Oregon

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Provider Alert
Nursing Facility Providers
IM-17-13-NF

Date: June 21, 2017
From: Nursing Facility Licensing Unit
Subject: CMS Notification Related to Resident Privacy

Summary:

Please see attached S&C: 16-33-NH from CMS regarding resident privacy in relationship to photographs and Audio/Video Recordings by Nursing Home Staff.

For general information contact the DHS Office of Licensing and Regulatory Oversight or visit the DHS Web site at www.oregon.gov/DHS/

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DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 16-33-NH

DATE: **August 5, 2016**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff

Memorandum Summary

- **Freedom from Abuse:** Each resident has the right to be free from all types of abuse, including mental abuse. Mental abuse includes, but is not limited to, abuse that is facilitated or caused by nursing home staff taking or using photographs or recordings in any manner that would demean or humiliate a resident(s).
- **Facility and State Agency Responsibilities:** This memorandum discusses the facility and State responsibilities related to the protection of residents. Specifically, at the time of the next standard survey for both the Traditional survey and QIS, the survey team will request and review facility policies and procedures that prohibit staff from taking, keeping and/or distributing photographs and recordings that demean or humiliate a resident(s).

Background

Recent media reports have highlighted occurrences of nursing home staff taking unauthorized photographs or video recordings of nursing home residents, sometimes in compromised positions. The photographs are then posted on social media networks, or sent through multimedia messages.

Nursing homes must establish an environment that is as homelike as possible and includes a culture and environment that treats each resident with respect and dignity. Treating a nursing home resident in any manner that does not uphold a resident's sense of self-worth and individuality dehumanizes the resident and creates an environment that perpetuates a disrespectful and/or potentially abusive attitude towards the resident(s). Federal nursing home regulations require that each nursing home provides care and services in a person-centered environment in which all individuals are treated as human beings.

NOTE: For purposes of this memorandum, nursing home staff includes employees, consultants, contractors, volunteers, and other caregivers who provide care and services to residents on behalf of the facility.

Resident's Rights to Privacy and Confidentiality

A nursing home resident has the right to personal privacy of not only his/her own physical body, but also of his/her personal space, including accommodations and personal care. Taking photographs or recordings of a resident and/or his/her private space without the resident's, or designated representative's, written consent, is a violation of the resident's right to privacy and confidentiality. Examples include, but are not limited to, staff taking unauthorized photographs of a resident's room or furnishings (which may or may not include the resident), or a resident eating in the dining room, or a resident participating in an activity in the common area.

Residents in nursing homes have varying degrees of physical/psychosocial needs, intellectual disabilities, and/or cognitive impairments. A resident may be dependent on nursing home staff for some or all aspects of care, such as assistance to eat, ambulating, bathing, grooming/dressing and toileting. Each resident has the right to privacy and confidentiality for all aspects of care and services. Only authorized staff directly involved in providing care and services for the resident should be present when care is provided, unless the resident consents to other individuals being present during the delivery of care. For example, if a resident requires assistance during toileting and/or other activities of personal hygiene, authorized staff should assure the resident's privacy, dignity and confidentiality. Each resident must be provided individualized care with dignity and respect. During the delivery of personal care and services, staff must remove residents from public view and provide clothing or draping to prevent unnecessary exposure of body parts. Taking unauthorized photographs or recordings of residents in any state of dress or undress using any type of equipment (e.g., cameras, smart phones, and other electronic devices) and/or keeping or distributing them through multimedia messages or on social media networks is a violation of a resident's right to privacy and confidentiality. Federal regulations include:

- **42 CFR §483.10(e) Privacy and Confidentiality (F164)** - The resident has the right to personal privacy and confidentiality of his or her personal and clinical records. Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident;

Abuse Prohibition

If a photograph or recording of a resident, or the manner that it is used, demeans or humiliates a resident(s), regardless of whether the resident provided consent and regardless of the resident's cognitive status, the surveyor must investigate Federal requirements related to abuse at F223 and F226. This would include, but is not limited to, photographs and recordings of residents that contain nudity, sexual and intimate relations, bathing, showering, toileting, providing perineal care such as after an incontinence episode, agitating a resident to solicit a response, derogatory statements directed to the resident, showing a body part without the resident's face whether it is the chest, limbs, or back, labeling resident's pictures and/or providing comments in a demeaning manner, directing a resident to use inappropriate language, and showing the resident in a compromised position.

There may be some situations in which the resident is unable to express him/herself due to a medical condition and/or cognitive impairment (e.g., stroke, coma, Alzheimer's disease), cannot relate what has occurred, or may not express outward signs of physical harm, pain, or mental anguish. A lack of response by the resident does not mean that mental abuse did not occur; the surveyor should evaluate how the reasonable person would react under such circumstances.

Nursing home requirements at 42 CFR §483.13(b) Abuse (tag F223) provide that "The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion." The Guidance to Surveyors in Appendix PP at tag F223 in the State Operations Manual (SOM) states, "Mental abuse includes, but is not limited to, humiliation, harassment, threats of punishment or deprivation."

