

elder voice

FAMILY ADVOCATES

KNOW YOUR RIGHTS WEBINAR
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INTRODUCTION

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Summary of Webinar Information

Presumptions in the Law

Brief History of Rights

Overview of Key Laws

Summary of Rights in Long Term Care

Enforcement of Rights

COVID-19 Impacts & Balancing of Rights

Practical Tips During COVID-19

Presumptions in the Law – Starting Points

Presumption #1

- Persons age 18+ are competent to manage their lives
- In MN, no category of vulnerability based solely on age

Presumption #2

- Persons age 18+ can make decisions not perceived to be in their best interest
 - Greater impact on others = more concern
 - Greater incapacity = more concern

Presumption #3

- Rights flow to the person receiving services (not family or others)

Definition of Legal Rights

Merriam Webster - *“a claim recognized and delimited by law for the purpose of securing it.”*

Brief History of Rights Development— US Constitution

Bill of Rights of US Constitution

- First 10 Amendments - Established in 1791
- Freedom of expression, freedom of the press, freedom to assemble, freedom of religion

Fundamental rights not in the Bill of Rights (but interpreted in 14th Amendment)

- Right to interstate travel
- Right to parent one's children
- Right to privacy
- Right to Marry

History of Rights – Equal Protection Clauses

14th Amendment added to US Constitution - 1868

Contains both a Due Process and Equal Protection Clause

- “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Equal Protection Analysis based on the level of scrutiny applied to the class of persons denied equal protection under the law

History of Rights – Level of Scrutiny by Class

Suspect Class = Strict Scrutiny

- Race, religion, national origin, and alienage

Quasi-Suspect Class = Intermediate Scrutiny

- Gender, legitimacy of birth, and arguably sexual orientation

Non-Suspect Class = Rational Basis Scrutiny

- Age, disability

Strict Scrutiny in equal Protection Claims

Strict Scrutiny

- Fundamental Right
 - Rooted in tradition
 - Implicit in concept of ordered liberty
- Action must be necessary to achieve a compelling government interest
- Government often loses

Rational Basis Scrutiny in Equal Protection Claims

**Rational
Basis**

- No Fundamental Right
- Action must be rationally related to legitimate government purpose
- Government often wins

Brief History of Rights Development – Minnesota Constitution

MN Constitution, including Article 1 – Bill of Rights - Ratified 5/11/1858

Article I – Bill of Rights

- §2 - **Equal Protection Clause** - no citizen in Minnesota shall be deprived of any rights available to the people of the state:
 - **Sec. 2. Rights and privileges.** No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. ...
- §8 – **Remedies for Injuries** - all citizens of Minnesota are entitled to remedies and justice for injuries:
 - **Sec. 8. Redress of injuries or wrongs.** Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Multiple Sources for Rights

Specific, enumerated rights

- i.e. Health Care Bill of Rights

Specific, enumerated prohibitions

- i.e. Retaliation

General protections under law

- i.e. Equal Protection Clause and Bills of Rights

State and federal law and regulations

Overview of Law - Federal

Age Discrimination

- Age Discrimination in Employment Act of 1967 (ADEA) – 29 USC 621-634 (age 40+)
- <http://www.eeoc.gov/laws/statutes/adea.cfm>

Other

- Older Americans Act of 1965 (OAA) - 42 USC 3021-3030 (2006)(as amended in P.L. 114-144, 4/19/2016) (community social services)
- <https://acl.gov/about-acl/authorizing-statutes/older-americans-act>
- Americans with Disabilities Act of 1990 (ADA) & ADA Amendments Act of 2008 – 42 U.S.C. § 12101 *et seq.*
- <https://www.ada.gov/pubs/adastatute08.htm>

Overview of Law - Federal

Health & Supportive Services

- **OBRA Regulations (Requirements for Long Term Care Facilities) – 42 C.F.R. § 483, Subp. B**
- **Requirements for Skilled Nursing Facilities (Medicare/Federal Funded; Social Security Act § 1819) – 42 U.S.C. 1395i-3**
- **Requirements for Nursing Facilities (Medicaid/Federal-State Funded; Social Security Act § 1919) – 42 U.S.C. 1396r**

Overview of Law - Federal

Patient Rights

- Rehabilitation Act of 1973, Section 504; 29 U.S.C. § 701 *et seq.*
- Requirements Relating to Residents' Rights (Medicare) – 42 U.S.C. § 1395i-3(c)
- Requirements Relating to Residents' Rights (Medicaid)– 42 U.S.C. § 1396r(c)
- OBRA Regulations (Resident Rights) - 42 CFR § 483.10

Overview of Law - Federal

Housing

- **Fair Housing Act (Prohibits Discriminatory Housing Practices Based on Disability and Other Factors) – 42 U.S.C. § 3604(f); 24 C.F.R. 100**

Payment

- **Medicare (Health Insurance for Aged and Disabled) - 42 U.S.C. § 1395**
- **Medicaid**
 - **State Plans for Medical Assistance - 42 U.S.C. § 1396a**
 - **Payment to States – 42 U.S.C. § 1396b**
- **Social Security Act of 1935 – 42 USC, ch. 7**
 - http://www.ssa.gov/OP_Home/ssact/title00/0000.htm

