Assisted Living and the Law — Medicaid Cuts: Potential Challenges and Legal Implications for Long-Term Care Facilities
Hosts: Cal Stein and Emma Trivax
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Cal Stein:

Hello, and welcome to *Assisted Living and the Law*. The podcast series that delves into the intricate legal considerations within the long-term care sector. I am your host, Cal Stein, and I'm a litigation partner in the Health Care + Life Sciences Department at Troutman Pepper Locke. My practice spans a broad spectrum of clients in the healthcare space involving litigation, government investigations, and proactive counseling to preempt and address issues before they escalate into litigation or investigations.

Throughout my career, I have represented numerous nursing homes and skilled nursing facility clients as well as their executives.

Emma Trivax:

Hello, everybody and thanks for joining us today. I'm Emma Trivax, an attorney in Troutman's Health Care + Life Sciences Department, specializing in transactional and regulatory law. My practice includes representing a diverse range of healthcare providers, particularly long-term care facilities. My work often involves advising on multi-state licensure matters, HIPAA compliance, fraud and abuse analyses, and of course, large-scale mergers and acquisitions.

Cal Stein:

Thanks, Emma, and it's great to be here with you again today. And we're going to start by talking about something that's been in the news a bit lately that I think will and could have a real impact on nursing homes and long-term care facilities. And that is the possibility of cuts coming to the Medicaid program.

Now, recently, both the US House of Representatives and the Senate have had discussions about cutting the Medicaid budget, albeit using different methodologies. And while nothing has been finalized, should Congress ultimately pass Medicaid cuts, that would certainly have a negative impact on nursing homes and long-term care facilities.

Emma Trivax:

Yes, that is certainly right, Cal. Just to give some background for our listeners, Medicaid serves eligible older adults, younger adults, children, expectant mothers, and people with disabilities. Medicaid covers nursing home costs for eligible beneficiaries if you meet eligibility requirements. In fact, Medicaid is the primary payer for long-term care in the US, covering more than 60% of nursing home residents. So, without Medicaid, many older adults and individuals with disabilities would not have access to the essential care that they need for daily activities.

Cal Stein:

Right. That's why Medicaid funding is very frequently top of mind for nursing homes and long-term care facilities, as it should be. And it's why these potential cuts to Medicaid are really coming at a more inopportune time than normal for these facilities that are already trying to navigate a number of regulatory changes from the new administration including the new CMS staffing mandates which we'll get to in a moment. There's actually some good news there for nursing homes, as well as updated CMS surveyor guidance. And as we'll also talk about, that updated guidance, for example, it makes clear that surveyors are going to be scrutinizing facility documentation and facility processes when they discharge patients, including those discharged for non-payments.

So, if these Medicaid cuts end up going through, that could, of course, lead to more discharges and thus additional compliance obligations on facilities and further additional risk from both government enforcement activity and civil litigation.

Emma Trivax:

So, Cal, you just mentioned the recent nursing home staffing mandate. And as we discussed in a previous episode, CMS passed this mandate to require nursing homes to maintain certain specified higher staffing levels. It was already going to be challenging for nursing homes to meet these new staffing mandates while continuing to hire qualified staff. So, if there are cuts to Medicaid that lead to even further financial constraints on facility, that would make compliance with the mandates even harder and therefore lead to increased scrutiny and potential penalties from regulatory bodies, not to mention civil qui tam cases from whistleblowers.

Interestingly though, and you previewed this a little bit, there's been a recent federal court decision that offers some relief to nursing homes from these mandates. The Northern District of Texas recently struck down key provisions of the staffing mandate. Specifically, nursing homes are no longer required to have a registered nurse on site 24/7 or meet the minimum staffing ratios of 3.4 hours per resident per day.