Mental abuse may occur through either verbal or nonverbal conduct which causes or has the potential to cause the resident to experience humiliation, intimidation, fear, shame, agitation, or degradation. Examples of verbal or nonverbal conduct that can cause mental abuse, include but are not limited to, nursing home staff taking photographs or recordings of residents that are demeaning or humiliating using any type of equipment (e.g., cameras, smart phones, and other electronic devices) and keeping or distributing them through multimedia messages or on social media networks. Depending on what was photographed or recorded, physical and/or sexual abuse may also be identified.

NOTE: Although a finding of mental abuse indicates that a facility is not promoting an environment that enhances a resident's dignity, surveyors must cite a finding of mental abuse at F223 at the appropriate severity level with consideration of the psychosocial outcome to residents.

Each nursing home must develop and implement written policies and procedures that prohibit all forms of abuse, including mental abuse. Each nursing home must review and/or revise their written abuse prevention policies and procedures to include and ensure that nursing home staff are prohibited from taking or using photographs or recordings in any manner that would demean or humiliate a resident(s). This would include using any type of equipment (e.g., cameras, smart phones, and other electronic devices) to take, keep, or distribute photographs and recordings on social media.

Federal requirements include:

- **42 CFR §483.13 (b) Abuse (tag F223)** - The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

- **42 CFR §483.13(c) Staff Treatment of Residents (tag F223)** - (1) The facility must—(i) Not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion.

- **42 CFR §483.13(c) Staff Treatment of Residents (tag F226)**- The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

Training on Abuse Prevention

Each nursing home must provide training on abuse prohibition policies for all staff who provide care and services to residents, including prohibiting staff from using any type of equipment (e.g., cameras, smart phones, and other electronic devices) to take, keep, or distribute photographs and recordings of residents that are demeaning or humiliating.

The provision of in-service education on abuse prohibition alone does not relieve the nursing home of its responsibility to assure the implementation of these policies and procedures. The nursing home must provide ongoing oversight and supervision of staff in order to assure that these policies are implemented as written.

Federal requirements include:

- **42 CFR §483.13(c) Staff Treatment of Residents (tag F226)** - The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

- **42 CFR §§483.75(e)(2) to (e)(4)– Nurse Aide Competency (tag F495)** – Nurse aides must have received initial and annual abuse prevention training, in accordance with sections 1819(f)(2)(A)(i)(I)) and 1919(f)(2)(A)(i)(I) of the Social Security Act.

Facility Response to Allegations of Abuse

Each nursing home must be managed and operated to ensure that staff implement policies and procedures that promote and maintain each resident's individuality, self-worth, dignity and respect. The facility must report all allegations of abuse, provide protections for any resident involved in the allegations, conduct a thorough investigation, implement corrective actions to prohibit further abuse, and to report the findings as required.

Each nursing home must establish and enforce an environment that encourages individuals to report allegations of abuse without fear of recrimination or intimidation. Protection of residents can be compromised or impeded if individuals are fearful of reporting, especially if the alleged abuse has been carried out by another staff member. For example, it has been reported that after a nursing home employee had posted a humiliating photograph of a resident on social media, several staff had seen the photograph online but did not report it to the facility administration. The nursing home management must assure that all staff are aware of reporting responsibilities, including how to identify possible abuse and how to report any allegations of abuse.

Anytime that the nursing home receives an allegation of abuse, including those involving the posting of an unauthorized photograph or recording of a resident on social media, the facility must not only report the alleged violation to the Administrator and other officials, but must also initiate an immediate investigation and prevent further potential abuse. Examples of steps that the facility may put in place immediately to prevent further potential abuse include, but are not limited to, staffing changes, increased supervision, protection from retaliation, and follow-up counseling for the resident(s). Based on the investigation findings, the facility must implement corrective actions to prevent recurrence.

Federal requirements include:

- **42 CFR §483.13(c)(2) - Response to Alleged Violations (tag F225)**- The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property are reported within prescribed timeframes and thoroughly investigated. The facility must also assure that further potential abuse is prevented and appropriate corrective action is taken.

- **42 CFR §483.75 Administration (tag F490)** – A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.

- **42 CFR §483.75(d) Governing body (tag F493)** - (1) The facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility.

Section 1150B of the Social Security Act (the Act) requires certain individuals in federally funded long-term care facilities to report timely any reasonable suspicion of a crime committed against a resident of that facility. Those reports must be submitted to at least one law enforcement agency of jurisdiction and the State Survey Agency (SA), in fulfillment of the statutory directive to report to the Secretary. Individuals who fail to report under Section 1150B(b) are subject to various penalties, including civil monetary penalties. Section 1150B(d) of the Act also prohibits a facility from retaliating against any individual who makes such a report. Refer to the facility's obligations under "Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility: Section 1150B of the Social Security Act," (See S&C Memo: 11-30-NH, revised January 20, 2012, http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/downloads/scletter11_30.pdf).