Overview of Law – MN State

Health & Supportive Services

- **Nursing Homes – Minn. Stat. §§ 144A.01-.37; Minn. R. 4658 *et al***
- **Veteran’s Homes – Minn. Stat. §§ 198 *et al*; Minn. R. 9050 *et al***
- **Boarding Care Homes – Minn. Stat. §§ 144.50-144.56; Minn. R. 4655 *et al***
- **Home Care Licensure Law – Minn. Stat. § 144A.43-.48**
- **Housing with Services Establishment Act – Minn. Stat. § 144D**
- **Assisted Living Services – Minn. Stat. § 144G**
- **Memory Care – Minn. Stat. §§ 144.6503; 144D.065; 144A.45, Subd. 5; and 245A.04, Subd. 12**

Overview of Law – MN State

Patient Rights

- **Assisted Living Bill of Rights Addendum– Minn. Stat. § 144A.441**
- **Assisted Living Bill of Rights (Post-Licensure) – § Minn. Stat. 144G.91**
- **Health Care Bill of Rights – Minn. Stat. § 144.651**
- **Home Care Bill of Rights – Minn. Stat. § 144A.44**
- **Hospice Bill of Rights – Minn. Stat. § 144A.751**
- **Maltreatment of Minors Act – Minn. Stat. § 626.556**
- **Minnesota Human Rights Act – Minn. Stat. § 363A**
- **Persons Subject to Guardianship/Conservatorship - Minn. Stat. § 524.5-120**
- **Vulnerable Adults Act – Minn. Stat. § 626.557 -.5573**

Overview of Law – MN State

Employee Regulation

- Nurse Practice Act – Minn. Stat. §§ 148.171-148.285
- Criminal Background Study – Minn. Stat. §§ 144.057 & 245C *et al*

Advertising

- Assisted Living Title Protection – Minn. Stat. § 144G.01-.02
- Attorney General responsibility related to Prevention of Consumer Fraud – Minn. Stat. § 8.31
- Consumer Fraud Act (Senior Citizens & Disabled Persons) – Minn. Stat. § 325F.71
- Disclosure of Special Care Status for Memory Care – Minn. Stat. § 325F.72
- False Statement in Advertisement – Minn. Stat. § 325F.67

Overview of Law – MN State

Housing

- Landlord Tenant Law – Minn. Stat. § 504B
- Building and Fire Codes (*See i.e.* Construction Codes and Licensing - Minn. Stat. § 326B)
- Common Interest Community and Cooperative Laws – Minn. Stat. § 515B

Payment

- Medical Assistance for Needy Persons – Minn. Stat. § 256B

WI State Law

Care and Residential Facility License – Wis. Stat. Ch. 50.01-50.14

Medical Assistance – Wis. Stat. Ch. 49.43-49.499

Criminal code – 940.285; 940.295 (“elders at risk”)

Vulnerable Adult Maltreatment Reporting – 46.90

- Notably WI seems to have a “elder at-risk” (based primarily on age) category separate from “adult at-risk” category (based primarily on need for services)
- <https://www.dhs.wisconsin.gov/aps/index.htm> (More information on reporting)

Summary of Bills of Rights & Care Standards

Nursing Home

- 42 CFR 483.10 – OBRA Regulations under FNHRA
- Minn. Stat. 144.651
- Minn. Stat. 144A.001-.1888
- Minn. R. 4658

Assisted Living

- Pre-Licensure under Home Care Bill of Rights – Minn. Stat. 144A.44
- Post-Licensure under Assisted Living Bill of Rights – Minn. Stat. 144G.91
- Home Care – Minn. Stat. 144A.43-.483

Vulnerable Adults Act – Minn. Stat. § 626.557 -.5573

Medical Records

Right to Medical Records

- General – Minn. Stat. 144.292; 45 CFR 164
- NH - Minn. Stat. 144.651(16)
- AL – Minn. Stat. 144A.44(a)(11)

Process

- Minnesota Health Care Records Act – Minn. Stat. 144.291-144.298
- HIPAA – 45 CFR 164

Medical Records Timing

Timing - When provided

- General
 - Within 30 days (HIPAA - 45 CFR 164.524(b)(2))
 - “Promptly” – Minn. Stat. 144.291
- Nursing Home – within two days to resident (42 CFR 483.10(g))

Medical Records Cost

General – If resident request delivered to resident

- Free if patient request to review current care
- Minn. Stat. 144.292, subd. (6)(a) When a patient requests a copy of the patient's record for purposes of reviewing current medical care, the provider must not charge a fee.
- Electronic Copies - HITECH Act Rate of supply only (i.e. USB drive)
 - 42 U.S.C.A. 17935(e)(1), and its implementing regulations 45 CFR 164.524(c)(4)(i)
- Paper Copies – Minn. Stat. 144.291
 - 2020 retrieval fee (\$19.19) plus per page cost (\$1.44)

Nursing Home resident request – 42 CFR 481.10(h) – labor, supply, and postage

Electronic Monitoring

Minn. Stat. 144.6502 – Process

- Nursing home, boarding care home, HWS, and assisted living
- Effective 1/1/2020

Minn. Stat. 144.651 – No Right under Health Care Bill of Rights

Minn. Stat. 144A.44(a) – Right under Home Care Bill of Rights

- (23) place an electronic monitoring device in the client's or resident's space in compliance with state requirements.

Retaliation

Prohibition against Retaliation

- NH - Minn. Stat. 144.6512
- AL pre-licensure – Minn. Stat. 144G.07
- AL post-licensure – Minn. Stat. 144G.92

Landlord Covenants

Landlord covenants the following - Minn. Stat. 504B.161, subd. 1(a)

- (1) that the premises and all common areas are fit for the use intended by the parties;
- (4) to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee.

