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Nursing homes are likely to face increased government enforcement actions over COVID-19

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On April 10, 2020, the U.S. Department of Justice (DOJ), Civil Rights Division, and the U.S. Attorney's Office in Boston [announced](#) that they are investigating whether Soldiers' Home, a state-funded nursing facility for military veterans in Holyoke, Massachusetts, failed to provide adequate medical care to patients, both generally and during the COVID-19 pandemic. A separate investigation by the Massachusetts Attorney General's Office is also underway to assess what may have gone wrong at Soldiers' Home and whether legal action is warranted.¹ To date, 33 Soldiers' Home residents have reportedly died from the coronavirus, and another 88 residents and 78 employees have tested positive for the disease.²

Nursing homes and other long-term care facilities (LTCFs) have been hard hit by COVID-19 outbreaks. Residents of nursing facilities are typically older, suffer from high levels of chronic illness, and live together in close quarters, all factors that make them susceptible to contracting and transmitting the disease and to resulting illness or death.³ As of this alert, over 3,600 residents of LTCFs nationwide have reportedly died from COVID-19, a figure some believe understates the actual total because it fails to include patients who died without being tested.⁴

Long-term care providers are under tremendous pressure to limit the spread of COVID-19 among their vulnerable patient populations. Unfortunately, ongoing shortages of protective gear and testing supplies have compounded the inherent difficulties of preventing coronavirus infections

¹ [AG Maura Healey launches investigation into coronavirus outbreak at Holyoke Soldiers' Home](#). Krueger, H. (Apr. 8, 2020). *The Boston Globe*.

² [Coronavirus leaves 1 more veteran dead at Holyoke Soldiers' Home: 88 residents, 78 employees test positive for COVID-19](#). DeForge, J. (Apr. 13, 2020). *MassLive*.

³ [Nursing Homes Are Ground Zero for COVID-19 Pandemic](#). Michael L. Barnett, MD, and David C. Grabowski, PhD (2020). *JAMA Health Forum*.

⁴ [Nursing home deaths soar past 3,600 in alarming surge](#). Condon, B. & Herschaft, R., (Apr. 13, 2020). *The Philadelphia Inquirer*.

and containing transmissions within the LTCF environment.⁵ Although CMS has tried to alleviate some of the burdens on nursing facilities, such as by temporarily postponing routine inspections, LTCFs still face daunting challenges in containing the virus.

In March 2020, DOJ [launched](#) a National Nursing Home Initiative to coordinate and enhance civil and criminal enforcement actions against nursing homes and other LTCFs that provide “grossly substandard care” to residents. This initiative was not a direct outgrowth of COVID-19, but is part of DOJ’s broader effort to protect the nation’s elderly population from inadequate care, abuse, and neglect. Still, under the Nursing Home Initiative, DOJ intends to target LTCFs that, among other things, fail to adhere to basic infection control protocols—a key focus of recent guidance issued by the Centers for Medicare & Medicaid Services (CMS) and Center for Disease Control and Prevention (CDC) to assist LTCFs in responding to the pandemic.

In announcing the Nursing Home Initiative, DOJ noted that it has a history of holding nursing homes and long-term care providers accountable when they fail to provide Medicare and Medicaid residents with basic nursing services. Just last year, for example, Vanguard Healthcare LLC [agreed to pay](#) more than \$18 million to resolve claims that it billed Medicare and Medicaid for grossly substandard nursing home services. Specifically, the government alleged that numerous nursing facilities operating under the Vanguard umbrella failed to administer medications as prescribed, provide appropriate infection control, administer proper wound care, and regularly turn and reposition residents to prevent pressure sores.

The Vanguard settlement was notable for several reasons. First, Vanguard’s CEO and former Director of Operations were held personally liable and paid \$250,000. Second, unlike most False Claims Act (FCA) resolutions, the Vanguard settlement did not arise out of a *qui tam* suit filed by a whistleblower, evidencing the government’s independent initiative to scrutinize nursing home care and spending. And third, the settlement relied on a “worthless services” theory of False Claims Act liability in which the government claims that the medical services provided were so deficient that for practical purposes, they were “the equivalent of no performance at all.” *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001).⁶ Whether and how the government adapts the worthless services theory to redress suspected misconduct exposed by the unprecedented COVID-19 pandemic remains to be seen. But where unusually high numbers of infections and deaths have occurred, heightened scrutiny is likely to follow.

⁵ [Nursing homes overwhelmed by coronavirus: ‘It is impossible for us to stop the spread’](#). Khimm, S. and Strickler, L. (Apr. 2, 2020). *NBC News*.