State Survey Agency Responsibility-Review of Facility Policies and Procedures

Surveyors are expected to take the following actions 30 days after the release of this memorandum. During the next standard survey, whether a Traditional or Quality Indicator Survey (QIS) survey, the survey team must request and review nursing home policies and procedures related to prohibiting nursing home staff from taking or using photographs or recordings in any manner that would demean or humiliate a resident(s). This would include using any type of equipment (e.g., cameras, smart phones, and other electronic devices) to take, keep, or distribute photographs and recordings on social media. Survey teams should begin this review for standard surveys, effective immediately and implement this policy until each nursing home has been surveyed for the inclusion and implementation of such policies. During any survey, the survey team may request to see such written policies, as necessary based upon identified concerns and/or complaints.

State Survey Agency Responsibility for Investigation

If the SA receives an allegation in the following circumstances, the SA must investigate onsite to determine whether the nursing home is in compliance with the Federal requirements:

1) Unauthorized photographs or recordings of a resident(s) have been taken, kept, and/or distributed on social media or transmitted through multimedia messaging by staff; or
2) A photograph or video itself, or the manner that it is used, humiliates or demeans the resident(s), including, but not limited to, distributing on social media.

Depending on the seriousness of the allegation, the SA must conduct an onsite investigation within two to 10 days (See Section 5075 of the State Operations Manual). In addition, the SA must evaluate whether the allegation may require referral to law enforcement.

During the survey, if the facility is determined to not be in substantial compliance with Federal requirements, the survey team must identify:

- The specific noncompliance;
- The resident(s) who has been, or is likely to be affected; and
- The outcome, or likelihood of an outcome, as a result of the noncompliance, including the presence of or potential for psychosocial harm.

Examples of psychosocial harm include, but are not limited to, extreme embarrassment, ongoing humiliation, degradation as a human being, and fear or panic at the thought of the public or unknown persons accessing these types of photographs or recordings.

If there is no discernible response from the resident, or if the resident's response is incongruent with that of a reasonable person, or if one cannot directly evaluate the resident's psychosocial outcome, the surveyor must attempt to interview family, responsible parties, or other individuals involved in the resident's life to gather how he/she believes the resident would react to the incident.

If the surveyor is unable to conduct interviews with the resident's family, the surveyor must utilize the reasonable person approach, which considers how a reasonable person in the resident's position would be impacted by postings of photographs and recordings, regardless of whether the resident consented, such as:

- Non-offensive authorized photographs or recordings used in a demeaning or humiliating manner; or

- Demeaning or humiliating photographs or videos of nudity, exposed bodily parts, such as genitalia, breasts, or of posting examples of bodily functions such as toileting, provision of incontinence care exposing perineal areas, and/or fecal material on body parts or beddings/furnishings.

The following examples illustrate the use of the reasonable person concept: (NOTE: The survey team must rely on the specific facts identified during each investigation when determining which severity level to assign to a finding of noncompliance.)

A Severity Level 4 example for F164 and F223 includes, but is not limited, to the following:

The facility failed to protect two residents from mental and sexual abuse perpetuated by two staff members, who posted unauthorized videos and photographs on social media of the residents during bathing, toileting and grooming, including nude photos and photos of genitalia. Both residents were cognitively impaired and unable to express themselves. As a result, the two residents suffered public humiliation and dehumanization.

A Severity Level 3 example for F164 and F223 includes, but is not limited, to the following:

The facility failed to protect a resident from mental abuse as a result of taking and sending an unauthorized video of a resident. A staff member had messaged to three of his/her co-workers a video of a cognitively impaired resident eating lunch in the facility's dining room. In the video, the resident was feeding him/herself, using his/her fingers to eat the items on the plate, including mashed potatoes and pudding. The resident was pictured to have food items all over his/her face, clothing, and tray area. During an interview with the resident, the resident was incapable of perception and unable to express him/herself. During an interview with one of the staff members who had received the message, he/she initially thought that the video was funny. As a result, this unauthorized video had the effect of humiliation and embarrassment and did not promote an environment where the residents' self-worth is being upheld.

Reporting to the Nurse Aide Registry and Other State Licensing Authorities

If the State determines that an individual has abused a resident or if the individual waives the right to a hearing (based on a preliminary determination of abuse), the State must report the findings in writing within 10 working days to—

- The individual;
- The current administrator of the facility in which the incident occurred;
- The administrator of the facility that currently employs the individual, if different than the facility in which the incident occurred;
- The licensing authority for individuals used by the facility other than nurse aides, if applicable; and
- The nurse aide registry for nurse aides. [See 42 CFR §488.335(f)]

Contact: Please forward any questions regarding this memorandum to the CMS DNH triage team, DNH_TriageTeam@cms.hhs.gov.

Effective Date: Immediately. This policy should be communicated with all survey and certification staff, their managers and the State/Regional Office training coordinators within 30 days of this memorandum.

/s/
David R. Wright

cc: Survey and Certification Regional Office Management

The contents of this letter support actions to improve patient safety and increase quality and reliability of care and promote better outcomes.