Tenant Rights

Deposits

- Pre-Lease Deposits must be disclosed and returned if conditions met - Minn. Stat. 504B.175
- Security Deposits must be returned if conditions met – Minn. Stat. 504B.178

Tenant may seek emergency services – Minn. Stat. 504B.205, subd. 2

Termination of lease upon death of tenant (2 month notice) – Minn. Stat. 504B.265

Landlord may take control of personal property 28 days after abandonment – Minn. Stat. 504B.271

Key Patient Rights – Nursing Facility

Laws & Regulations that Apply

- OBRA – 42 CFR 483, Part B
- State law – 144A
- State Rules – Minn. R. 4658 Omnibus Reconciliation Act of 1987 - OBRA

Applies to SNF & NF (& arguably others)

Not organized with similar rights in mind

- Various rights related to harm mixed throughout OBRA
- Some related to care standards and others are not

Key Patient Rights – OBRA Nursing Facility

42 CFR 483.10(g)(2) – Right to access all his/her medical records

42 CFR 483.10(c)(6) – Right to refuse treatment

42 CFR 483.10(d) – Right to choose a personal attending physician

42 CFR 483.10(h) – Right to privacy and confidentiality of records

42 CFR 483.10(g)(10) – Right to examine survey results

42 CFR 483.10(f)(4) – Right to visit family and others, with consent

Key Patient Rights – OBRA Nursing Facility

42 CFR 483.10(g)(6) – Right to reasonable access to private telephone

42 CFR 483.10(e)(4) – Right to share a room with spouse, with consent

42 CFR 483.10(f)(5) – Facility must allow Resident and Family Groups

42 CFR 483.10(a) – Right to have dignity maintained

42 CFR 483.10(f) – Right to self-determination

Key OBRA Regulations – Nursing Facility

42 CFR 483.15(a)(3) – The facility must not require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility

42 CFR 483.10(d) – The resident has the right to choose a personal attending physician

42 CFR 483.10(f)(4)(i) – The resident has the right and the facility must provide immediate access to any resident by ... relatives ... others visiting with the consent of the resident.

Key OBRA Regulations – Nursing Facility

42 CFR 483.10(e)(1) – The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

42 CFR 483.10(f)(5) – Resident and Family Groups

42 CFR 483.25(b)(1) – A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable

42 CFR 483.25(g)(2) – The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

Key Patient Rights – MN Nursing Facility

Health Care Bill of Rights – Minn. Stat. §144.651

- To have continuity of care – Subd. 11
- To refuse care – Subd. 12
- To be free from maltreatment – Subd. 14
- To have confidential records – Subd. 16
- To have responsive service – Subd. 18
- To communicate privately with others – Subd. 21
- To associate freely - Subd. 26
- To not be arbitrarily discharged – Subd. 29
- To request and consent to restraint – Subd. 33

Key Patient Rights – MN Nursing Facility

Minn. R. 4658.0220 (as to nursing homes)

- Right to telephone
- Right to visitors
- Right to pet animals

Minn. Stat. 144.291-.34 – Right to health care records

Key Patient Rights – MN Nursing Facility

Minn. R. 4658.0105 – Direct care staff must be competent, in areas of resident need according to care plan

Minn. Stat. 144.6503 – Staff working with dementia resident's must be trained in memory care

Minn. R. 4659.0110 – Facility must immediately document accidents

Minn. R. 4658.0400 – Facility must conduct comprehensive assessment

Minn. R. 4658.0405 – Facility must have an individualized care plan based on comprehensive assessment

Minn. R. 4658.0520, subp. 1 – Care according to care plan

Minn. R. 4658.0520, subp. 2 – Proper hygiene

Minn. R. 4658.0510 – Sufficient nursing personnel requirements

Six Grounds for Discharge from NH

The resident has needs that cannot be met in the facility. 42 U.S.C. § 1396r(c)(2)(A)(i), 42 C.F.R § 483.15(c)(1)(A).

The resident no longer needs the services provided by the facility. 42 U.S.C. § 1396r(c)(2)(A)(ii), 42 C.F.R § 483.15(c)(1)(B).

The resident endangers the safety of others in the facility. 24 U.S.C. § 1396r(c)(2)(A)(iii), 42 C.F.R § 483.15(c)(1)(C).

The resident endangers the health of others in the facility. 24 U.S.C. § 1396r(c)(2)(A)(iv), 42 C.F.R § 483.15(c)(1)(D).

The resident failed to make or ensure payment for care. 24 U.S.C. § 1396r(c)(2)(A)(v), 42 C.F.R § 483.15(c)(1)(E).

- *King v. Butler Rest Home, Inc.*, 365 S.W.3d 561 (Ky. Ct. App. 2011) (finding the standard to be denial of medical assistance, not outcome of appeal)

The facility ceases to operate. 24 U.S.C. § 1396r(c)(2)(A)(vi), 42 C.F.R § 483.15(c)(1)(F).

OBRA Regulations – Nursing Facility Discharge Procedure

42 C.F.R. § 483.15(c)(2)(i) The nursing home must provide notice including the grounds of discharge to the resident and any known family member or legal representative in writing and in a language and manner they understand.

42 C.F.R. § 483.15(c)(5) Notice must include when and where the discharge will take place, a statement of the resident's right to appeal, and the address and telephone number of the state long-term care ombudsman and, if applicable, the ombudsman for mental health and developmental disabilities.

