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Assisted Living in Florida, How is it Changing?



An Assisted Living Facility (ALF) is a residential establishment that is designed to provide personal care services to one or more persons in the least restrictive and most home-like environment. Personal services that are provided to residents of an ALF are services such as physical assistance with, or supervision of, the activities of daily living and the self-administration of medication. ALFs can range in size from one resident to several hundred and may offer a wide variety of personal and nursing services designed specifically to meet an individual's personal needs. The services available in these facilities are intended to help residents remain as independent as possible and for some to "age in place" when their health care needs increase.

Standard Licensed ALFs

A standard ALF must be licensed by the Agency for Health Care Administration (AHCA). The official definition of an assisted living facility is *any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.* Specialty licensed facilities are avail-

able for individuals with increased health care needs. There are three types of specialty licenses: Extended Congregate Care License, Limited Nursing Services License and Limited Mental Health License.

Regardless of the facility's license status, residents living in ALFs cannot have conditions that require 24-hour nursing supervision. The only exception to this is for an existing resident who qualifies for and receives hospice services from a licensed hospice while continuing to reside in an ALF.

Specialty License: Extended Congregate Care

An **Extended Congregate Care (ECC) license** is issued to an assisted living facility that provides services beyond those authorized for a standard ALF, meaning that they may provide additional nursing services and total assistance with personal care services. New facilities may apply for an ECC license at the time of initial application. Existing facilities qualifying to provide extended congregate care services must have maintained a standard license and may not have been subject to administrative sanctions during the previous two years, or since initial licensure if the facility has been licensed for less than two years. Mandatory services that must be provided include, but are not limited to total help with the activities of daily living, more frequent nursing assessments and

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“A mental health resident is an individual who receives social security disability income or supplemental security income due to a mental disorder as determined by the Social Security Administration and receives optional state supplementation.”

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assistance with administered and self-administered medications.

Specialty License: Limited Nursing Services

A **Limited Nursing Services (LNS) License** is issued to an ALF that provides nursing services that are beyond what a standard ALF is licensed to provide. Residents living in an ALF with a LNS license must meet the same residency criteria for a standard licensed ALF; however, they may also receive a limited number of nursing services. Existing facilities qualifying to provide limited nursing services shall have maintained a standard license and may not have been subject to administrative sanctions that affect the health, safety, and welfare of residents for the previous two years or since initial licensure of the facility has been licensed for less than two years. The nursing services available in a limited nursing services facility are more extensive than what is provided in a standard ALF and are provided pursuant to the resident's service plan.

Specialty License: Limited Mental Health

A **Limited Mental Health (LMH) License** is issued to a standard ALF that serves three or more mental health residents. A mental health resident is an individual who receives social security disability income or supplemental security income due to a mental disorder as determined by the Social Security Administration and receives optional state supplementation. To obtain a limited mental health license, a facility must

hold a standard license as an assisted living facility, must not have any current uncorrected deficiencies or violations, and must ensure that, within six months after receiving a limited mental health license, the facility administrator and the staff of the facility who are in direct contact with mental health residents must complete specified training.

ALF Staff Training

Administrators and Managers: Administrators and other ALF staff must meet minimum training and education requirements that are established by the Department of Elder Affairs, that are comprised of “core” training, in-service training and continuing education that is required throughout their tenure. Every facility shall be under the supervision of an administrator who is responsible for the operation and maintenance of the facility including the management of all staff and the provision of adequate care to all residents. Administrators who supervise more than one facility shall appoint in writing a separate “manager” for each facility.

Staff: Staff with direct care responsibilities are required to have in-service training that covers a variety of topics, including infection control training, elopement training, training on “do not resuscitate” orders and may have to complete training on special topics such as self-administration of medication, Alzheimer's disease and related disorders, and HIV/AIDS training. Staff in “direct contact” means direct care staff and staff whose duties take them into resident living areas and require them to interact with residents (this does not include

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maintenance, food service, or administrative staff). There are additional specific requirements for ECC staff and LMH staff, such as continuing education on ECC and LMH specific topics.

Resident Rights

Each resident living in an ALF has special rights that are delineated in Florida Statutes. An example of some of these rights are that no resident of a facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Constitution of the State of Florida, or the Constitution of the United States as a resident of a facility; every resident shall have the right to live in a safe and decent living environment, free from abuse and neglect; be treated with consideration, respect and with due recognition of personal dignity, individuality, and the need for privacy. Each patient is given a copy of their rights upon entering the ALF.

