NELSON HARDIMAN
HEALTHCARE LAWYERS

AB 641: What will the End of CRC's Mean for Long-Term Care Facilities

For long-term care ("LTC") facilities in California, a recent bill known as "AB 641" is about to make the calculus of appealing citations more complicated. LTC facilities – including nursing facilities, skilled nursing facilities, and assisted living facilities – face the risk of citations when regulators determine that facilities have violated state and federal statutes and regulations.

While citations can be issued at different levels of seriousness, California Health & Safety Code Section 1424 provides for the imposition of civil monetary penalties for any citation, ranging from $100 for minor violations to up to $25,000 for a serious violation that proximately caused a resident death.

In recent years, the California Department of Public Health (DPH) has been criticized for failing to collect revenues from the citation process into the State and Federal Health Facilities Citation Penalties Accounts. The Bureau of State Audits ("BSA") has identified two reasons why the accounts are not maximizing revenue capabilities. First, California law permits a 35% reduction to the monetary penalty if paid within a specified time frame. Second, a significant amount of monetary penalties assessed are stalled in the appeals process. According to one study, between 2003 and 2010, facilities appealed citations totaling $15.7 million in monetary penalties, of which $9 million were still under appeal.[1] From the regulators' perspective, LTC facilities have adapted to take advantage of a "glitch" in the system via the delays of the process and the reductions of the ultimate determinations. According to the above study, on average, over 70% of citations appealed resulted in reductions to the original amount imposed.

To address the problem of stalled appeals and ensure that DPH captures revenues more effectively through the citation process, Assemblyman Mike Feuer introduced AB 641, a bill that passed September 8, 2011, and takes effect January 1, 2012. The bill brings some significant changes to the citation review process.

First, AB 641 eliminates the citation review conference ("CRC"), which had previously been an option the facility could elect in the first fifteen days. The CRC had been criticized as a source of significant delay due to limited staffing, which led to a significant backlog. Beginning in 2012, the appeals process will be significantly streamlined. Without the CRC stage, when a LTC licensee is issued a citation, it has 15 days to notify DPH of its intent to adjudicate the validity of the citation either before an administrative law judge (ALJ) or before the Superior Court of the county in which the LTC facility is located.

Second, AB 641 increases penalties for Class B violations, which had been criticized as insufficient for some violations. Currently, a class AA violation – a determination that the violation was a direct proximate cause of death of a patient – carries a penalty of not less than $5,000 and not more than $25,000.[2] A Class A violation – a determination that the violation constitutes an imminent danger or a substantial probability that death or serious harm to patients would result – carries a penalty of not less than $1,000 and more than $10,000. A Class B violation – a direct or immediate relationship to the health, safety, or security of patients, other than class AA or A violations – carries a penalty of not less than $100 and not more than $1,000. AB 641 increases the maximum of a class B citation from $1,000 to $2,000.

Third, AB 641 allows DPH not only to issue a citation pursuant to California law, but also to refer and recommend citations for separate, additional federal civil monetary penalties when an incident violates both state and federal laws. This threat may be significant because it opens up a risk of federal review and penalties that have not previously been present.

Additionally, until AB 641 takes effect, there exists the possibility of obtaining a miscellaneous administrative line item reimbursement from Medi-Cal for a CRC expenditure. However, according to a reliable source in the Department, under the new appeals regime, such reimbursement is unlikely to continue.

LTC licensees should consider the impact of these changes. The repeal of the CRC is arguably the most significant change. Many facilities had elected to handle CRC's without attorneys, and even those that had relied upon legal

counsel had benefited from both the backlog and the informality of the CRC process. In the pre-AB 641 world, facilities could give notice of their desire for a CRC, sit back and wait. After the benefit of a long delay, facilities could then proceed to informal conferences, where, often, penalties would be dramatically reduced in negotiated settlements, with rare dismissals of the entire citation. Assemblyman Feuer recognized not only that the heavy backlog of citation appeals was incentivizing DPH to settle for heavily discounted amounts, but also that the failure to apply the proper legal standards resulted in the net effect of a low statistical dismissal rate.

Stripped of the CRC's, both regulators and LTC licensees will be forced to meet the required burdens of proof based on the requirements in the Health and Safety Code. In this more formal setting, a citation will be more likely to receive a disposition on the merits of each case. For example, a licensee seeking to establish the "reasonable licensee defense" to a citation will need to meet the burden of demonstrating that the facility did what might reasonably be expected of any LTC facility, acting under similar circumstances, to comply with the regulation.[3] According to reviews of appeals since 2004, this defense successfully resulted in dismissals in as few as 1.6% of all cases brought before the Department.

Indeed, in *California Association of Health Facilities v. Dept. of Health Services*, the California Supreme Court highlighted the limited utility of the "reasonable licensee defense" (codified in Section 1424)[4]. The Court noted that the defense had been extended to all three classes of citations via the 1987 amendment of the statute on a trial basis, with a three year sunset provision. The Department determined that the defense had a low impact: of 3,781 citations issued by the Department in the two years after the 1987 amendment, only 85 reasonable licensee defense claims were raised, and the Department found the defense applicable in only seven cases – less than .25% of the total number of citations. The defense was retained and made into permanent law on the basis of its limited viability and resulting low impact as demonstrated in the CRC setting.

In the post-AB 641 environment, the "reasonable licensee defense" is likely to be adjudicated significantly more frequently. Facilities that contest citations with valid defenses are likely to see a much higher success rate. Prevailing facilities will not only avoid financial penalties, but are also likely to fare better by improving their reputations with government regulators and through data comparison/ratings websites. At the same time, facilities are likely to elect simply to pay citations based on indefensibility. In either case, AB 641 will require licensees to weigh new tactical and strategic considerations when they receive citations.

[1] Report from California State Auditor June 17, 2010. [2] Cal. Health & Safety Code 1424. [3] Cal. Health & Safety Code 1424. [4] CAHF v. Dept. of Health Services (1997) 16 Cal.4th 284,292