

Third Party Caregivers in Independent and Assisted Living: A Guide to Setting Policies



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Third Party Caregivers In Independent and Assisted Living

Introduction

Residents' aging in place is a phenomenon that most senior living professionals have witnessed. As residents age there are times when support or additional services are needed in order to help them remain as independent as long as possible. Thus when a resident's needs exceed what the community can provide, "outside" providers are hired by the residents to bring in needed services. For the purposes of this document these providers will be referred to as "third party caregivers".

It is important to point out that the Fair Housing and Americans with Disabilities Acts do not permit discrimination based on an individual's physical disabilities and require reasonable accommodations for those who need assistance. Prohibiting the use of third party caregivers in senior living settings would be a violation of these laws. In addition IL/AL providers may not require a resident to use a specific agency or service provider. However, this doesn't mean that Independent and Assisted Living (IL/AL) providers can't have policies in place to address issues related to the use of "outside" services.

Third party caregivers play an important role for residents with increased care needs by providing the support and services that allow them to remain in the least restrictive setting for as long as possible. Unfortunately if not managed properly the influx of caregivers seen in recent years that come and go from a community may add management and operational challenges and unwanted liability.

Because of the variety of issues raised by the presence of third party caregivers in communities IL/AL providers need to consider putting safeguards in place to limit their liability as well as policies to protect the rights of those who call the community home – the residents.

Definitions

Independent Living

Before examining the additional liability that third party caregivers may create we should clarify the term "independent". While this term is used all the time in senior housing it can denote different meanings, the use of the term "independent living" in this document in no way reflects the nature of the residents' abilities or their need for services.

For the purposes of this document the term "independent living" refers to those buildings or settings that only provide services associated with non-licensed, non-hands-on services. These settings may provide some amenities or "concierge" services such as

transportation, housekeeping, dining services and social and educational events but they do not provide any hands-on care, personal care, or medical services such as medication reminders or medication administration.

Assisted Living

For the purposes of this document “assisted living” refers to buildings or settings that are licensed as “Assisted Living or Shared Housing” by the Illinois Department of Public Health (IDPH) and Supportive Living Facilities certified by the Illinois Department of Healthcare and Family Services. (Note: SLFs need to be sure third party caregivers are not providing services duplicative of those the SLF is required to provide, per Section 146.230 of the SLF Code, to Medicaid eligible residents.)

Liability

Generally, liability arises from a duty that one individual has to another. The good news about operating an independent living community, as previously defined, is that it limits the amount of liability management is subject to for care that is delivered. However, assisted living presents a slightly different liability profile because an AL provider is legally responsible for providing care to its residents.

- **Independent living:**

In this case the relevant inquiry is what duty does the IL community have to the Resident? Under Illinois law a landlord (the IL community) generally has a duty of exercising reasonable care to keep common areas in a reasonably safe condition and a landlord is liable for injuries to persons due to failure to perform duties for those lawfully on said premises. Illinois courts have further held that the landlord-Resident relationship generally does not create a duty of the landlord to protect Residents against criminal acts of third persons. A landlord generally does not have a duty to provide care to Residents or to monitor the level or quality of care being provided by third party caregivers.

While a landlord's liability is generally limited, the liability can increase if the landlord assumes a duty. The most common example of this is when a landlord generally does not have an obligation to perform a given service, i.e. removing snow and ice. Courts have held that "when a landlord chooses to remove snow and ice, he is charged with the duty of exercising ordinary care in the accomplishment of that task." Thus by choosing to provide a service or to take an action, the landlord assumes the duty to exercise ordinary care while doing so.

The assumption of a duty may come through a representation such as an advertisement or through a policy. For example, by advertising that a certain service is available at the community the landlord may be held liable for ensuring that the service is delivered at a certain level of quality. Likewise, by maintaining a policy that the landlord will take certain actions the landlord will be required to carry out

those obligations in a responsible manner. The assumption of liability becomes particularly important in the context of third party caregivers.

- **Assisted living:**

As indicated earlier, assisted living presents a slightly different liability profile than IL because an AL provider is legally responsible for providing care to its residents. However, the amount of liability that management is subject to for care that is delivered as a result of a contract between the resident and the care/service provider is limited. The introduction of third party caregivers can muddy the waters and lead to additional liability when there is not a clear delineation between what the responsibilities are for the AL community and what the responsibilities are for the third party provider.

