Incident Investigation & Reporting: What You Need to Know

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Reporting Incidents-

2014 Rules

REPLACE

2007 Rules

DADS Reporting Guidelines Require ...
“any facility staff member with cause to believe...abuse, neglect, or exploitation caused by another person to report...”
10 different incident categories
10 categories

- Abuse
- Neglect
- Exploitation
- Death
- Missing Resident
- Misappropriation
  - (formerly Misappropriation of Funds in 2007 rules)
- Drug Diversions
- Suspicious Injuries of Unknown Source
  - (formerly Injuries of Unknown Source)
- Fires
- Conditions that pose threat to resident health or safety
(1) Abuse

2014 makes the rules for reporting ABUSE more clear by expressly defining abuse.

- 40 TAC 19.101 definition (express in 2014)
- 2014 clearly outlines the guideline —
  - A facility owner or employee who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect or exploitation caused by another person must report the abuse, neglect or exploitation.
(1) Abuse cont. - Resident-to Resident

- Resident to Resident Abuse - Flowchart
  - If resident does NOT have capacity to act knowingly/willfully (e.g., dementia) → no abuse → No report
  - But is it Neglect?
    - Ask – Did the facility exercise reasonable judgment in managing the resident?
      - Yes → No neglect → no report
      - No → Neglect may have occurred → should be reported
(2) Neglect

• 2014 makes the rule more clear – by expressly defining neglect.
  • 2007 & 2014 guidelines define neglect by 40 TAC 19.101 definition, but 2014 expressly spells it out the statutory definition
  • Both letters provide the same 4 examples of neglect (lack of supervision, failure to follow care plan, facility inaction)
  • 2014 clarifies “staff inaction” and differentiates between accident hazards and injuries due to neglect.
(3) Exploitation


• 2007 – The illegal or improper act or process of a caretaker using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain.

• 2014 - The illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with a resident using the resources of the resident for monetary or personal benefit, profit, or gain without the informed consent of the resident

– Changes in italics
(4) Death

• No substantive changes.

• Reporting rule: If the death of a resident involves unusual circumstances that raise a doubt about whether the death was from natural causes, the death must be reported
(5) Missing Resident

• No substantive changes.

• Reporting rules
  – Immediately Report –
    • (1) resident cannot be found in vicinity &
    • (2) resident’s health, safety, or welfare are at risk
      – (e.g., medical conditions, dementia, extreme weather, foul play)
  – Must report any resident missing and not located after 8 hours
(6) Misappropriation

• Formerly Misappropriation of Funds (2007)
  • 2007 – defines misappropriation by 40 TAC 19.101(79)
  • 2014 - defines misappropriation by 40 TAC 19.101(79)
    40 TAC 19.101(80) – same definition, different code section

• Clarifies that facilities must report not only the misappropriation of resident *funds*, but of any resident property (real or personal).
(7) Drug Diversions

• No substantive changes

• Reporting Rule – If facility has reason to believe drugs were stolen facility must
  – (1) report to DADS and
  – (2) notify local police.
(8) Suspicious Injuries of Unknown Source

- Formerly only Injuries of Unknown Source
  - 2014 added Suspicious
    - 2014 expressly states that suspicious injuries are defined by CMS 05-09.

Reporting Rule: Must report to DADS if
- (1) no one saw or resident cannot explain and
- (2) injury is suspicious (e.g., extent, location, frequency, etc)
(9) Fires

– Reporting Rule –

• Fires of any nature are to be reported to DADS within 15 days using the official fire report form.
• If fire caused death of serious injury – telephone report immediately, followed by written report.
• 2014 expands on this rule.
  – Immediate telephonic reporting not limited only to fires “the facility must immediately notify DADS by phone of an emergency situation that caused death or serious injury” (emphasis added).
    » not limited to only fires
(10) Conditions that pose threat to resident health or safety

– No substantive Changes.