42 C.F.R. § 483.15(c)(4) The nursing home must provide notice at least 30 days prior to the intended discharge. However, a facility may provide notice "as soon as practicable" if the resident's health, or the health and safety or others, calls for more immediate discharge or if the resident has not resident there for 30 days.

MN Law Appealing Involuntary Discharge – Nursing Facility

Minn. Stat. § 144.651, subd. 29. Resident must be notified of the proposed discharge, its justification, the right to contest it, and the contact information for the area long-term care ombudsman at least 30 days before discharge.

Minn. Stat. § 144A.135(b). To appeal, the resident or a resident's representative must request a hearing in writing within 30 days after receiving written notice of the discharge.

Minn. Stat. § 144A.135(c). Unless impractical or parties agree otherwise, the hearing must be held at the resident's facility within 14 days of receipt of the hearing request.

Key State Regulations – Admit & Discharge Nursing Facility

Minn. Stat. 144.6501 – Admission agreement requirements

- Format and certain font
- Process of admission, including making information available ahead of time
- Definition of “Responsible Party”

Minn. R. 4658.0140 – NH must not admit someone for whom they cannot provide requisite care

Minn. 144.651, subd. 29 – 30 day notice of discharge

Minn. Stat. 144A.135 – Discharge appeals heard by ALJ, then court

Minn. Stat. §§ 14.48 - 14.69. (statutes governing contested hearings before the Office of Administrative hearings)

Minn. Admin. R. §§ 1400.5010-8401. (rules governing proceedings under the Administrative Procedure Act)

Prior opinions by administrative law judges are not precedential but may be persuasive. A searchable archive of past opinions is available at <http://search.state.mn.us/oah/>.

42 U.S.C. § 1396r (c)(5)(A)(ii).

42 U.S.C. § 1395i-3(c)(5)(A)(ii).

42 C.F.R. § 483.15(c).

56 Fed. Reg. 48,826, 48,841 (1991). Of those four sources of law, the federal regulation has the clearest statement of legislative intent within the Federal Register: "The legislative history reveals that Congress was concerned with prohibiting SNFs and NFs from requiring a person, such as a relative, to accept responsibility for the charges incurred by a resident..."

Minn. Stat. § 144.6501, subd. 4(d).

Signor – Nursing Home

Patient Right to a Restraint - Nursing Home

Right to Use a Restraint – Minn. Stat. 144.651, subd.

- (a) Competent nursing home residents, family members of residents who are not competent, and legally appointed conservators, guardians, and health care agents as defined under section [145C.01](#), have the right to request and consent to the use of a physical restraint in order to treat the medical symptoms of the resident.
- (b) Upon receiving a request for a physical restraint, a nursing home shall inform the resident, family member, or legal representative of alternatives to and the risks involved with physical restraint use. The nursing home shall provide a physical restraint to a resident only upon receipt of a signed consent form authorizing restraint use and a written order from the attending physician that contains statements and determinations regarding medical symptoms and specifies the circumstances under which restraints are to be used.
- (e) For purposes of this subdivision, "medical symptoms" include:
 - (1) a concern for the physical safety of the resident; and
 - (2) physical or psychological needs expressed by a resident. A resident's fear of falling may be the basis of a medical symptom.

Home Care Bill of Rights – 144A.44(a)

- To receive services from a current and up-to-date plan, Subd. 2
- To refuse treatment – Subd. 6
- To freely choose provider – Subd. 9
- To have access to client’s records – Subd. 11
- To be served by trained and competent staff – Subd. 12
- To receive reasons for termination - Subd. 16
- To make a grievance – Subd. 19
- To assert rights – Subd. 22

Key Patient Rights – MN
Assisted Living/Home Care

Home Care

- Services - Minn. Stat. 144A.4791, subd. 10 – Written notice of termination of service plan, including effective date and reason for termination
- Services – Minn. Stat. 144A.44, subd. 17 – 10 day written notice, unless
 - Client conduct that significantly alters service plan
 - Abusive or unsafe work environment for caregiver
 - Emergency or significant change that requires needs beyond the current service plan
- Housing – 30 day notice under Minn. Stat. 504B

Key Patient Rights – MN
Assisted Living/Home Care
Admit & Discharge

Assisted Living Discharge

Minn. Stat. 144A.441 (alters Home Care Bill of Rights at subd. 17)

- 30 days written notice, unless
 - Client conduct that alters contract between home care provider and employee, or creates unsafe employee environment
 - Emergency or significant change that requires needs beyond the current service plan
 - Non-payment, for which 10 day written notice applies

Minn. Stat. 144A.442; 144G.03, subd. 6

- Written notice of termination of services, including effective date and reason for termination
- Offer to meet with the client within 5 days to discuss the termination

Key Patient Rights – MN
Assisted Living/Home Care
Admit & Discharge

Minn. Stat. 144A.4791, subd. 2; 144D.065 –Training of staff working with patients with dementia

Minn. Stat. 144A.4791, subd. 7 – For basic services, review of client needs within 30 days and as needed or within 90 days since last review

Minn. Stat. 144A.4791, subd. 8 – For comprehensive services, assessment by RN within 5 days; reassessment within 14 days; and ongoing reassessment as needed or within 90 days since last review

Minn. Stat. 144A.4791, subd. 9 – Service plan within 14 days of start of service

Key Patient Rights – MN
Assisted Living/Home Care
Care Standards

Minn. Stat. 144D.07 – Right to be free from restraints in HWS

Minn. Stat. 144A.4793 – Facility must retain policies, procedures, and records related to treatments and therapies