It is important, that an AL community prevent any action that would lead a resident or family member to believe that a third party caregiver is an employee of the AL community. If the community identifies any possibility for confusion, it should work hard to eliminate that possibility. This can be done through clear policies on third party providers as well as communication as necessary with residents and families.

Mindful of these cautions AL providers should also remember they share a mutual goal with the third party caregivers – that of making sure the resident's needs are met and the best care possible is provided.

The Perfect Balance

The "perfect balance" for IL/AL communities is to be able to remove unsatisfactory third party caregivers when necessary, to have limited or no liability for their actions while facilitating the delivery of services as an important support for residents. Reaching this balance is difficult but IL/AL providers can increase their chances of reaching this balance by being mindful of actions that may result in the assumption of liability. The development of policies and procedures is one way to help reach this balance.

Developing Policies and Procedures

While third party caregivers offer crucial support for residents they can also create operational challenges. As a result, IL/AL providers may be tempted to create an exhaustive screening process and a comprehensive set of policies. As is often the case with the development of policies, what works in the conference room may not work in the real world of the community. **Remember, if a community affirmatively represents a specific action it creates a duty to responsibly do so.**

Screening of third party caregivers is an excellent example of how a policy can create a duty. Therefore, if you wish to implement a screening process only do so if you are willing to take the responsibility seriously and to conduct screenings for **all** third party

caregivers. WHY? Because if an IL/AL provider screens 99 out of 100 third party caregivers it will be the one hundredth third party caregiver that breaks the rules or commits the crime in the community and the landlord may be subject to liability for failing to have properly screened the caregiver.

In 2009 licensure of home health/nursing/service agencies became mandatory in Illinois however there are still many individuals and some companies still providing caregiver services without a license. In an effort to minimize liability and alleviate some of the concerns IL/AL providers have about the influx of third party caregivers coming into their communities, one option available is to require residents to use only licensed agencies. The advantage of doing so is this - the law requires these agencies to have liability insurance and conduct background checks and health screenings on their employees.

Licensure of Home Health/Nursing/Service Agencies

The licensure law has placed numerous requirements on agencies which are listed here:

Home Health agencies must:

- Provide skilled nursing and other services under a physician's plan of care.
- Meet licensure standards that address quality.
- Maintain clinical records.
- Conduct a quality improvement program.
- Provide services with licensed and certified personal.

Home Nursing agencies must:

- Establish a written agreement with the client.
- Provide nursing services based on the instructions from the client's physician.
- Identify who is responsible for supervising client care.
- Meet licensure standards that address quality.
- Conduct background checks on agency workers.

Home Services agencies must:

- Establish a written agreement with the client.
- Provide non-nursing services designed to help clients remain safely and comfortably in their own homes.
- Identify who is responsible for supervising client care.
- Conduct background checks on agency caregivers.
- Report any instance of elder neglect or abuse and violations of Illinois laws.

Placement Agencies, sometimes known as Registries, that place but do not employ the worker must:

- Notify the client and the worker of their rights and responsibilities.
- Conduct background checks of all workers on the registry.
- Provide training to all workers on the registry prior to placement with a client.

Screening Recommendations:

Should the provider opt to require residents to use licensed agencies the only screening the provider needs to do is request proof of licensure. They can also verify that the agency is licensed on the Illinois Department of Public Health website.

(http://www.idph.state.il.us/healthcarefacilities/homehealth_list.htm#hha)

For those who do not require residents to use licensed agencies and choose to screen third party caregivers remember to take the responsibility very seriously. If a provider decides to screen all third party caregivers it will then have a responsibility to do so for **every** third party caregiver. The failure to do such a screening could result in a claim that the provider was negligent¹. Should a community decide to implement a screening policy, the following is a list of suggested measures:

- If the caregiver is employed by an agency secure verification that the agency is licensed.
- If the caregiver is not employed by an agency check any or all of the following:
 - Verify² that the third party caregiver has the proper insurance coverage including:
 - o Personal Liability
 - o Medical professional liability, if providing medical services
 - o Automobile liability, if TPCG's automobile will be used
 - Require proof of worker's compensation insurance from the caregiver.³
 - Check the caregiver's references.
 - Conduct a criminal background check. This can be done through the Illinois State Police or a variety of private security agencies.
 - Check whether the individual has ever been determined to have committed abuse by checking the Illinois Certified Nurse Aide Registry.⁴
 - Check whether the individual has been excluded from participating in a federal program such as the Medicare and Medicaid Programs. The following two sites should be checked <http://epls.arnet.gov> & <http://oig.hhs.gov/fraud/exclusions.asp>.
 - Require a written statement from a physician based on an exam within the last six (6) months that the third party caregiver is in reasonably good health and does not appear to be at risk of transmitting communicable diseases.
 - Require proof of a non-reactive Mantoux test or negative chest X-ray as to tuberculosis from the TPCG.