– Reporting Rule - Any situation that poses a threat to residents, staff, or the public must be reported
  • (e.g., Bomb threat, tornado, flood, fire alarm failure, structural problem, emergency power failure, firearms in building, no heat <65, no A/C >90).
All Categories - Procedure for Incident Reporting

• Call within 24 hours of learning of incident

• Send Written Investigation report within 5 WORKING days after the telephone report
All Categories - Procedure for Initial Telephone Report

• Call (800) 458-9858
• The report must include the following information (List is updated in 2014):
  – WHERE: facility name & vendor,ID number;
  – WHO: resident name(s);
  – WHEN: time and date of incident;
  – WHAT: what occurred; condition of resident(s), person(s) involved (other than resident); and action taken by facility authority to date.

• Voicemail? Leave your contact information! Tell them WHO to speak with at the facility (you want the right person answering questions).
All Categories - Procedures for Facility Investigation

• Facility must conduct investigation of reported acts

• Must send written report of investigation no later than fifth (5\textsuperscript{th}) working day after the oral report

• Submit on Provider Investigation Report Form
  • Fax (< 15 pages): (877) 438-5827
  • Mail: DADS – Consumer Rights and Services Section, E-249

• **New** contact number for questions about these guidelines
  – (512) 438-3161
Reporting Requirements

• Nursing facilities vs. Assisted Living

  – Similar Reporting Action Steps
    • Immediate oral report of Abuse & Neglect
    • Written report within 5 days

  – Nursing facilities have more categories
    • Assisted Living does NOT have
      – Misappropriation category
      – Suspicious Injuries of Unknown Source
Objectives

• Learn to conduct investigations
• Learn how to interview witnesses
• Learn how to document investigations

Without incurring unwarranted regulatory and personal injury liability
Internal Investigations

• Best Practices

• Take Care in Interviewing Your Staff

• Take the LONG VIEW!
The Quality Assurance Committee

• Keep constantly active.
• Use appropriately in investigations.
Advantages of QA Intervention

• Privileges
• Should preclude F-tags & CMP’s
• Proper Monitoring effects Compliance Dates
• Good Regulatory Defense mitigates Liability
• Can also mitigate Criminal and Civil Liability
The Provider Investigation Report

Both DADS and the AG provide forms for reporting incidents and deaths.
Conducting Investigations

• Do not have staff write their own statements
• Report Facts not Feelings
• Put only what is absolutely required on the forms
Common Investigation Steps

• Recognize investigation is in order
• Plan investigation
• Select appropriate investigators
• Identify potential witnesses and document for review
• Security Measures
Common Investigation Steps

• Plan investigation
  – Best to have written plan
• Organize list of questions to ask witnesses
• Establish security for files and records
• Be prepared to modify and update
  – As needed based on new information that might come in as investigation progresses
Goals of Investigation

• Provide a sound, factual basis for decisions by management
• Produce reliable documentation that can be used to support management actions
Goals of Investigation

• Reveal whether any misconduct has occurred
• Identify specific employees who are suspected or guilty of misconduct
• Put a stop to further wrongful actions
Are You the Right Person to Investigate?

• Expertise and experience?
• Objectivity
• Appearance of Bias
• Conflict of Interest
  – Is this an attorney/client investigation or will it be used as evidence of employer’s responsiveness?
  – CAN’T HAVE IT BOTH WAYS
Who Makes the Best Investigator?

• Choosing right investigator team is critically important

• Must be:
  – Credible
  – Respected
  – Regarded as fair and impartial
  – Knowledgeable of company policies and employment law
Who Makes the Best Investigator?

• Need to have good interviewing skills
• Well organized
• Able to follow a plan
• Able to communicate well and with various types of employees
Who Makes the Best Investigator?

- Must be able to stand up well in court if called upon to testify in a lawsuit
- Can be safely trusted with all confidential things that will come up in process
Who Makes the Best Investigator?

