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THE TROUBLE WITH PRIVATE DUTY AIDES

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THE TROUBLE WITH PRIVATE DUTY AIDES

Introduction

Residents of senior living communities will often hire private aides or caregivers as companions or to assist them with their daily activities. This may occur in an independent living community that has no staff available to provide personal assistance or care, or may also be done in a licensed care setting to supplement services available from the operator's staff.

Are private duty aides a benefit or a detriment in the operation of a senior living community? On the one hand, they may assist your residents in obtaining needed services, without placing a burden on your already-overworked staff. On the other hand, they are strangers in your building who are supposed to be caring for your customers, but you may have little or no ability to supervise their activities, or to assure yourself that they are delivering quality services or informing you of significant developments.

The Need for Private Aides and Caregivers

Home care aides (unlike home health care providers) generally provide unlicensed, non-medical care, paid for privately by the resident or family and not reimbursed by Medicare or other federal programs. Home care aides generally are not required to have any particular training or certification (such as nurse assistant certification) to practice their professions. They may be affiliated with agencies or work as individuals.

Residents and families often are strongly motivated by cost considerations to choose an unlicensed independent living setting over a more expensive licensed care facility. Such a strategy may work well before a resident's care needs arise or when such needs are mild to moderate in intensity. Private care may then be added or expanded as the resident's needs increase with age.

Similarly, when private home care is added to the services of a community that provides licensed care with its own staff, it can enable the resident to "age in place" and not be moved to a higher level of care, such as a nursing or memory care facility. In such circumstances, economic considerations can motivate both the families and the providers to add private care to the routine services of staff and defer a transfer from the premises.

Whether the community offers licensed care or unlicensed independent living, “acuity creep” within the resident population often creates pressure to hire private aides to maintain a level of service intended to promote the resident’s safety and well-being. Sometimes, however, the property management may see unsupervised private duty aides and attendants as interfering with the community’s staffing or service delivery plans or otherwise creating liability risks.

The Right of Disabled Residents to Have a Private Duty Aide

Many residents in a senior living community are likely to have one or more disabilities, under the broad definitions in the Americans with Disabilities Act (ADA) or the Fair Housing Act (FHA). Senior living communities, like most businesses, are required to “reasonably accommodate” their customers’ disabilities.

Accordingly, the US Department of Justice (DOJ) has determined that disabled occupants of a senior living community have the right to have live-in private caregivers as needed to address their disability needs. That determination was in the context of the independent living portion of a continuing care retirement community, and it certainly would also apply to other unlicensed independent living apartments. What is not clear, is whether the DOJ would make an exception for a licensed care setting where the operator has regulatory responsibilities and contractual commitments to manage the delivery of care to residents.

The resident’s right to hire a live-in caregiver includes the right to have the caregiver accompany the resident in the dining room and on outings and other activities. Management also may be required to waive guest fees, age restrictions, or other requirements for the live-in caregiver that would be applicable to any other co-occupant if such a waiver is necessary to reasonably accommodate the disabled resident. Whether a waiver of fees is necessary will depend upon the amount of the fees and the ability of the resident to pay them without their becoming a barrier to the resident’s access to the senior living community.

Managing Private Caregivers

Senior living communities, whether independent living or those providing licensed care, are often faced with the problem of managing the presence of private duty aides on the premises. One independent living community reported that there were so many private aides in the building that an apartment had to be devoted exclusively for them to use as a break room. Private aides identified by residents from the newspapers or the internet may not be trained, supervised, insured or screened for a criminal record and could be at risk of engaging in physical or financial abuse. They may not communicate significant changes in a resident’s condition to management and allow a problem to worsen to the point of becoming a danger to the resident or others at the community.

One response can be to require that residents use one of a few caregiver agencies known to and trusted by the community's managers. The agencies can perform the criminal record screening, competence evaluation, supervision, recordkeeping, reporting, insurance and other functions designed to improve the safety and quality of care given to residents.

