants operated a SNF with "vent unit" for ventilator-dependent patients
- Three residents/patients of vent unit died within a three month period
  - Mr. A found in room with ventilator and alarms turned off for unknown period of time - suffered anoxic brain injury and then death
  - Ms. B found dead in her room with breathing apparatus pulled from neck, no alarm or oxygen in use and no sitter
  - Ms. C died when tracheostomy tube could not be replaced in a timely manner due to lack of proper bedside supplies
- Plaintiffs filed suit against the SNF, the corporate owner of the SNF and its management company, alleging improper staffing led to violations of the standard of care and also violations of North Carolina regulations on nursing staff for vent units
- Jury verdict for plaintiffs more than \$5 million, including punitive damages
- Trial judge dismissed punitive damages award by granting post-trial motion for judgment as a matter of law, and both sides appealed

---

---

---

---

---

---

---

---

---

---

## North Carolina

### · Evidence

- Defendants consistently provided fewer than 5 hours of nursing care per day and no RN for third shift, both violations of NC regulation on vent unit staffing
- Multiple former employees testified defendants repeatedly warned about safety risk of staffing levels
- One administrator resigned because he was pushed by defendants to cut staff and supplies that would not allow proper care for patients, and new administrator told staff his job was to cut staff and supplies to save money
- Supplies were either cut or replaced with supplies of low quality

---

---

---

---

---

---

---

---

---

---

## North Carolina

### · Issues

- Punitive damages
  - Defendants argued NC law required proof that a company's directors or managers were directly involved in conduct that led to punitive damages before they can be awarded against a company
  - Appellate court cited case law that the punitive damages statute was satisfied when management or directors condoned aggravating conduct and noted evidence of defendants knowledge of the cutting of staff and supplies by administration

---

---

---

---

---

---

---

---

---

---

## North Carolina

- Issues
  - Compensatory damages
    - Defendants argued there was not sufficient evidence of negligence with respect to decedent who died after delays in replacing her tracheostomy tube
    - Appellate court noted there was sufficient evidence of negligence that lack of bedside supplies was a failure to meet the standard of care, and expert testimony from a physician that lack of supplies proximately caused death
  - Compensatory award upheld and punitive damages award reinstated but reduced by statutory cap

---

---

---

---

---

---

---

---

## California

- Facts
  - Class action brought by representatives of two former nursing facility residents as representatives of class of former residents against 16 separately licensed but interrelated business entities who owned and operated skilled nursing facilities in the state
  - Allegations were that defendants consistently and intentionally failed to provide adequate nursing staff for its elderly and disabled residents and misrepresented its staff levels to residents and the consuming public
  - Suit based on California regulatory staffing requirements for nursing facilities – no dispute that defendants did not meet minimum staffing requirements (3.2 nursing hours per patient day)
  - Defendants claimed the relevant statute did not allow a private right of action, and if it did, courts should exercise the doctrine of abstention and allow administrative action to resolve – trial court agreed and dismissed case
  - Plaintiffs appealed

---

---

---

---

---

---

---

---

## California

- Court analysis
  - Appellate court determined there was a private right of action sanctioned by another statute within the regulatory framework for alleging noncompliance with staffing statute
  - Appellate court also determined abstention was only available for requests for equitable relief and was not appropriate in case where statutory damages were also sought
  - Judgment dismissing the case reversed and remanded back to trial court

---

---

---

---

---

---

---

---

## Takeaways

- **Statutory/regulatory minimums**
  - Meeting the minimum does not mean a facility is not understaffed
  - Not meeting the minimum complicates litigation defense
  - Seek waivers on nursing staff where applicable
- **Complaints**
  - Whether from residents, families or staff should be addressed and documented
  - Complainants can be witnesses in litigation
- **Corporate structure**
  - Medical directors should make all related ownership and management entities aware of care issues related to understaffing

---

---

---

---

---

---

---

---

## Questions?

---

---

---

---

---

---

---

---