¹ The Alaska Supreme Court found that a patient could proceed with a claim against a hospital for negligently credentialing a surgeon who allegedly injured the patient during surgery. The court stated that the hospital owed an independent duty to its patients to use reasonable care when credentialing to insure that physicians granted hospital privileges were competent. The plaintiff in the case alleged that the hospital was negligent in renewing the surgeon's credentials because the surgeon had disclosed that his medical privileges had been suspended at another hospital.

² Appropriate verification would be a certificate of insurance.

³ Many independent caregivers will not carry workers compensation insurance.

⁴ This is a valuable check even if the person is not currently a certified nurse aide.

An Alternative to Provider Screening = Less Liability

As an alternative to the IL/AL provider screening third party caregivers, a preferable approach, one that helps limit the provider's liability, is to recommend that the resident conduct the screening. Guidelines for screening (See Exhibit I) should be provided to the resident and it is recommended that the resident contract/lease include an addendum that specifically states that:

- The resident will have the responsibility to notify the community that a caregiver has been engaged and to provide the landlord with the third party caregiver's contact information.
- The community has the right to request evidence of proper licensing, training, insurance, lack of criminal record, etc...
- The community is not responsible for screening the caregiver and that the resident will indemnify the community for negligent actions of the caregiver.
- The failure of a third party caregiver to comply with a community policy would be grounds for terminating the lease.

Policies for Third Party Caregiver Conduct

Whether an IL/AL provider requires third party caregiver screenings or not there should be policies developed to address the conduct of the caregivers while they are in the community. A related consideration is ensuring that the caregiver complies with the community's policies. This is best addressed by making the resident responsible for the caregiver's compliance through the lease as noted in the prior section of this document.

The policies should be part of the Resident Handbook. In addition, a copy of the "Third Party Caregiver Code of Conduct" policies should also be given to each third party caregiver or agency. It is also recommended that third party caregiver or agency representative acknowledge in writing receipt and agreement of said policies.

The following are suggested policies to address:

- Honoring the rights of other Residents and staff.
- Safety procedures for entering and leaving the building:
 - Sign in and out policies
 - Identification of what entrance(s) to use
 - Use of resident key by caregiver - what keys can the caregiver have (i.e. common areas, mail box, resident's apartment/unit).
 - Cost to Resident for re-keying locks if key is not returned. Prohibit the making of duplicate keys.etc...
- Acknowledgment that caregiver has reviewed and understands the emergency procedures as stated in the Resident Handbook.

- Drug or alcohol use.
- Smoking.
- Use of cell phones and other electronic devices in common areas; use of public phones if located in the community.
- Solicitation of contributions, donations, tips, gifts or employment from other residents.
- Weapons
- Theft
- Abuse & neglect - including verbal, physical and financial abuse.
- Use of identification badges by caregivers while on the premises of the community.
- Use of common area space and special use rooms in the community
- Dress code
- Third party caregiver's right to stay overnight or live in the community, add on charges for doing so.
- Limit or prohibiting the use of on-site laundry facilities for personal laundry.
- Food & dining services: whether the caregiver can dine or sit with the resident in the dining room.⁵ Payment/cost for the meals. Etc...
- Programs/Activities/Events: cost for caregiver attending?
- Transportation: i.e. whether to charge the Resident when the personal care giver accompanies the Resident on the facility bus.
- Parking: where are caregivers should park.
- Caregiver visitors: whether they are permitted or not, under what conditions.
- Community's role regarding differences between caregiver/agency and the resident/family.
- Use of foreign languages in common areas.
- Orientation process or procedure for caregivers.

As with most policies that address behavior you are advised to have an attorney review it to be certain you have not discriminated against any protected group or violated anyone's constitutional rights.

⁵Due to the limitations of the Fair Housing Act and the ADA it would be difficult to prohibit a caregiver from the dining room or to limit the amount of assistance the caregiver could provide. The same concern would apply to a limitation preventing the caregiver from accompanying the Resident in common areas or during transportation.

