

# Legal Considerations on Daily CNA Visits



## Can Nursing Homes Be Liable?

Because we value our partnership with your community, we feel an obligation to share our thoughts on the question: **"Do you provide daily CNA visits... Agency "X" guarantees that their CNAs will be in our building every day."** Our answer has always been, **"We will provide any and all services according to the needs of our hospice patients."**

Typically, our patients need three CNA visits per week initially, but as their condition deteriorates our CNA visits increase...often up to daily visits. However, many communities are simply requesting daily CNA visits from the beginning because some hospices provide it regardless of the patient's needs which can turn into a dangerous compliance trap for all involved. With this in mind, we asked our legal team if we could simply provide daily CNA care to all of our patients. The following legal advice was given:

*"First of all, as you may be aware, the potential for kickback arrangements between hospices and LTC & ALFs is an issue that has long been on the radar of the OIG. In March 1998, the OIG issued a "Special Fraud Alert: Fraud and Abuse in Nursing Home Arrangements with Hospices" wherein it specified a number of arrangements which it considers "suspected kickbacks." Specifically, the list identifies "a hospice providing staff at its expense to the nursing home to perform duties that otherwise would be performed by the nursing home." (OIG Alert, p. 4).*

In 2016, the OIG issued an advisory opinion (No. 16-08) wherein it reaffirmed the principles set forth in its 1998 Special Fraud Alert. Particularly, the OIG emphasized that **arrangements between SNFs and hospices are particularly vulnerable to fraud and abuse** because *"a nursing facility's population represents a sizeable pool of potential hospice patients, and therefore may be particularly desirable from a hospice's financial standpoint."* (OIG Opinion, No 16-08, p. 4).

In these types of third-party provider arrangements, it is most often the hospice that is providing something of value in exchange for referrals that ends up being the target. However, the plain language of the law supports that **the recipient** of the bonus or free services can be just as liable. (See the **Anti-Kickback Statute at 42 USC 1320a-7b(b)**), which makes it a criminal offense to offer, solicit, pay, or **receive** anything of value in an effort to induce referrals for services that are paid for by federal healthcare programs).

In any event, we hope you find these cases helpful because they do stand for the principle that the **LTC can certainly be implicated** when hospices provide free services that otherwise have value to a LTC facility because the apparent reason for providing such free services is to induce referrals from the facility to the provider. **"Hopefully these types of cases would be enough for any reasonable facility to understand that such a scheme could implicate criminal laws, and that they would want to not be implicated from being intertwined with such potential liability."**

At Kindful Health we are not passing judgment on other hospice agencies nor do we want to diminish our value to you.

We simply want to remain a trusted partner and we will continue to share information in an effort to provide education and excellent care in a legal, ethical and compliant manner.

Kindful is not in the practice of law. Consult your attorney for any questions.