Cal Stein:

Yes, I mean look that decision was certainly significant. I mean, the court found that CMS had overstepped its authority in implementing these staffing mandates. And the court emphasized that agencies like CMS can only operate within the limits set for them by Congress. The staffing mandates the court found were outside of those limits. So, in that sense, this decision really aligns is quite well with the Supreme Court's recent decision in Loper Bright Enterprises v. Raimondo, which restricted the power of government administrative agencies to only what Congress explicitly delegated to them. That was the case, of course, that overruled what had been known in some circles as the Chevron doctrine of administrative law, and we are now seeing one of the consequences of that ruling in the form of some of the CMS staffing mandates being struck down.

There is one last point I do want to make on this though, then that is the decision by the District Court in Texas is certainly an important one and a potentially helpful one for nursing homes and

long-term care facilities, but it is possible that the government will appeal that decision. So, that is something we will have to follow very closely

Emma Trivax:

That's exactly right, Cal. And like you said, with this appeal potentially looming, I think it's too soon to say that all nursing or long-term care facilities should move on from the staffing mandate. But interestingly enough, there's also been some discussion from Senate leaders about nixing the nursing home staffing mandate altogether and reallocating related funds to help pay are things like enhanced immigration enforcement. So, we really have to keep an eye on how this continues to develop.

Cal Stein:

Yes. I mean, what's interesting is if that happens, the potential repeal or the potential elimination of these staffing mandates would certainly provide some relief to nursing homes and long-term care facilities who are facing challenges trying to hire more staff to meet them. But I don't know and I don't think that whatever benefit would come would fully offset the financial challenges that could be posed by the Medicaid cuts if they go through on the current levels being discussed by both the House and the Senate.

Additionally, there are some other policies from this administration, like the one you mentioned about immigration enforcement, which could, and dare I say would, reduce even legal immigration, policies like that could also further exacerbate the staffing issues for long-term care providers, even if the mandates don't go into effect or are eliminated.

Now, let's talk about another aspect of these potential cuts to Medicaid, which is the impact it could have on the agency's staffing and the agency's ability to process applications. Now, by statute, Medicaid is supposed to approve applications within 45 days, but in many States, it can take 100 days or more. Since Medicaid requires the past three months of all financial records for an applicant, as soon as 90 days past, applications need to be updated and resubmitted. And if applications take longer across the board to be approved, it's going to upset what is already a very precarious balance for new Medicaid recipients who are either waiting for placements in nursing homes or those who have been paying privately but ran out of money.

Emma Trivax:

Yes. To expand on that, up until now, most facilities will work with families on a provisional basis when they know that Medicaid is pending. So then, the facility will get reimbursed by Medicaid back to the date when the patient was deemed eligible. But if that starts to drag on for far too long, it won't be feasible and some families may end up footing the bill in the meantime. So, private pay rates at nursing homes are much higher than what the government reimburses. You can see how this will cause a problem, especially for families relying on those Medicaid payments, that impact on older adults who need care and on the non-profit mission-driven nursing home members who provide it would be significant. It would not be good.

Cal Stein:

Yes. I mean, there's already a shortage of beds and plenty of patient and patient family complaints about facilities, whether warranted or unwarranted. This is particularly stressful for nursing homes and long-term care facilities, and we are seeing a wave of higher admissions into these facilities as a result of the higher aging population.

Emma Trivax:

Just an aside, because you mentioned the shortage of beds, that brings me to related costs that facilities face, which are what many states call certificates of need or certificates of public need. Whenever a nursing home seeks to add a bed to their facility, they need to apply for these certificates of needs or CONs. And those will certainly need to be kept up. So, just the applications for these CONs can range anywhere from $3,000 to $20,000. And this doesn't even include the cost to actually implement the new beds.

Cal Stein:

Those estimates, Emma, don't include appeals or other legal challenges that sometimes arise and which, therefore, need to be addressed within the CON process. The legal fees alone can be significant. All of this is to say that these problems and others have been building and building for some time and it looks like it might be starting to crash just at the same time when the government is contending that it too is financially strained and is too financially strained to continue to fund Medicaid at the same level that it has in the past. Seems like there are not enough facilities, not enough beds, and maybe now not enough money to pay for everything.