Key Patient Rights – MN
Assisted Living/Home Care
Care Standards

Enforcement of Rights

Generally, rights are largely unenforceable

Nursing Home

- OBRA Regulations – 42 CFR 483
 - Does not create a private right of action for violation of a right
 - *Duncan v. Johnson-Mathers Health Care, Inc.*, No. 5:09-cv-417-KKC, 2010 WL 3000718, at *5 (E.D. Ky. July 28, 2010)

Minn. Stat. 144.651

- Does not create a private right of action
- Subd. 1 - But guardian, conservator, or interested person may enforce rights

Enforcement of Rights

Assisted Living Assertion of Rights

- Client or Representative may assert rights – Minn. Stat. 144A.44(a)(22)
- (22) assert these rights personally, or have them asserted by the client's representative or by anyone on behalf of the client, without retaliation; and

Enforcement of Rights - Summary

In nursing home and hospital context

- Some courts recognize standing to enforce right, but do not recognize a private right of action for violation of rights (i.e. no damages)
- Such claims rarely brought

In assisted living context (in Minnesota)

- Less recognition of standing to enforce right
- Such claims rarely brought

Informal resolution often sought, or grievances or complaints

Lack of enforceability is why a “private right of action” in discussed legislatively

General Categories of Resident Rights Based on Enforceability

Autonomy

(No Harm/Little
Enforceability)

- Visitation
- Privacy
- Refuse Treatment

Admit/Discharge

(Some Harm/Admin
Process)

- Admission Agreement
- Grounds for Discharge
- Payment

Care Standards

(Likely Harm/Civil
Claim)

- Change in Condition
- Pressure sores
- Restraints

COVID-19 Impacts Nursing Home

Person Centered Care

- NH – Minn. Stat. 144.651, subd. 6
 - Patients and residents shall have the right to appropriate medical and personal care based on individual needs. Appropriate care for residents means care designed to enable residents to achieve their highest level of physical and mental functioning. ...

Participation in Planning Treatment

- NH – Minn. Stat. 144.651, subd. 10
 - ... This right includes the opportunity to discuss treatment and alternatives with individual caregivers, the opportunity to request and participate in formal care conferences, and the right to include a family member or other chosen representative, or both. ...

COVID-19 Implications

Nursing Home

Continuity of Care

- NH – Minn. Stat. 144.651, subd. 11
 - Patients and residents shall have the right to be cared for with reasonable regularity and continuity of staff assignment as far as facility policy allows.

Right to be Free from Maltreatment - Minn. Stat. 144.651, subd. 15

- Patients and residents shall be free from maltreatment as defined in the Vulnerable Adults Protection Act.
...

Right to Prompt Response - Minn. Stat. 144.651, subd. 18

- Patients and residents shall have the right to a prompt and reasonable response to their questions and requests.

COVID-19 Implications

Nursing Home

Right to Grievances - Minn. Stat. 144.651, subd. 19

- Patients and residents shall be encouraged and assisted, throughout their stay in a facility or their course of treatment, to understand and exercise their rights as patients, residents, and citizens. Patients and residents may voice grievances and recommend changes in policies and services to facility staff and others of their choice, free from restraint, interference, coercion, discrimination, or reprisal, including threat of discharge.

Right to Communication Privacy - Minn. Stat. 144.651, subd. 21

- Patients and residents may associate and communicate privately with persons of their choice and enter and, except as provided by the Minnesota Commitment Act, leave the facility as they choose.

COVID-19 Implications

Nursing Home

Visitors and Right to Association – Minn. Stat. 144.651, subd. 26

- (a) Residents may meet with and receive visitors and participate in activities of commercial, religious, political, as defined in section [203B.11](#) and community groups without interference at their discretion if the activities do not infringe on the right to privacy of other residents or are not programmatically contraindicated. This includes:
 - (1) the right to join with other individuals within and outside the facility to work for improvements in long-term care;
 - (2) the right to visitation by an individual the patient has appointed as the patient's health care agent under chapter 145C;
 - (3) the right to visitation and health care decision making by an individual designated by the patient under paragraph (c).

COVID-19 Implications

Nursing Home

Visitors & Access by Immediate Family 42 CFR 483.10(f)(4)

- **(4)** The resident has a right to receive visitors of his or her choosing at the time of his or her choosing, subject to the resident's right to deny visitation when applicable, and in a manner that does not impose on the rights of another resident.
- **(ii)** The facility must provide immediate access to a resident by immediate family and other relatives of the resident, subject to the resident's right to deny or withdraw consent at any time;
- **(iii)** The facility must provide immediate access to a resident by others who are visiting with the consent of the resident, subject to reasonable clinical and safety restrictions and the resident's right to deny or withdraw consent at any time;

COVID-19 Implications

Nursing Home

Move about Freely – 42 CFR 483.10(f)(3) (Self-Determination)

- **(3)** The resident has a right to interact with members of the community and participate in community activities both inside and outside the facility.

Access to providers and professionals – 42 CFR 483.10(f)(4)

- **(iv)** The facility must provide reasonable access to a resident by any entity or individual that provides health, social, legal, or other [services](#) to the resident, subject to the resident's right to deny or withdraw consent at any time;

COVID-19 Implications

Nursing Home

Medical Records – 42 CFR 483.10(g)

(2) The resident has the right to access personal and medical records pertaining to him or herself.

