

2009 Assembly Bill 389/LRB-4282/1: Written Resident Notice of Alleged Nursing Home Violations

Issue: **Assembly Bill 389** is authored by Representative Peggy Krusick (D-Milwaukee) and was the subject of a September 10, 2009 public hearing before the Assembly Aging and Long-Term Care Committee, which Representative Krusick chairs. A vote on AB 389 has yet to be scheduled. Senator Tim Carpenter (D-Milwaukee), the chair of the Senate Public Health, Senior Issues, Long-Term Care and Job Creation Committee, has distributed a Co-Sponsorship memo to his legislative colleagues seeking their support for **LRB-4282/1**, which duplicates AB 389. LRB-4282/1 has yet to be introduced in bill form.

AB 389/LRB-4282/1 would **require a nursing home** which receives either a state Class “A” notice of violation (NOV) or a federal statement of deficiency (SOD) indicating a finding of “immediate jeopardy” (IJ) (both would be categorized as serious violations) **to provide a written notice to each resident** identified in the NOV/SOD, as well as to the resident’s legal representative, if any, within 15 days of the receipt of the violation notice. The written notice to the resident must include a copy of the NOV/SOD, as well as the anonymous identifier used to identify the resident in the NOV/SOD and the address, telephone number, and email address of the regional office of the DHS Division of Quality Assurance (DQA) in the region where the facility is located. Upon the request of the resident and/or his/her legal representative, AB 389/LRB-4282/1 would require the DQA to provide the resident and/or their legal representative with the final disposition of the Class “A”/IJ **allegations** once the appeals process runs its course. Failure by a nursing home to provide this information is a Class “C” violation, which under s. 50.04(5)(a)3 may subject the facility to a forfeiture of not more than \$500. However, under s. 50.04(5)(a)3 (intro.) of AB 389/LRB-4282/1, the forfeiture level for this particular Class “C” violation would change to not more than \$2,500.

After the September 10th Assembly Aging and Long-Term Care Committee public hearing on AB 389, Representative Krusick drafted an amendment to the bill which would make the following changes: (1) The written notice requirement only would apply to an IJ finding that identifies a substandard quality of care or occurrence of actual harm; (2) The written notice only would have to include a summary of the NOV/SOD, not the entire document, which would be prepared by the nursing facility and contain the exact language used by the DQA in the deficient practice statement; and (3) If the facility decides to take the NOV/IJ to informal dispute resolution (IDR), the written notice to the resident/legal representative must be provided within 15 days of the completion of the IDR, regardless of the IDR finding.

The Assembly Aging and Long-Term Care Committee has yet to vote on either AB 389 or Representative Krusick's proposed amendment to the bill and at this writing, no such vote has been scheduled. In addition, the changes to AB 389 in the draft amendment proposed by Representative Krusick are not contained in LRB-4282/1.

WAHSA Position: *Oppose AB 389 and LRB-4282/1, as well as Representative Krusick's proposed amendment to AB 389.*

Rationale: WAHSA members oppose AB 389/LRB-4282/1, as well as Representative Krusick's proposed amendment to the bill, for the following reasons:

- **AB 389/LRB-4282/1** and Representative Krusick's proposed amendment to AB 389 all **deny nursing facilities their due process rights**. The "written notice requirement" under **this legislation is based on allegations of violations, not on adjudicated findings of violations**. Nursing facilities have the right to challenge the findings of a DQA nursing home survey initially through an informal dispute resolution (IDR) process and, if unsatisfied with that finding, through a formal appeals process. The Class "A" or IJ **allegations** which trigger the written resident notice requirement under this legislation could be reduced to a level below a Class "A" or IJ or even reversed at either the IDR or appeals level, yet those decisions, which would eliminate the need for a written notice, are not taken into account under this legislation.
- Current federal and state notification requirements provide a nursing home resident, the resident's legal representative, if any, and any designated family member with sufficient and timely notification of any significant changes of condition or adverse circumstances affecting the resident. At the September 10, 2009 hearing on AB 389, the DQA provided committee members with a memo "Applicable Requirements for Communication Between Nursing Home Personnel and Residents/Families/Legal Representatives." That memo listed the following federal/state codes/statutes which require nursing facilities to either "immediately" or "promptly" notify a resident and the resident's legal representative, personal physician, and designated family member(s) of any significant accident, injury, or adverse change in the resident's condition: F-Tags 154, 157 and 168 under 42CFR483.10, s. 50.09(1)(n), Wis. Stats., and DHS 132.60(3)(a) and (3)(b), Wis. Adm. Code. **This legislation is unnecessary if its goal is prompt notification of significant changes in a resident's condition; if the goal is a proliferation of litigation, that's another question.**
- **Under AB 389/LRB-4282/1, the maximum forfeiture of \$2,500 for failure to provide a written notice of a serious violation could in some instances exceed the forfeiture for the serious violation itself.** The \$2,500 forfeiture for violation of the written notice requirement under this legislation equates to a Class "B" violation, which is defined under s. 50.04(4)(b)2 as a violation "which creates a condition or occurrence relating to the operation and maintenance of a nursing home directly threatening to the health, safety or welfare of a resident." Simply stated, failing to notify a resident that a facility has received a NOV/SOD which the facility disagrees with and intends to challenge does not meet the level of "directly threatening the health, safety or welfare" of that resident.

- **Nursing homes view the requirements under AB 389/LRB-4282/1 as a denial of their due process rights and a needless diversion of staff time away from caregiving. If the written notice provision under this legislation is as important as its supporters maintain it is, WAHSA members respectfully suggest the duty to notify residents of these allegations be given to the DQA.**

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership association of 200 not-for-profit long-term care organizations. WAHSA members own, operate and/or sponsor 189 not-for-profit nursing homes, of which 38 are county-owned and operated, 9 facilities for the developmentally disabled (FDD), 76 community-based residential facilities (CBRF), 60 residential care apartment complexes (RCAC), and 113 senior apartment complexes, as well as community service programs ranging from home care, hospice, Alzheimer's support and child and adult day care to Meals on Wheels. Our members employ over 38,000 dedicated staff that provides care and services to over 48,000 individuals. For more information, please contact the WAHSA staff at (608) 255-7060: John Sauer, Executive Director (jsauer@wahsa.org); Brian Schoeneck, Director of Financial Services (bschoeneck@wahsa.org) and Tom Ramsey, Director of Government Relations (tramsey@wahsa.org).

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