



## December 2008 Edition

From time to time I would like to send you a complimentary copy of my *GreisGuide to LTACHs* Newsletter highlighting important legal and business developments in the Long Term Acute Care Hospital (LTACH) industry. The Newsletter will provide the latest news on the purchase and sale of LTACHs and other health care facilities, key regulatory issues, discussions about critical operational challenges, updates on recent litigation and government investigations, articles about Federal and state legislation and the movements of industry insiders.

### **N.C. General Assembly Bill on Medicaid Payments for LTACHs Stalled in Committee on Health.**

A bill in the North Carolina House of Representatives, H.B. 2196, would require the Division of Medical Assistance of the Department of Health and Human Services to pay the same Medicaid rate to LTACHs as it pays to short-term acute care hospitals that provide services to Medicaid patients. If passed, the law would require this rate to be paid to hospitals that are (i) licensed by the State as acute care hospitals, (ii) certified as long-term care hospitals under Medicare, (iii) accredited by The Joint Commission, and (iv) serving a case-mix index that is the same or higher than short-term acute care hospitals under Medicaid. Sponsored by North Carolina Representative Alma Adams (D-Guilford), the bill was referred to the House's Committee on Health, where it has stalled. We will continue to monitor this Bill's status, as it would have a significant impact on LTACH reimbursement in North Carolina.

**CMS Discusses Possible Application of the Preventable Healthcare-Associated Condition (HAC) Program to Post-Acute Care Providers.** The Centers for Medicare and Medicaid Services (CMS) discussed possible application of the short-term acute care hospital HAC program to post-acute care providers in the LTACH Final Rate Year Rule.

HACs are preventable conditions that are not present when patients are admitted to a health care facility, but which become present during the course of a patient's stay. These preventable medical conditions were identified by CMS in response to the Deficit Reduction Act of 2005 and meet the following criteria: (i) they are high cost or high volume or both, (ii) result in the assignment of a case to a DRG that has a higher payment when present as a secondary diagnosis, and (iii) could reasonably have been prevented through the application of evidence-based guidelines. Effective October 1, 2008, CMS stopped paying acute care hospitals for the extra care resulting from HACs and also prohibited acute care hospitals from passing these charges on to patients and their insurers.

This discussion by CMS is especially of interest to LTACHs in light of the fact that many adverse events classified by CMS as HACs or "Never Events" in a short-term acute care hospital setting occur with greater frequency in LTACHs as a result of the increased length of patient stay and extended patient immobility (e.g., Stage III and IV pressure ulcers acquired after admission).

### **Joint Commission Leadership Standard Addressing Disruptive and Inappropriate Behavior Becomes Effective January 1, 2009.**

Effective January 1, 2009, together with a general renumbering and reorganization of all accreditation standards, The Joint Commission (TJC) will implement new Leadership Standard LD.03.01.01 requiring all accredited health care facilities, including LTACHs, to have a code of conduct defining disruptive and

inappropriate behaviors. This Standard also requires health care facilities to implement a process for managing disruptive and inappropriate behaviors. The Standard has developed from TJC's historical concern that intimidating and disruptive *physician* behaviors foster medical errors, contribute to poor patient satisfaction and to preventable adverse outcomes, increase the cost of care, and cause attrition of qualified health care professionals. It is important to note, however, that the new Standard *targets the behavior of all physicians and non-physician staff members*.

TJC issued a Sentinel Event Alert on July 9, 2009, addressing the problem of intimidating and disruptive behaviors. The Alert stated that such problematic behaviors include, among others, "verbal outbursts and physical threats, as well as passive activities such as refusing to perform assigned tasks or quietly exhibiting uncooperative attitudes during routine activities . . . reluctance or refusal to answer questions, return phone calls or pages; condescending language or voice intonation; and impatience with questions."

The Alert attributes such behavior to multiple systemic and individual factors, including a history of tolerance and indifference to intimidating and disruptive behaviors; indirect promotion of such behavior by organizations that fail to correct unprofessional behavior through formal disciplinary systems; the inherent stresses of dealing with life-or-death situations; fatigue; productivity demands; cost containment requirements; the fear of, or stress from, litigation; and individual personality traits such as self-centeredness, immaturity, and defensiveness.

The new Leadership Standard promotes three courses of action: (i) education regarding both acceptable and inappropriate behaviors; (ii) development of policies and procedures promoting a culture of teamwork, safety, and quality; and (iii) monitoring all individuals and activities covered by the policy. TJC recommends educating all team members, both physicians and non-physician staff, on appropriate professional behaviors defined by the organization's code of conduct and holding all team members accountable for modeling desirable behaviors. TJC also encourages organizations to develop a "zero tolerance" policy for intimidating and/or disruptive behaviors. Organizations are encouraged by TJC to incorporate the zero tolerance policy into their medical staff bylaws, employment agreements, and administrative policies. Leaders are also required to monitor individuals for compliance with its disruptive behavior policy and to consistently and equitably enforce the policy among all physicians and non-physician staff members, regardless of seniority or clinical discipline.

**Preventing and Responding to Healthcare Compliance Investigations.** In the last year, there have been at least five health care fraud settlements in excess of \$100 million each and total recoveries from health care providers in excess of \$2 billion. Two of my colleagues recently authored an article titled "*Pre- and Post- Commencement of an Investigation of Health Care Compliance: Key Considerations for All Providers.*" The article discusses the means by which health care providers can minimize fraud allegations as well as mitigate damages in the event of a fraud investigation. The article highlights the importance of preventative measures by encouraging health care providers to implement internal compliance policies.