(i) The facility must provide the resident with access to personal and medical records pertaining to him or herself, upon an oral or written request, in the form and format requested by the individual, if it is readily producible in such form and format (including in an electronic form or format when such records are maintained electronically); or, if not, in a readable hard copy form or such other form and format as agreed to by the facility and the individual, within 24 hours (excluding weekends and holidays); and

(ii) The facility must allow the resident to obtain a copy of the records or any portions thereof (including in an electronic form or format when such records are maintained electronically) upon request and 2 working days advance notice to the facility. The facility may impose a reasonable, cost-based fee on the provision of copies, provided that the fee includes only the cost of:

(A) [Labor](#) for copying the records requested by the individual, whether in paper or electronic form;

(B) Supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media; and

(C) Postage, when the individual has requested the copy be mailed.

COVID-19 Implications

Nursing Home

Telephone Communication – 42 CFR 483.10(g)

- **(6)** The resident has the right to have reasonable access to the use of a telephone, including TTY and TDD services, and a place in the facility where calls can be made without being overheard. This includes the right to retain and use a cellular phone at the resident's own expense.

Video Communication – 42 CFR 483.10(g)

- **(9)** The resident has the right to have reasonable access to and privacy in their use of electronic communications such as email and video communications and for Internet research.

COVID-19 Implications

Nursing Home

Notify of Changes in Condition – 42 CFR 483.10(g)

(14) Notification of changes.

(i) A facility must immediately inform the resident; consult with the resident's physician; and notify, consistent with his or her authority, the resident representative(s), when there is -

(A) An accident involving the resident which results in injury and has the potential for requiring physician intervention;

(B) A significant change in the resident's physical, mental, or psychosocial status (that is, a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) A need to alter treatment significantly (that is, a need to discontinue or change an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) A decision to [transfer](#) or discharge the resident from the facility as specified in [§ 483.15\(c\)\(1\)\(ii\)](#).

COVID-19 Implications

Nursing Home

Privacy in Communication – 42 CFR 483.10(h)

(h) *Privacy and confidentiality.* The resident has a right to personal privacy and confidentiality of his or her personal and medical records.

(1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident.

COVID-19 Implications

Nursing Home

Safe and Clean Environment – 42 CFR 483.10(i)

(i) *Safe environment.* The resident has a right to a safe, clean, comfortable and homelike environment, including but not limited to receiving treatment and supports for daily living safely. The facility must provide ...

COVID-19 Implications

Nursing Home

Grievances – 42 CFR 483.10(j)

(j) *Grievances.*

(1) The resident has the right to voice grievances to the facility or other agency or entity that hears grievances without discrimination or reprisal and without fear of discrimination or reprisal. Such grievances include those with respect to care and treatment which has been furnished as well as that which has not been furnished, the behavior of staff and of other residents; and other concerns regarding their LTC facility stay.

COVID-19 Implications

Nursing Home

Right to Be with Spouse– Minn. Stat. 144.651, subd. 28

- Residents, if married, shall be assured privacy for visits by their spouses and, if both spouses are residents of the facility, they shall be permitted to share a room, unless medically contraindicated and documented by their physicians in the medical records.

Right to Notice upon Transfer or Discharge – Minn. Stat. 144.651, subd. 29

- Residents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility.

What Rights Can Be Limited by Law?

Visitors and Self-Determination – 42 CFR 483.10(f)(4)

- **(v)** The facility must have written policies and procedures regarding the visitation rights of residents, including those setting forth any clinically necessary or reasonable restriction or limitation or safety restriction or limitation, when such limitations may apply consistent with the [requirements](#) of this subpart, that the facility may need to place on such rights and the reasons for the clinical or safety restriction or limitation.

COVID-19 Implications Assisted Living

Plan of Services & Changes – Minn. Stat. 144A.44(a)

(2) receive care and services according to a suitable and up-to-date plan, and subject to accepted health care, medical or nursing standards and person-centered care, to take an active part in developing, modifying, and evaluating the plan and services;

(4) be told in advance of any recommended changes by the provider in the service plan and to take an active part in any decisions about changes to the service plan;

COVID-19 Implications Assisted Living

Properly Trained Staff – Minn. Stat. 144A.44(a)

- (12) be served by people who are properly trained and competent to perform their duties;

Courtesy and Respect – Minn. Stat. 144A.44(a)

- (13) be treated with courtesy and respect, and to have the client's property treated with respect;

Free from Maltreatment – Minn. Stat. 144A.44(a)

- (14) be free from physical and verbal abuse, neglect, financial exploitation, and all forms of maltreatment covered under the Vulnerable Adults Act and the Maltreatment of Minors Act;

COVID-19 Implications for Long Term Care – Data as of 7/30/2020

Nursing Facilities

- 53% of nursing facilities with COVID-19
- 2,641 resident cases (average of 22 cases per facility with outbreak)
- 816 resident deaths (31% of residents with COVID-19 died)

Assisted Living

- 25% of ALF settings with COVID-19
- 1,316 resident cases (average of 6 cases per facility with outbreak)
- 403 resident deaths (31% of residents with COVID-19 died)

MDH Guidelines

Infection Control and Tool-Kits –Update 6/5/2020

- <https://www.health.state.mn.us/diseases/coronavirus/hcp/ltctoolkit.pdf>
- <https://www.health.state.mn.us/diseases/coronavirus/hcp/response.pdf>