• Often come from:
  – Human resources staff
  – High-level management
  – Some cases may be necessary to bring in outside investigator
    • Consultant
    • Attorney
  – Technical experts
    • If technical issues are concerned
Identify Witnesses

• Waiting too long may mean potential witnesses:
  – Leaving company
  – Becoming intimidated or influenced
  – Forgetting details
  – Become unavailable (vacation)
Identify Witnesses

• Important to know who witnesses are for:
  – Scheduling of witnesses
  – Order of interviews
    • Can make big difference in development of facts

• Be prepared for additional witnesses if other names come up
Identifying Documents

- Equally as important
- Identifying documents needed quickly helps to prevent shredding or otherwise purged as part of a routine procedure
Identifying Documents

• These documents may include:
  – Memos
  – Time cards
  – Policies
  – Personnel files
  – Journals
  – Logs
  – Resident Charts
Organize a List of Questions

• Each situation demands different questions
• Generally, each witness will need to answer questions relating to:
  – What they saw
  – When they saw it
  – Who else was there
  – Why something happened (if known)
  – What happened next, etc.
Organize a List of Questions

• Some witnesses know a lot more than others
• Be prepared to customize the questions asked of certain people
• Investigator needs to be able to think of new questions on the spot for follow up information
Let’s Talk About Interviewing Employees
Preparation

- Selection of Interviewer
  A. Consider
    - Previous contact and resulting rapport
    - Personality conflicts and disagreements
    - Cultural or gender issues
  B. Privacy-Advantages
    - Easier to talk about with one person
Preparation Cont’d

C. Location

- Avoid distractions
- Supportive environment
- Not place where discipline employees
Preparation Cont’d

D. Setting

• Neutral, non threatening environment
• Warm and comfortable
  – Reduces defensiveness
  – Reduces resistance
  – Reduces interview’s level of seriousness and confrontation
Getting Started

• Identify
• Gather
• Review
  – Policies/guidelines
  – Personnel files
  – Accounting info
  – Comparative docs
  – Resident Chart
Getting Started

- Identify special resources
  - Experts
    - Legal
    - Human Resources
    - Accounting
    - Environmental
    - Security
    - DON
    - Housekeeping
    Etc.
Whom to Interview

• Talk to the employee complained about usually first
  – Make sure they hear it from you first
  – Might eliminate need to talk to other witnesses
  – Warn about retaliation
  – Document interview
Whom to Interview

• Other witnesses – What order?
  – Most to least knowledgeable
  – Determine need for surprise
  – Concerns about confidentiality
  – Never interview groups
Advantages to Having a Witness Present

• Witness has no threats, coercive tactics, etc.
• Second set of eyes and ears to observe
• Witness can fill in as second interview
Interviewing Techniques

• For best chance of getting all relevant information within reasonable amount of time:
  – Start interviews soon after the situation arises
  – Hold individual interviews to uphold confidentiality and minimize peer pressure
  – Maintain objectivity
Interviewing Techniques

– Take good notes, or record if appropriate
  • Be up-front about recording though Texas law does not require that.
– Hold interview in quiet, private location
– Never promise absolute confidentiality
– Keep interview on track
– Do not interrupt witnesses while coming out with relevant information
Interviewing Techniques

– Start with general questions, then graduate to more closely-focused questions to pin witnesses down with details

– Repeat important questions, but with different wording
  • This checks to see if witness sticks with same answer

– Avoid confrontation or accusatory questions
Interviewing Techniques

– Pay attention to witnesses’ body language
– Use silence after a question
  • A technique to encourage reticent witnesses to start talking
  • People have a need to “fill in” periods of silence
– Be ready for follow up questions as needed
Interviewing Techniques

• Rationalization (rationalize actions)
• Establish Rapport
  – Common ground (show respect)
  – Appearance and demeanor (smile)
  – mirroring
Selling the Interview
Sell Benefits of Cooperation