Another way to mitigate exposure to liability from home care aide misconduct is to adopt a Private Home Care Aide Policy that residents and caregivers must agree to as a condition of allowing caregivers to conduct their business on the premises. Such a policy can include the following elements:

- » Require the resident and private aide to clarify that the resident is the employer; the building operator is not responsible for supervision of the aide, nor responsible for ensuring compliance with labor and wage laws or tax withholding obligations
- » Require the resident and aide to itemize the services that the resident authorizes the aide to perform (e.g., personal care, use of automobile, grocery shopping, access to checkbook)
- » Require that aides meet certain standards in order to be permitted onto the premises, including:
 - criminal record screening
 - insurance
 - required affiliation with a preferred agency
- » Require aides to communicate changes in the resident's condition or service needs to the management
- » Establish rules of conduct (e.g., proper identification, signing in and out of the property, wearing of name tags, prohibition against loitering and the solicitation of other residents)

Special Issues for Independent Living Operators

Private duty aides may represent the only way for residents of an unlicensed independent living property to obtain care for their disabilities. For independent living providers, which generally do not undertake to furnish any health care monitoring or intervention for their residents, the presence of private aides and attendants may provide a layer of resident safety and protection that is welcome to property managers. However, independent living operators also may have lingering concern that residents' needs are not being fully met, and that, as senior living managers, they need to take action to prevent harm to residents whose health and safety risks have increased with age.

Prohibition Against Managing Resident Care Needs

The federal antidiscrimination laws place severe restrictions upon the ability of unlicensed independent living operators to monitor the health care status of residents or to intervene in the management of a resident's care needs.

In the case of *Oakmont Senior Communities of Michigan*, <https://www.hud.gov/sites/documents/14-1577561-V1-CONCIL.PDF> (2014), the Department of Housing and Urban Development (HUD) determined that an independent living property manager violated the FHA's disability discrimination provisions by collecting medical information about residents and otherwise imposing health-based limitations on occupancy. HUD determined that the following activities violated the FHA and required the operator to cease them:

- (1) health status reviews of residents returning from the hospital;
- (2) requiring residents to sign in and sign out of the premises;
- (3) routine safety checks (e.g., for failure to appear for a meal);
- (4) routine monitoring or restriction of resident diets;
- (5) mandatory liability insurance coverage for motorized mobility devices;
- (6) requiring residents to disclose medical information;
- (7) requiring residents to be capable of living independently, without needing "continuous nursing care," feeding assistance or other personal care assistance;
- (8) conditioning occupancy on compliance with "reasonable behavior requirements," not being a "flight risk to wander away from the building," maintaining bowel and bladder control, and other similar criteria.

HUD did permit Oakmont's management to:

- (a) provide for voluntary safety check and dietary programs;
- (b) require renter's insurance covering damage to the resident's unit and common areas;
- (c) inform residents that management is not responsible for providing care;
- (d) require that residents not disrupt other residents' quiet enjoyment of the premises; and
- (e) limit the number of residents who use certain areas to prevent overcrowding for safety reasons.

As a practical matter, an independent living operator cannot be involved in managing the care needs of residents. While it is usually a good practice for independent living management to inform residents that it has no responsibility to monitor the resident's health condition or provide any care, it must allow residents to manage their own care needs, including through the use of third-party caregivers.

Potential Liability Increase for Anticipating Resident Care Needs

When determining a business's liability for injury to a customer, courts will often examine the nature of the business and its relationship with customers to determine whether the risk was "reasonably foreseeable" and whether appropriate steps were taken to minimize the likelihood of the injury.

In one 2022 case involving an independent living resident who exited the building, was accidentally locked out and died of hypothermia [*Rowland v. Independence Village*, 974 N.W. 2d 228 (Mich. Supr. Ct. 2022)], the Michigan Supreme Court determined that the managers had a heightened responsibility to anticipate the risk of such an event due to the nature of the business and their awareness that residents were more vulnerable than a typical tenant. The court noted that residents on average exceeded 80 years of age, and the operator provided daily check-in calls, a pull cord alert mechanism in the apartments and arranged for an on-site third-party contractor who offered additional home care and medical services for a fee. In effect, the managers' efforts to recognize and address residents' potential health and safety needs indicated an increased awareness of residents' vulnerabilities and made the possibility of a lock-out leading to death more foreseeable.

The *Rowland* case illustrates how an independent living community's efforts to arrange for residents to hire private caregivers can increase the operator's potential liability for unrelated incidents. Independent living operators need to be aware that any effort they make to address

resident care needs, even if it is only to facilitate residents' hiring of third-party caregivers, is evidence of an awareness of a heightened risk, which can establish a greater duty of care.

An independent living manager cannot attempt to monitor and control resident health and safety as obtrusively as was done in HUD's *Oakmont* decision. Nor will most independent living operators be willing to completely ignore resident vulnerabilities. However, it is possible to set reasonable safety and cooperation parameters for the use of private caregivers and make voluntary safety programs available, while disclaiming any duty to monitor or respond to resident health needs.