Window Visits – 6/12/2020

- <https://www.health.state.mn.us/diseases/coronavirus/hcp/ltcwindows.pdf>

Outdoor Visitation – 6/17/2020

- <https://www.health.state.mn.us/diseases/coronavirus/hcp/ltcoutdoor.pdf>

MDH Guidelines

Essential Caregiver 7/10/2020

- <https://www.health.state.mn.us/diseases/coronavirus/hcp/lccaregiver.html>

Testing – 7/28/2020

- <https://www.health.state.mn.us/diseases/coronavirus/hcp/lctestrec.pdf>

New Visitation and Activities – 8/10/2020

- <https://www.health.state.mn.us/diseases/coronavirus/hcp/lcvisit.pdf>
- Summary - <https://www.health.state.mn.us/diseases/coronavirus/hcp/lcvisitsum.pdf>
- FAQ - <https://www.health.state.mn.us/diseases/coronavirus/hcp/lcvisitfaq.pdf>

Essential Caregiver Summary

Facilities must establish policies and procedures for how to designate and utilize an EC.

Resident must be consulted as to EC

Residents can designate more than one EC

EC schedule can be up to three hours per day

The facility may limit the number of EC in the building

Essential Caregiver Summary

The EC must wear all necessary personal protective equipment (PPE) while in the building (minimally eye protection and face mask), and must perform frequent hand hygiene. The facility should ensure hand sanitizing stations and alcohol-based hand rubs are accessible.

Evening and weekend EC visits must be allowed

Essential Caregiver Summary

EC may take the resident outside or wheeled through the facility with proper PPE

EC should not take the resident out into the community except for essential medical appointments.

The LTC facility may restrict or revoke EC status if the EC fails to follow social distancing, use of PPE, or other COVID-19 related rules of the facility. Prior to restriction/revocation, the facility, EC, and resident should discuss in attempt to mediate the concerns.

8/10/2020 Visitation and Activities Guidance

Key concepts

- Not a reopening plan - Provides framework around when and how to open visitation and activities
- Testing is seen as integral Effective 8/29/2020
- Independent Living – not required to be screened and tested but otherwise same restrictions
- Continue to Follow MDH ToolKit

Two levels

- Level 1 – for facilities with no facility-onset transmission to resident or one staff member working while infected, in last 28 days
- Level 2 – for facilities with no such cases in the last 28 days

8/10/2020
Visitation and
Activities
Guidance –
Level I

Level 1 – summary – Continue to Follow Guidance in the ToolKit

Visitation

- Restrict visitation of all visitor and non-essential health care personnel.
- Compassionate care visits are allowed.
- Essential Caregivers are allowed.
- Outdoor Visitation is allowed.
- Window Visits are allowed.
- Beauty Shop is unable to be open if there has been an exposure within the last 14 days.

8/10/2020 Visitation and Activities Guidance – Level I

Dining and Activities

- No residents with signs or symptoms of a respiratory infection, or with confirmed diagnosis of COVID-19 (regardless of symptoms) may eat in dining rooms. For dining, LTC facilities should apply social distancing methods, such as ensuring residents sit in limited numbers at least 6 feet apart.
- Group activities may be facilitated (for residents who have fully recovered from COVID-19, and for those not in isolation for observation, suspected or confirmed COVID-19 status) with social distancing among residents, appropriate hand hygiene, and use of a cloth face covering or facemask. Facilities should use creative methods to provide socialization, such as virtual activities. Facilities should also continue individualized activities.

8/10/2020 Visitation and Activities Guidance – Level II

Level II Summary

- COVID-19 positive coming from hospital to TCU does not prevent the facility from going to Level 2
- Testing Summary
 - Nursing Facilities - must have at least one facility-wide test to go to level 2
 - Assisted Living – recommended to have at least one facility-wide test for level 2

8/10/2020 Visitation and Activities Guidance – Level II

Visitation

- Beauty Shop services are allowed.
- Must have an active screening system to screen all visitors entering the facility for signs and symptoms of COVID-19, at a screening location prior to the visitor walking through the facility.
- All visitors should sign in and out and leave contact information.
- Must have a system to ensure residents wear a mask, as tolerated, and visitors wear a mask
- The visitor must proceed directly to the resident room or designated visiting area.
- Facilities should consider establishing a visitation schedule for non-essential visitors that takes into account the size of the facility, the number of residents, and resident activities to better monitor the number of visitors at any given time.
- A wave is the safest way to greet the resident. Due to the risk of exposure, holding hands and kissing is not allowed during visits. A quick hug from behind, to the side, or with faces turned away while wearing face coverings is lower-risk.

8/10/2020
Visitation and
Activities
Guidance –
Level II

Dining and Activities

- For dining, LTC facilities should apply social distancing methods, such as ensuring residents sit in limited numbers at least 6 feet apart.
- Group activities may be facilitated (for residents who have fully recovered from COVID-19, and for those not in isolation for observation, suspected, or confirmed COVID-19 status) with social distancing among residents, appropriate hand hygiene, and use of a cloth face covering or facemask. Facilities should continue to use creative methods to provide socialization, such as virtual activities. Facilities should also continue individualized activities.

COVID-19 EXECUTIVE Orders from Gov. Walz

EO 20-46 – Out of State workers rendering aid – 4/25/2020

Pursuant to Minnesota Statutes 2019, section 12.42, I authorize and request Out-of-State Healthcare Professionals who hold an active, relevant license, certificate, or other permit in good standing issued by a state of the United States or the District of Columbia to render aid in Minnesota during the peacetime emergency declared in Executive Order 20-01 (including any extensions of that peacetime emergency).