• Describe assumed need of witness
  – Need to improve systems

• Benefit to witnesses addressing their need
Discerning Credibility

• Types of Lies
  – Direct Denial
  – Lie of Omission
  – Lie of Fabrication
  – Lie of Minimization
  – Lie of Exaggeration
Interviewing Witnesses

• Broad to narrow
• Easy to hard
• Avoid leading or Y/N questions
• Follow-up with 5 W’s
• Force chronology
• Get opinions on motives
• List witness leads
• Document interviews
• Documents unsuccessful attempt to get information
  – Phone calls
  – Refusals to talk
Documentation of Conclusions

• Include in formal report:
  – Background
  – Witnesses interviewed (or why not)
  – Documents reviewed
  – Issues and short answers
  – Findings and conclusions

• Support all statements

• Separate facts from opinions
Structure Your Interview
Strive for Goals

• Obtained untainted detailed narrative
• Evaluate veracity of witness
• Test validity of information
Structured Interview Format

• Determine behavioral norms using questions will probably answer truthfully
• Establish rapport using physical and conversational tactics
• Request story – listen without interrupting
Structured Interview Format

• If believe deception:
  – Ask for retaliation
  – Pick starting point
  – Have retell forward or backward

• Establish Chronology
Telephone Interviewing
Disadvantages of Telephone Interviewing

• Lack of Control
• Limited to Verbal Channel
• Impersonal
• Own supportive environment
Disadvantages of Telephone Interviewing

• Interviewer cannot tell if person is paying attention to conversation
• No props/evidence
  – Impact might be muted
• Uncertain meaning of silence
• More difficult to develop suspect’s admission into other areas of dishonesty or criminal acts
Advantages of Telephone Interviewing

- Suspect cannot read Interviewer’s body language or expressions
- Interviewer’s physical appearance not a factor
- Interview can follow script without subject’s knowledge
- Evidence can be referred to and information confirmed without suspect being aware of physical movements
Advantages of Telephone Interviewing

• Rapport building position of phone in intimate position with earpiece in suspect’s ear. Creates physical closeness.
• Submissive head-down position to focus
• Interviewer can react immediately
• Suspect in emotional state following his/her apprehension
Advantages of Telephone Interviewing

• Most experienced interrogator can be used
• Can be used for training purposes
• Legal liability of whether suspect was restrained or in custody for interview is limited
• Saves time and money
Key Listening Skills - Telephone Interview

• Prepare to listen
  – Clear mind of other thoughts, concerns, and emotions

• Monitor the conversation
  – Constantly focus on what is being said.
  – Most important

• Correct
  – If mind starts to drift, bring back to focus on task. Self-monitoring helps protect focus and keeps properly directed
Setting Up for Telephone Interview

• If call is going to be made to the individual’s place of business, it is possible to have more control.
  – Contact individual’s manager and discuss:
    • Subject’s personality
    • Subject’s employment history
    • General background of subject
  – Necessity for confidentiality and management behavior
Setting Up for Telephone Interview

• Identify best way to get subject to phone.
• Identify who will act as witness
• Instruct witness on what you want them to do and how to observe
  – Make sure witness knows not to react to an admission
  – Overall positioning and structure
  – Knows not to talk or counsel subject
Setting Up for Telephone Interview

• Have witness prepare the room
  – No distractions
  – Pen and paper
    • Admission can be reduced to writing
    • Taking notes to confirm times and sequence
  – Witness should be positioned as if interviewer were present in the room
    • Limit eye contact
    • Focus on notes
    • Avoid speaking or interrupting
Witness Statements

• Do not let witnesses write their own
Advantages to Written Statements

• Lock witness into details
• Use in IDR’s and other hearings
• Loss prevention tool
• Use for QAAC
• Establishes loss for insurance purposes
• Refresh memories for testimonies later
Types of Statements

• Narrative
• Question and Answer
• Formal
• Audio or Video Recording
Interrogator Control