The Office of Inspector General ("OIG") of the Department of Health and Human Services has published compliance program guidelines for various health care providers, such as hospitals, small physician practices, nursing homes, and home health and hospices. Although the OIG has not published specific guidance for LTACHs, the principles in the hospital compliance program guidelines are equally applicable to LTACHs. Ultimately, having some form of documented, effective compliance plan will mitigate penalties in the event of an investigation. Periodically performed internal audits also may be

used to evaluate the effectiveness of a compliance policy and to identify problem areas, as required under the Federal Sentencing Guidelines. The article discusses the steps necessary to perform an internal audit.

Although the most cost-effective approach to reducing allegations of health care fraud includes the implementation of preventative measures, it is also important to understand how to respond to government-initiated investigations. There are several ways in which a government-initiated inquiry may proceed—informal inquiry, subpoena *duces tecum* or through a search warrant. The article offers a number of suggested responses to each of these types of inquiries. If you would like a copy of this article, please contact Gretchen Townshend via email at [ghtownshend@mcguirewoods.com](mailto:ghtownshend@mcguirewoods.com) or by phone at (312) 849-8237 or Jason Greis via email at [jgreis@mcguirewoods.com](mailto:jgreis@mcguirewoods.com) or by phone at (312) 849-8217.

### Recent Transactions.

- Triumph Acquisition. Triumph HealthCare, the nation's third largest provider of LTACH services, acquired Our Lady of Peace Hospital from South Bend, Indiana based Saint Joseph Regional Medical Center on October 31, 2008. Our Lady of Peace is a thirty-two bed HwH LTACH located on the fourth floor of Saint Joseph's South Bend Campus. Our Lady of Peace, which has provided LTACH services for over eight years, will remain in its current location for the present. Future plans call for a move to Saint Joseph's Mishawaka location. With the acquisition, Triumph now operates twenty-one LTACHs in seven states.
- Kindred to Open Two New LTACHs in Florida. On October 13, 2008 Kindred Healthcare announced the opening of Kindred Hospital-The Palm Beaches in Palm Beach County, Florida, and announced plans for a new freestanding hospital in Melbourne, Florida. Kindred Hospital-The Palm Beaches is a seventy bed freestanding LTACH in Riviera Beach, Florida. The Melbourne, Florida facility, which will open in the fourth quarter of 2009, will be a sixty bed freestanding LTACH. The Company presently operates eight hospitals in Florida.

### Upcoming Events.

- 6<sup>th</sup> Annual Healthcare Private Equity Conference. McGuireWoods will host its 6th Annual Healthcare Private Equity Conference on Thursday, February 26, 2009 in Chicago, Illinois. This well-attended event is an excellent opportunity for healthcare organizations to network with principals from various private equity firms and financial institutions focusing on the healthcare sector. We are also still accepting speakers for this event. Please contact me if your organization has at least \$1 million of EBITDA and you would like to participate in a panel to provide attendees an overview of your organization. Please contact Andrea Fisher at (312) 750-8896 or at [afisher@mcguirewoods.com](mailto:afisher@mcguirewoods.com) if you would like to register or if you would like more information about this event.
- 7<sup>th</sup> Annual Dialysis and Nephrology Symposium. McGuireWoods will host its 7<sup>th</sup> Annual Dialysis and Nephrology Symposium on Wednesday, May 13, 2009 at the Sofitel Chicago O'Hare. Please join us for an engaging seminar covering business and legal issues in dialysis and nephrology. There is a \$300 fee to attend (\$250 for additional registrants from the same organization). Please contact Andrea Fisher at (312) 750-8896 or at [afisher@mcguirewoods.com](mailto:afisher@mcguirewoods.com) if you would like to register or if you would like more information about this event.

- ALTHA Louisville Conference. The Acute Long Term Hospital Association (ALTHA) will hold a conference May 20-22, 2009 in Louisville, Kentucky.
- NALTH Annual Meeting. The National Association of Long Term Hospitals (NALTH) will hold its Annual Meeting April 30-May 1, 2009 at the Marriott Wardman Park, Washington, D.C.

**Buying and Selling.** We are regularly approached by companies and individuals interested in buying or selling LTACHs, skilled nursing facilities, acute care hospitals, dialysis centers, ambulatory surgery centers, billing companies, management companies, medical device and pharmaceutical manufacturers and various other healthcare-related businesses. Please feel free to contact me if you have an interest in any of these opportunities, either as a buyer or as a seller.

**eNewsletter and Weblog.** Please contact me if you have questions about any of the topics contained in this Newsletter, if you know of someone who would like to receive a copy of this Newsletter or if you would like your name removed from my distribution list. This Newsletter is also available in electronic format. Please visit my weblog ([www.greisguidetoltachs.com](http://www.greisguidetoltachs.com)) and register to receive the Newsletter by email. More frequent content updates are available through my weblog ([www.greisguidetoltachs.com](http://www.greisguidetoltachs.com)). The weblog provides links to valuable business and legal resources, recently published articles, presentations and white papers, upcoming industry events and a hosted blog site where you can discuss topics of interest with peers.

I hope you find the *GreisGuide to LTACHs* Newsletter useful to you in your business. Please feel free to contact me if you would like to suggest a topic for the next issue.

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