Protection of Resident Rights

The Long-Term Care Ombudsman Program is comprised of 17 local councils across Florida, all offering free, localized advocacy services. The Ombudsman program is housed in the Department of Elder Affairs (DOEA) and is headed by the State Long-Term Care Ombudsman, Leigh Davis, who is appointed by the DOEA secretary. An ombudsman is a specially-trained and certified volunteer who has been given authority under federal and state law to identify, investigate and resolve complaints made by, or on behalf of, long-term care facility residents. Ombudsmen respond to resident complaints and concerns ranging from

issues with medication and care administration to matters of dignity and respect. It is the ombudsman's role to protect the legal rights of residents and assure that they receive appropriate treatment and quality care. Anyone can report a concern, including residents, relatives, friends, facility staff, legal representatives and other concerned citizens. Complaints may be related to the facility, its employees, or any agency or person who threatens or violates the rights, health, safety or welfare of a resident. Complaints filed with the Long-Term Care Ombudsman Program are kept completely confidential, unless permission is given by the resident or complainant to disclose related information.

Changing Law

Over the past two legislative sessions, lawmakers have been trying to strengthen the regulation of ALFs. This legislative push was prompted by the *Miami Herald's* investigative series "Neglected to Death" published in April 2011. This series reported numerous instances where the investigative journalists alleged that AHCA failed in its duty to protect the residents of Florida's ALFs. The investigative series reported on a series of incidents that occurred in licensed ALFs that resulted in death or serious injury to a resident. The journalists created the impression that these incidents were caused by lax enforcement efforts by AHCA. The article stated that AHCA repeatedly caught facilities breaking the law; however, AHCA failed to act on the violations, or in some cases only partially punished the violators agreeing to reduced fines and suspensions rather than full fines and revocation of licenses. As

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“The proposed bill was estimated to generate approximately \$1.1 million of additional net revenues for AHCA per year based on the revised fine amounts.”

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reported in the article, the ombudsman program was reporting more and more occurrences of abuse and neglect in Florida ALFs, however according to the articles, AHCA failed to investigate a large portion of the cases.

Prompted by the *Miami Herald* investigative reports, in July 2011, Governor Rick Scott directed AHCA to examine the regulation and oversight of ALFs. AHCA’s response was to increase its enforcement efforts, and Administrative Complaints with severe sanctions for ALF operators found not to be in compliance with licensure standards. AHCA also created a workgroup with the objective to make recommendations that would improve the monitoring of safety in ALFs. The workgroup had two phases and produced a final report to the Governor and Legislature on November 26, 2012. In June 2012, the DOE, in consultation with AHCA, the Department of Children and Families (DCF) and the Department of Health (DOH), began rulemaking meetings to address the problems with ALF regulation.

In the 2013 legislative session, an “ALF reform bill” was proposed but failed to pass. In the most recent 2014 legislative session Senate Bill 248, with a proposed effective date of July 1, 2014, was proposed to strengthen the regulation of ALFs and make other regulatory changes to improve their quality. Among other goals, the bill would have clarified issues regarding mental health residents in an ALF relating to necessary services and would require facilities with one or more, rather than three or more state supported mental health

residents to obtain a Limited Mental Health License. The bill proposed changes to resident rights regarding the protection against retaliatory action for presenting grievances. The proposed bill also authorized additional staff duties in the assistance with self administration of medication and required additional training for staff. However, the bulk of the bill was directed at the regulation of ALFs by AHCA through increased fines for violations, double fines for repeated violations, fines against a facility that does not show good cause for terminating the residency of an individual, specifying the circumstances under which AHCA must impose an immediate moratorium on a facility, and even authorizing AHCA to revoke the license of a facility that has or had a 25 percent or greater financial ownership interest in a second facility which closed due to financial inability to operate or was the subject of other specified administrative actions.

The proposed bill was estimated to generate approximately \$1.1 million of additional net revenues for AHCA per year based on the revised fine amounts. Of course, one aspect of the increased administrative penalties and fines that would be handed out by AHCA is that there will be an increased number of legal cases brought on by the harsher penalties and fines. In the face of opposition from many in the ALF industry, the bill failed to pass.

What does this mean for providers?

Although Senate Bill 248 did not pass during this legislative session, the fact

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remains that lawmakers will most likely continue in their pursuit of stricter regulation of ALFs. In fact, AHCA has already launched a regulatory “crackdown” on ALFs. If an ALF is cited for deficiencies during a survey, investigation or monitoring visit, AHCA may file an Administrative Complaint and seek to impose sanctions. Civil penalty sanctions available to AHCA depend on the class of violation. There are four classes: Class I violation penalties are between \$5,000 and \$10,000 for each violation; for each Class II violation between \$1,000 and \$5,000; for each Class III violation between \$500 and \$1,000; and for each Class IV violation between \$100 and \$200 for each violation if the problem is not corrected. During fiscal years 2011-2013 AHCA entered 115 final orders for Class I violations, 749 final orders for Class II violations, 507 final orders for uncorrected Class III violations, and 18 final orders for uncorrected Class IV violations.

In addition to financial penalties, AHCA may also sanction an ALF by imposing an emergency moratorium or suspension on patient admissions, denial of a license, temporary license suspension and permanent revocation of the ALF license. For the period between July 1, 2012 and June 30, 2013, the current count for AHCA actions against ALFs is 43 cases involving suspension, revocation, moratorium on admissions or denial of licenses. Below are examples of AHCA’s crackdown and all providers should be aware that they are susceptible to increased scrutiny by AHCA.