Emma Trivax:

So, what happens if these cuts do happen, and nursing homes can no longer afford to keep around Medicaid patients?

Cal Stein:

Well, look, Emma, it's important to note right up front that the Nursing Home Reform Act of 1987 governs the reasons a nursing home resident can be forced to leave a nursing home. Outside of these reasons, a resident cannot be evicted.

Emma Trivax:

That's right. There are two types of nursing home discharges. You've got voluntary and involuntary. If the nursing home resident agrees that they should leave the nursing home, this would be, of course, a voluntary discharge. Now, if they do not agree, and I think this is where we're getting at, and instead they think they need to continue receiving care at the nursing home, this would be an involuntary discharge, also called, like you mentioned, an eviction.

Cal Stein:

Yes. So, for instance, we've seen nursing homes attempt to involuntarily discharge residents who run out of coverage or evict residents who are on Medicaid to free up a bed for other perhaps higher-paying residents. And as long as a resident has a pending application for Medicaid, he or she cannot be forced to leave the nursing home unless the nursing home does not accept Medicaid as a payment.

Emma Trivax:

So, based on the Nursing Home Reform Act, a nursing home can only legally transfer or evict a patient if, first, the needs of the nursing home resident are greater than the facility is able to provide and a transfer or discharge is necessary for the well-being of the resident. Second, the nursing home resident is not paying for nursing home care after "reasonable and appropriate notice" and has not applied for Medicare or Medicaid. Third, the resident has regained their health to the point where nursing home services are just no longer necessary. Fourth, the resident's presence in the nursing home jeopardizes the health or safety of other residents. Or fifth, the nursing home facility closes.

Cal Stein:

When a facility is discharging a resident, there are certain procedures that it must follow. The nursing home facility must, for example, provide at least 30 days written notice of a discharge to the resident and their family or legal representative, except in the case of an emergency. This notice cannot be given verbally, and it must provide the reason for the discharge, the location to where the resident will be discharged and the right and instructions to appeal.

Emma Trivax:

To even cover more bases, a summarization of the nursing home resident's physical and mental status must be prepared, and a discharge plan must be written up by the nursing home. This plan must ensure that the nursing home resident has a place to move and summarize the care and services that the individual will receive following discharge.

Cal Stein:

So, why are we going through all of this material and all of these requirements? Well the reason is because it is crucial, perhaps now more than ever, that nursing homes and other skilled nursing facilities put these processes and legal protections in place for residents to prevent improper discharges. We previously mentioned that CMS recently revised its surveyor guidance for long-term care facilities, and one of the significant areas of revision in that guidance was to the discharge procedures for residents who cannot pay or who stop paying. And one of the biggest themes that is embraced throughout the revised guidance is the unwavering need for facilities to make sure that before any discharge takes place, efforts are made and even more importantly, efforts are documented in a resident's file to apply for Medicaid support.

I think this change really crystallizes just how paramount Medicaid funding is for many individuals in the long-term care setting. By understanding these rights and knowing how to respond if they are violated, illegal discharges and transfers can be minimized and prevented.

Emma Trivax:

Thank you, Cal. And listeners, listen, while the potential Medicaid cuts pose significant challenges, you have to remember that the healthcare sector is resilient and continually adapts to changes. There are still so many dedicated professionals and innovative solutions working to ensure that quality care remains accessible. Let's stay informed, let's stay proactive, and focus on the positives and working together to navigate these challenges effectively.

Cal Stein:

Very well said, Emma. And thank you for our listeners for tuning in to *Assisted Living and the Law*. If anyone has any thoughts, any comments, any questions about the series or about this episode, I invite you to contact either of us. Please subscribe and listen to this podcast and other Troutman Pepper Locke podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening. And as always, stay informed and stay healthy.

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