COVID-19 EXECUTIVE Orders from Gov. Walz

EO 20-23 – Extension of Health-Related Licensing Functions –
3/27/2020

Extension of 60-day temporary nursing certification through the
MN Board of Nursing

Allowing health related licenses to proceed without fingerprint
check

COVID-19 EXECUTIVE Orders from Gov. Walz

EO 20-03 – 3/16/2020

Direct the Minnesota Veteran's Home in visiting and related policies

Directs the VA Homes to follow CMS guidelines

COVID-19 EXECUTIVE Orders from Gov. Walz

EO 20-32 – Authority to Commissioner of Health – 4/8/2020

Granting authority to the Commissioner of Health to waive, modify, delay many provisions in law, including

- Provisions regulating the hospital moratorium and nursing home moratorium laws found in Minnesota Statutes 2019, sections 144.551, 144A.071, and 144A.073;
- Provisions that MDH is responsible for in Minnesota Statutes 2019, Chapters 62D, 62J, 62Q, 144, 144A, 144D, 144G, 144H, 146A, 146B, 148, 149A, 153A, 157, 214, 256.045, 327, 626.556, 626.557
- Suspending compliance and regulatory standards, as they apply to the use of nontraditional spaces to provide patient care in temporary alternative care facilities established by the Commissioner of Health
- Granting of variances for rules

COVID-19 Executive Orders from Gov. Walz

EO 20-55 – Encouraging at risk population to stay home – 5/13/2020

“At-Risk” Defined

- 65 years and older.
- Living in a nursing home or a long-term care facility, as defined by the Commissioner of Health.
- Any age with underlying medical conditions, particularly if not well controlled, including:
 - People with chronic lung disease or moderate to severe asthma.
 - People who have serious heart conditions.
 - People who are immunocompromised (caused by cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, or prolonged use of corticosteroids and other immune weakening medications).
 - People with severe obesity (body mass index (BMI) of 40 or higher).
 - People with diabetes.
 - People with chronic kidney disease undergoing dialysis.
 - People with liver disease.

COVID-19 Executive Orders from Gov. Walz

EO 20-79 – Restriction on evictions during peacetime emergency –
7/14/2020

Landlords prohibited from recovering premises, filing writs, or initiating evictions, except

- Seriously endangers the safety of other residents;
- Violates Minnesota Statutes 2019, section 504B.171, subdivision 1;
- Remains in the property past the vacate date after receiving a notice to vacate or nonrenewal under paragraph 4 of this Executive Order; or
- Materially violates a residential lease by the following actions on the premises, including the common area and the curtilage of the premises:
 - Seriously endangers the safety of others; or
 - Significantly damages property.

COVID-19 Executive Orders from Gov. Walz

EO 20-81 – Mask requirements – 7/22/2020

- Doesn't specifically reference long term care settings
- Exception may apply - Individuals with a medical condition, mental health condition, or disability that makes it unreasonable for the individual to maintain a face covering. This includes, but is not limited to, individuals who have a medical condition that compromises their ability to breathe, and individuals who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance. These individuals should consider using alternatives to face coverings, including clear face shields, and staying at home as much as possible.

COVID-19 Concerns from Families

Neglect of care or abuse

Restrictions in independent living environment

Lack of physical activity

Termination of Services

Lack of staff support (i.e. for cares or to facilitate communication)

Communication and transparency regarding hospice

Lack of communication about changed in health condition of resident

Social isolation

Wide variety of interpretation of guidelines

Practical Tips During COVID-19

Remember that all procedures are altered during COVID-19

Also remember that the person receiving services retains rights (know them and assert them)

Contact the Ombudsman for Long Term Care and Ombudsman for Mental Health

As possible, focus on items of greatest importance and give on other items

Ask for policies and procedures

- Infection control
- Essential Caregivers
- Compassionate Care Visits

Practical Tips During COVID-19

If possible, ship a simple camera (Echo) to resident to placement in room (with proper notice and consent pursuant to Minn. Stat. 144.6502)

Tell the facility the communication preferences (i.e. MyChart; by phone)

As possible, ensure that the resident has designated multiple people to receive care updates

Recognize that with guidance and not law/rules, the interpretation is up to the provider, so maintain as good of relationship with provider as possible

Keep in contact with the primary care physician and unaffiliated providers

Practical Tips During Covid- 19

Continue to report maltreatment

- Call MAARC when maltreatment is suspected (844.880.1574)
- Call police and primary care physician for additional reporting
- Contact your legislator to make them aware of the concerns

Resist the tendency to elevate provider knowledge and discount your personal knowledge of the person receiving services

Ask for explanation of the services charged on the billing statement

Ask to go off hospice if in the person's best interest to receive curative treatment

Remember that people go on hospice to transition to death, not to live

PRACTICAL TIPS DURING COVID-19

Wild ideas (really wild)

- Invest in large sheet of plastic (i.e. like at grocery store) for a barrier during visits instead of mask wearing that causes confusion and fear for some
- Invest in large sheets of malleable plastic wrap to allow a hug through the wrap

According to facility policy, consider taking person offsite even if quarantine period to allow greater, necessary interaction

If necessary and safely possible, find a new living situation (i.e. home or apt)

Participate in broad advocacy (what helps your loved one helps others)

THANK YOU

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elder voice
FAMILY ADVOCATES



THANK YOU AND QUESTIONS

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