Premier Adult Care:

Owned two houses, one in Titusville

operating as a five-bed adult family care home and one in Merritt Island operating as a two-bed ALF seeking to operate under the exemption that “*Any person who provides housing, meals, and one or more personal services on a 24-hour basis in the person's own home to not more than two adults who do not receive optional state supplementation. The person who provides the housing, meals, and personal services must own or rent the home and reside therein.*”

The Merritt Island home was under a lease agreement between the owner and the caregiver who provided services to the two residents of the Merritt Island home that was operating as an ALF under the “exception.”

AHCA filed an administrative complaint against the ALF stating that it was operated and maintained without a license, which the Agency determined directly threatened the physical or emotional health, safety, or security of the residents; and also that it failed to maintain its operation in accordance with the minimum requirements of law, failing to provide care and services at mandated minimum standards, and intentionally operated an unlicensed ALF. AHCA sought fines in the amount of \$7,000.

The case did not involve any allegation of abuse, neglect, or mistreatment in any manner whatsoever of any resident of either the Merritt Island or Titusville homes. The sole issue was whether the Merritt Island home was required to obtain a license, or was instead exempt from licensure.

Although the Administrative Law Judge

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recommended only a temporary suspension and payment of a fine, AHCA overruled the recommendation and the ALF's license was permanently revoked.

Pompano Retirement Village:

Owner and vice president of the ALF Pompano Retirement Village was a controlling interest as defined by Florida Statute.

3/5/12 A criminal information filed charging the Owner with unlawful receipt of kickbacks in a federal health care program, considered to be a disqualifying offense.

4/5/12 Owner of the ALF was arrested.

April 2012 Plea was entered.

6/15/12 Judgment entered against Owner.

7/12/12 Documents filed with Florida Division of Corporations evidencing the resignation of Owner as vice president of the ALF.

10/19/12 AHCA filed an Amended Administrative Complaint charging the ALF with not timely removing Owner from his position with the ALF, constituting an act upon which a license may be denied and furthermore that it failed to abide by the background screening standards of the Florida Statutes.

The ALF's license was therefore revoked.

Personal Care:

Two facilities and each location had 14 beds.

The ALF was threatened with an Emergency Suspension Order after a diabetic resident had to be transported to the hospital with a stage 3 decubitus ulcer on

her foot.

AHCA filed at least five Administrative Complaints against these two facilities collectively over a period of two years, alleging any combination of the following: failure to keep medication records updated, provide proper assistance with medication, failure to document changes in medications, failure to have background checks on employees, failure to provide safe and decent living environments (medications not in lock box), and similar deficiencies.

AHCA sought license revocation and administrative fines.

AHCA settled for a voluntary relinquishment of both ALF licenses within one year and no fines.

The Paradise ALF:

Administrative complaint seeking a \$1,000 fine was filed after AHCA conducted a survey and alleged that two staff members were lacking in background screening clearance.

Administrative complaint seeking a \$5,000 fine and revocation of license filed after a complaint survey wherein it was alleged that among other things, the ALF failed to protect the residents from unsafe conditions and deficient practices that exist in the facility.

AHCA issued an Immediate Moratorium on Admissions and Emergency Suspension of License Order after the complaint survey.

The ALF failed to timely respond to the Administrative Complaint and Election of Rights, thus waiving its right to a

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hearing to contest the allegations and sanctions sought in the Administrative Complaint.

The ALF’s license was therefore revoked.

Provider Rights

If an ALF receives an Administrative Complaint from AHCA, it is notified of the right to request an administrative hearing. If the ALF elects to seek an administrative hearing, there are two options, an informal administrative hearing or a formal administrative hearing. **The ALF must request the hearing within 21 days of the day the Administrative Complaint was received.** At an informal hearing, the ALF may submit testimony and written evidence to AHCA to show that the proposed agency action contained in the Administrative Complaint is too severe or that the fine should be reduced. If a formal hearing is requested, the ALF will have the opportunity to present its case in front of an administrative law judge appointed by the Division of Administrative Hearings, not just to plead their case with AHCA. The attorney for the ALF will be able to present testimony and witnesses, can cross-examine witnesses presented by AHCA, can conduct formal discovery to obtain information that AHCA possesses and will have the opportunity to submit proposed findings of fact and conclusions of law for consideration by the administrative law judge. The attorney has the opportunity to fight for the ALF’s rights to operate and that decision will be made by an administrative law judge, not AHCA.

Conclusion

All ALFs will need to increase their vigilance in complying with licensure standards, training standards and resident care. The purpose of increased standards is to protect the residents of ALFs. Unfortunately, sometimes the side effect of stricter fines and heavier penalties is unfair policing of providers which results in higher agency revenue. If you have recently had a survey with poor results and an Administrative Complaint is imminent, call your attorney today. Don’t wait.

Geoffrey D. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of health care law and ALF regulation for over 20 years.