⁶ Often, fraud and abuse actions are based on allegations of overuse—the provision of medically unnecessary services, for example. But nursing home cases often rely on the “worthless services” theory of FCA liability, which has been adopted to some extent by the Courts of Appeal for the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits. Notably, however, in *United States ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, 764 F.3d 699, 709–10 (7th Cir. 2014), the court narrowed the circumstances under which the government or relators may proceed under a “worthless services” theory. *Absher* involved allegations similar to those against Vanguard—improper “infection and pest control,” “pressure sore management,” and “cleanliness.” Holding that “[s]ervices that are ‘worthless’ are not ‘worthless,’” the Seventh Circuit vacated the jury verdict for *Absher*. The court found that “the relators failed to offer evidence establishing that Momence’s services were truly or effectively ‘worthless,’” especially as “Momence was allowed to continue operating and rendering services of some value despite regular visits by government surveyors,” and the “surveyors would certainly have noticed if Momence was providing no or effectively no care to its residents.”

DOJ's investigation of Soldiers' Home fits within its larger focus on the care and protection of nursing home residents and may signal DOJ's intent to pursue similar investigations of LTCFs that experience high numbers of COVID-19 deaths or infections. Although the government may refrain from launching new investigations while nursing facilities grapple with the ongoing emergency, the Soldiers' Home investigations show that DOJ and other enforcement agencies are willing to intervene immediately when they believe patients are in imminent jeopardy. Moreover, once emergency conditions have passed, prosecutors are likely to turn their attention to the complaints and referrals they receive from facility residents, family members, whistleblowers, and other government agencies alleging that LTCFs failed to take appropriate steps to protect residents from COVID-19 and to prevent and contain the transmission of the virus.

Just last week, for example, the mayor of Elizabeth, New Jersey, called on the state's attorney general to investigate whether a local nursing home with a dozen COVID-19 deaths failed to properly notify health officials when many of its residents tested positive for the virus.⁷ As complaints like these are sure to mount in the coming weeks, it is critical that LTCFs monitor the guidelines and recommendations that CMS, CDC, and state and local officials continue to issue and update during the crisis. Long-term care providers should also memorialize their efforts to adhere to that guidance, including maintaining documentation on visitor restrictions, screening and testing protocols, identification and division of COVID-19-related staff responsibilities, procedures for notifying health departments of actual and suspected infections, protocols for separating infected and non-infected residents, and other infection control policies and practices. LTCFs should also document any impediments they encounter that are outside their reasonable control, such as shortages of tests or protective equipment.

A complete discussion of all the relevant guidance and recommendations government agencies have issued for LTCFs in dealing with the COVID-19 crisis is beyond the scope of this alert, but CMS and CDC have published key infection control guidelines and screening recommendations.⁸

CDC has also issued a [COVID-19 Preparedness Checklist for Nursing Homes and other Long-Term Care Settings](#), which identifies key steps that LTCFs should consider taking in their COVID-19 planning and response. The checklist is a useful tool not only for developing a COVID-19 response plan, but also for documenting the efforts nursing facilities have taken to protect their patients and control the spread of the virus.

Finally, CMS and CDC have developed a [COVID-19 Focused Survey for Nursing Homes](#) for federal and state inspectors conducting targeted infection control surveys during the pandemic and as a tool for voluntary self-assessments by LTCFs. This survey identifies priority areas for self-assessments, such as resident care and placement, infection prevention and control standards, infection surveillance, visitor entry, and education, monitoring, and screening of staff. This infection control survey is a valuable resource for LTCFs to ensure that they are appropriately addressing the critical areas associated with the transmission of COVID-19, and for memorializing

⁷ [Covid Nursing Home Deaths Prompt N.J. Mayor to Request Probe](#). Voreacos, D. and Young, E. (Apr. 8, 2020). *Bloomberg*.

⁸ See "[COVID-19 Long-Term Care Facility Guidance](#)," "[CMS Announces Findings at Kirkland Nursing Home and New Targeted Plan for Healthcare Facility Inspections in light of COVID-19](#)," "[Guidance for Infection Control and Prevention of Coronavirus Disease 2019 \(COVID-19\) in Nursing Homes \(REVISED\)](#)," and "[Preparing for COVID-19: Long-term Care Facilities, Nursing Homes](#)."

how the facility worked to limit the spread of the virus and protect the health and safety of its patients and employees.

Government enforcement agencies are likely to investigate nursing homes and other long-term care providers when it appears that a failure to provide adequate medical care or to implement appropriate infection control measures may have led to avoidable illnesses or deaths among the facility's residents. To protect patients, contain the spread of the virus, and mitigate the risk of future investigations by the government, LTCFs should closely monitor the ongoing guidance from CMS, CDC, and others, and avail themselves of the tools those agencies have issued for addressing critical risk areas and showing that the facility responded to the crisis with appropriate diligence and planning.

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