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EXHIBIT 1

Resident Guidelines for Screening Outside Caregivers

For the protection, safety & security of the residents residing in _____ (community), management strongly recommends/requires the following measures be taken when securing the services of a third party caregiver (TPCG) if not using a licensed agency:

- Verify that the third party caregiver has the proper insurance coverage including:
 - Personal Liability
 - Medical professional liability, if providing medical services
 - Automobile liability, if TPCG's automobile will be usedThis can be verified through a certificate of insurance.
- Require proof of worker's compensation insurance from the caregiver.
- Check the TPCG's references.
- Conduct a criminal background check. This can be done through the Illinois State Police or a variety of private security agencies.
- Check whether the individual has ever been determined to have committed abuse by checking the Illinois Certified Nurse Aide Registry.
- Check whether the individual has been excluded from participating in a federal program such as the Medicare and Medicaid Programs. The following two sites should be checked: <http://epls.arnet.gov> & <http://oig.hhs.gov/fraud/exclusions.asp>.
- Require a written statement from a physician based on an exam within the last six (6) months that the TPCG is in reasonably good health and does not appear to be at risk of transmitting communicable diseases.
- Require proof of a non-reactive Mantoux test or negative chest X-ray as to tuberculosis from the TPCG.
- If the TPCG will be driving the Resident request a copy of a current driver's license and appropriate automobile insurance.

Management reserves the right to request evidence of any of the items listed above.

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EXHIBIT 2

Independent Living Resident w/Third Party Caregivers Agreement

A third party caregiver (hereafter "TPCG") is any person with whom the Resident (or someone on the Resident's behalf) contracts to provide services for the Resident. The TPCG's contract for services may be as an employee of the resident, an independent contractor, or through an agency (management can choose any or all of these options). Examples of TPCGs may include: nurses, certified nurse assistants (CNAs), therapists, sitters, companions, personal aides, assistants and housekeepers.

Because _____ (the "Community") is an independent senior housing community, it does not provide hands on care or personal care services. Therefore, any care services are the sole responsibility of the Resident. While the Community retains the right to bar any TPCG from entering the Community it is under no obligation to screen any TPCG or to monitor the TPCG delivery of services or care. Please note that the lease outlines the Resident's responsibilities regarding TPCGs and additional rules regarding the conduct of TPCGs are set forth in the resident handbook as well as in the "Third Party Caregiver Code of Conduct". The Resident is responsible for ensuring that any TPCG he/she works with complies with the Code of Conduct.

Each Resident and TPCG must comply with the policies and procedures now existing or later amended by the Community. Should the Resident have any questions about the policies and procedures, the Code, or the information set forth in this document, please contact _____ (staff member).

Resident signature: _____

Management signature: _____

Date: _____

EXHIBIT 3

Assisted Living Resident w/Third Party Caregivers Agreement

A third party caregiver (hereafter "TPCG") is any person with whom the Resident (or someone on the Resident's behalf) contracts to provide services for the Resident. The TPCG's contract for services may be as an employee, an independent contractor, or through an agency (management can choose any or all of these options). Examples of TPCGs may include: nurses, certified nurse assistants (CNAs), therapists, sitters, companions, personal aides, assistants and housekeepers.

Because _____ (the "Community") is an assisted living community and is responsible for the wellbeing of the resident and the services delivered as determined necessary by the required assessment process it is imperative that other services arranged for and received by the resident and or family be reported to management. Coordination of services to assure continuity in the residents care is essential. Individuals and/or agencies providing personal care services to residents need to communicate to management what services are being provided and the frequency so the resident service plan can reflect accurately all of the support and assistance the resident is receiving.

Services secured by the Resident or Residents Representative or family are the sole responsibility of the Resident. While the Community retains the right to bar any TPCG from entering the Community it is under no obligation to screen any TPCG or to monitor the TPCG delivery of services or care. Please note that the lease outlines the Resident's responsibilities regarding TPCGs and additional rules regarding the conduct of TPCGs are set forth in the resident handbook as well as in the "Third Party Caregiver Code of Conduct" (the "Code"). The Resident is responsible for ensuring that any TPCG he/she works with complies with the Code.

Each Resident and TPCG must comply with the policies and procedures now existing or later amended by the Community. Should the Resident have any questions about the policies and procedures, the Code, or the information set forth in this document, please contact _____ (staff member).

Resident signature: _____

Management signature: _____

Date: _____