• Control formatting of documents ensuring orderly and clear, concise info
• Ensure all elements of regulations covered
• Do not leave witness alone to complete
  – Will likely result in
    • No statement
    • Failure to include pertinent info
Convince of Importance of Giving Statement

• Will allow to tell their side of story
• Will allow others to hear their side without being blown out of proportion
• Prevent being inconvenienced in future
Timing of Taking Statement

• Immediately at conclusion of interview
• Obtain without leaving room
  – Rapport and cooperation is high
• Call it statement of explanation
• Type it from investigator’s notes
• Have witness approve
Potential Problem

- Witness claims wasn’t his statement
  - Avoid using words witness doesn’t use
  - Structure sentences like witness does
- Witness can’t read or write
  - Put in mistakes to test literacy
  - Read aloud with witness
House Keeping
Regarding Statement

• Have additional witness to signing
• Document circumstances of interview and statement in notes
Legal Concerns
Privacy Concerns

• Employees have right to:
  – Keep private facts about selves and families private
  – Not be accused wrongly
  – Not be retaliated against for reports
Searches

• In the Event of Misappropriation
  – Zone of privacy (personal space)
  – If want to search, notify employees that everything is searchable.
Defamation

• Communication of false information about a person to a third party
  – Either intentionally (with malice)
  – With reckless disregard for its falsity

*Damages? Arrest?
Retaliation Claims

• Employee has cause of action if:
  – Suspended, terminated, disciplined, discriminated or retaliated against as a result of:
    • Reporting a violation of law
    • Initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility
False Imprisonment

• Employee must not feel restrained or confined or “imprisoned”
  – Sit employee with back to exit
  – Reassure employee can leave with their wish
Intentional Infliction of Emotional Distress

- Can be basis for lawsuit if investigator conducts an interview in such a way that the employee feels
  - Unusually humiliated
  - Threatened
Intentional Infliction of Emotional Distress

• Actions that have been basis for successful lawsuits
  – shout at an employee
  – Use slurs or other demeaning language, and
  – Cast the employee in a humiliating light
Assault and Battery

• Can arise if an employee charges that he/she feared investigator was going to or actually touch them in an offensive or harmful way
  – Prime example of why an employer should never physically force an employee to submit to a search
Malicious Prosecution

• An employee can sue if he/she is reported to the police and described as some sort of criminal, but for some reason there turns out to be no basis for criminal charges
Malicious Prosecution

• Best to report to law enforcement authorities of problem
  – Make various information available to them
  – It is not malicious prosecution to furnish factual information to the police
    • I.e. Names of employees with material knowledge of crime
Invasion of Privacy

• Disclosure of private facts about a person
  – Information that contains highly intimate or embarrassing facts that would be highly objectionable to a reasonable person
  – Information is of no legitimate concern to the third parties to whom the information was released
Invasion of Privacy

• Investigations often reveal highly intimate or embarrassing facts

• Information must be kept confidential by the employer and all involved with the investigation
Putting It All Together

• Investigator will eventually have to tie all various facts and documents together and show what it means
Putting It All Together

• The report should contain:
  – Description of situation at issue
  – List of witnesses and documents used as evidence
  – Summary of information from each document and witness
  – An assessment of credibility of each piece of evidence
Putting It All Together

– Description of how evidence relates to elements of alleged problem
– Findings of fact on each element of alleged offense or violation
– If recommendation is needed, it should follow the findings of fact
Keeping Investigations Confidential

• Use QAAC to investigate
  – Thrust of investigation must be improvement of facility
• Use Your Attorney
• Outside Attorney
• Corporate Counsel
Summary

• Know what you must report
• Know the particular deficient practice at issue
• Do conscious, purposeful investigation
• Designate best person to investigate
• Investigate in such a way to protect QA aspects
• Prepare to investigate
• Do not have staff write their own statements
The End

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