Straying into Regulated Territory

Even when independent living communities state that they have no responsibility to monitor resident health or to intervene in the event of an unmet care need, they are likely to have concern when the resident population ages and their care needs increase. The presence of qualified and screened private duty aides may relieve some of those operators' health and safety concerns.

On the other hand, it is also possible that a resident population may age in place so significantly and have such widespread care needs that an independent living property begins to look and operate in a manner that is almost indistinguishable from a licensed care setting. In fact, unlicensed communities where a large number of residents are receiving care sometimes have been reported to state regulatory agencies by licensed competitors and accused of unlawfully operating a care setting that requires licensure.

Regulations will vary from one state to another, but factors likely to lead to a finding that licensure is required for a property with an extensive number of private home care aides on the premises include:

- » employment of the aides by the property owner or manager
- » employment of the aides by a company controlled by or affiliated with the property owner or manager
- » referencing the availability of care in the occupancy agreement with the resident
- » advertising the availability of care on the premises
- » retaining such a high number and acuity level of residents with care needs that the licensing agency considers it a "de facto" assisted living operation

Independent living managers need to be sensitive to the distinctions between setting standards for private duty aides and supervising, advertising or controlling them, and avoid letting the desire to regulate private aides transform the business into that of a care setting.

Special Issues for Licensed Care Settings

Typically, licensed care settings have sufficient staff to provide residents with all the care they need. Nevertheless, there are circumstances where a resident or family member will want to supplement the services of staff with a private duty caregiver or attendant.

One problem with private caregivers supplementing the services of staff is that they may interfere with the operator's control over the delivery of care and services. Private caregivers may be performing services that are inconsistent with or contrary to the licensed operator's service plan, or they may be performing services at a level that does not meet the policies and procedures or expectations of the licensed operator. Private caregivers also may not be communicating or coordinating with the licensed operator's staff, leading to gaps in information about the resident or a lack of continuity of services.

Licensed care operators should include in their resident contracts or private duty caregiver policies a provision requiring that private caregivers communicate frequently with the property owner's staff and report any changes of condition, and that the resident consents to sharing with management all private caregiver assessments, service plans, and other documentation.

Some licensed care operators may seek to limit the use of private duty caregivers and attendants by their residents, but most have found that it is almost impossible to insist that residents accept care and other services exclusively from the operator's staff. On the other hand, private duty caregivers cannot be allowed to usurp the licensed operator's responsibility to follow regulations and care for resident needs. Often, a licensed operator will insist that private caregivers perform only those activities that are supplemental to the mandated regulatory responsibilities of the licensee, for example, companionship and assistance with household tasks. Private aides would be precluded from providing hands-on assistance with daily living activities such as bathing, dressing, transferring and other services that the licensee is required by regulation to perform. Certainly, a licensed operator has greater justification to limit or exclude the services of private caregivers than would an unlicensed independent living operator.

Private caregivers may also be used by residents or their families as a way to delay an otherwise necessary transfer or move to a higher level of care. Sometimes, a resident with significantly increasing care needs will resist moving to a higher level of care and hire private duty aides, up to 24 hours per day, to delay or block the move. In one case, [*Herriot v. Channing House*, 2009 U.S. Dist. LEXIS 6617 (N.D. Cal. 2009); 2008 U.S. Dist. LEXIS 65871 (N.D. Cal. 2008)], a resident in the independent living section of a continuing care retirement community was determined by the property managers to be in need of 24 hour skilled nursing care and notified her of the need to transfer to the on-site skilled nursing facility. The resident hired private duty caregivers to be with her in her apartment 24 hours per day and filed suit in federal court, claiming that efforts to move her to skilled nursing constituted disability discrimination under the Fair Housing Act. The court ruled that the continuing care agreement signed by the resident permitted the operator of the property to make decisions regarding the appropriate level of care for each resident and required the resident to move out of her apartment and into the skilled nursing facility.

Conclusion

Private duty aides and attendants are a common presence in virtually all senior living communities. They can serve a beneficial purpose in providing needed care in independent living properties where there is no staff to provide such services. They also may supplement staff in licensed care settings.

Policies and procedures regulating private aide conduct can be important in promoting a reasonable level of safety for residents and clarity as to the relative roles of resident, aide and building manager.

Precautions should be taken and systems put in place so that aides do not interfere with the functioning of staff or delivery of services in a licensed care community. And independent living operators cannot allow private aides to change the character of a community from one where residents, and not management, remain ultimately responsible for monitoring and responding to their own health and safety needs.

About the Author

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