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# Understanding Protections for Assisted Living Residents

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As life expectancy rises, resulting in an increase in the population of seniors, there is a heightened demand for long-term care facilities. One type of facility where statutory protections differ from those of nursing homes are assisted living residences (ALRs). With approximately 30,000 ALRs serving almost 750,000 residents, assisted living is the fastest growing form of residential housing for older Americans.[1]

This article will focus on statutory protections for residents at assisted living residences and what practitioners need to know when litigating claims on behalf of residents.

Between 2000 and 2010, people aged 85 to 94 increased approximately 30 percent; those 95 years old or older increased approximately 26 percent; and individuals 65 or above increased approximately 15 percent (over 40 million).[2] By 2020 those aged 85 and older are projected to increase from 5.5 million to 6.6 million.[3]

## Statute

Unlike nursing homes, there are no federal regulations or standards that are applicable to assisted living residences. Article 28 of the Public Health Law, for instance, applies to nursing homes and not ALRs.

Recognizing the need to protect vulnerable citizens who reside in these facilities, the New York State Legislature enacted the Assisted Living Reform Act (ALRA) on Feb. 23, 2005.[4] The ALRA is codified in Public Health Law (PHL) Article 46-B; Social Services Law (SSL) Section 2(25) as amended, and State Finance Law Section 99-L. The regulatory framework can be found at Title 10 Chapter X.

The ALRA defines an ALR as "an entity which provides or arranges for housing, on site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider."[5] An ALR is not a hospital, nursing home, continuing care retirement community, mental health facility, independent

senior housing, or an adult care facility. However, if a facility uses the term "assisted" in its marketing materials, it is subject to ALRA and Title 10.

The legislative intent of the ALRA is to further the "philosophy of assisted living emphasizing aging in place, personal dignity, autonomy, independence, privacy and freedom of choice…that contains consumer protections…[and] that enunciates and protects resident rights; and that provides adequate and accurate information for consumers…"[6]

Traditional negligence claims are typically based upon a common law theory of liability. The Legislature has added a separate and distinct statutory cause of action against an ALR.

## Licensing and Certifications

Prior to the passage of the ALRA, there were adult homes and enriched housing programs.[7] The ALRA maintains both, but requires ALRs to first be licensed as an adult home or enriched housing program prior to applying for licensure as an ALR (exceptions exist to apply simultaneously). Once licensed for assisted living, the facility can apply for enhanced assisted living or special needs certification. With enhanced assisted living certification, the ALR may retain residents that are non-ambulatory (i.e., bed-bound). With special needs certification, the ALR may maintain a dementia unit.

Certification allows an ALR to retain a resident whose condition declines and needs additional care to complete daily activities (i.e., dementia that requires greater supervision). Consistent with the idea of aging in place, these certifications allow residents to remain in the same facility.

When investigating a potential claim, acquire all applications submitted to, and certifications and licenses obtained from the New York State Department of Health. In the applications the facility must submit plans indicating how they intend to care for individuals with dementia. The department's website is also an important source of Information.

In addition, as ALRs must first be licensed as an adult home or enriched housing facility, they must comply with all applicable regulations. (Title 18—Chapter II—Subchapter D for adult care facilities and Title 18—Part 488 for enriched housing.) Under Title 10, Chapter X, if there is a conflict between the regulations that apply to ALRA and those that apply to adult homes and enriched housing then the ALRA prevails. Section 1001.1

## Admission

To become a resident of an assisted living residence, a person is required to undergo pre-screening and approval for admission by a physician, physician assistant or nurse practitioner. Such steps are to be repeated annually and when there is a change in the individual's condition. See Section 4657.

An enhanced assisted living facility must meet the following requirements to admit residents:[8]

- An assessment by a qualified person within 30 days prior to admission;
- A medical evaluation within 30 days of admission, when there is change in the resident's condition, and once every 12 months thereafter;

- Recording of information on significant medical history and current conditions, allergies, prescribed medications, ability to self-administer, recommendations for diet, exercise and recreation, frequency of medical examinations, cognitive and mental health statistics, and assistance with activities of daily living;

- A statement that the resident is suited for assisted living, Special Needs Assisted Living Residence (SNALR) or Enhanced Assisted Living Residence (EALR);

- A statement as to whether long-term medical needs or nursing care require placement in a nursing home;

- A statement as to whether nursing care is needed.

- Development of an individualized service plan (ISP) unless a doctor waives;

- The development of an ISP in accordance with the medical, nutritional, rehabilitation, functional, cognitive and other needs—implemented within 30 days of admission;

- An explanation as to how and by whom the services will be provided and accessed.

- Review and revision of the ISP every six months, as necessary, due to a change in needs, and/or as ordered by the physician; and

- At admission, development of a written ISP, with the assistance of the resident's physician.

Practice Point: When representing a resident, consider naming the physician, nurse practitioner and/or physician's assistant as defendants.

The ALRA requires that the owner and operator of the ALR register and maintain its name, address and phone number, an authorized agent to accept service of process, a statement of the licensure status and any home health care or personal care service agency that is under an agreement with the facility, and the effective period of the residency agreement and the resident's representatives.[9]

Practice Point: Knowing whom to serve is found in the residency agreement. Serve this person, as well as anyone else you deem appropriate. The family should have a copy of the residency agreement. In addition, request from the family all marketing materials obtained or viewed. In discovery, obtain all of the marketing materials concerning the facility's philosophy and mission.

It is also wise to obtain copies of any contracts the facility has with outside contractors.

## Individualized Service Plans

Pursuant to New York Public Health Law 4659, an ISP must be developed for each resident upon admission. It must be created "with the resident, the resident's representative, the resident's legal representative, if any, the assisted living operator, and [if appropriate] a home care services agency." The resident's physician must also be consulted.

The law requires ISPs be implemented within the first 30 days of admission and reviewed and revised every six months, whenever ordered by a physician, or as necessary to reflect a change in care needs. To the extent necessary, the creation needs to be undertaken in consultation with the

resident's physician, developed in accordance with the medical, nutritional, rehabilitation, functional, cognitive and other needs of the resident, include the services, how and by whom those services will be provided, and reviewed and revised as frequently as necessary to reflect changes in the resident's needs, but not less than once every six months.

Practice Point: The ISP is better than a care plan. It will identify all persons/entities that provided care to the resident while at the residence.

Under the ALRA, residents have the right that their dignity, autonomy, independence and privacy be promoted, in the least restrictive and most home-like setting, commensurate with preferences and physical and mental status.[10]

Any waiver of rights is void as against public policy. Residents are to be fully informed of their medical condition and proposed treatment; receive courteous, fair, respectful care and treatment; receive adequate and appropriate assistance with activities of daily living; be able to refuse treatment or medications (but only "after being fully informed of the consequences of such actions"); have private consultations with their lawyer; and be given the opportunity to provide their version of an accident/incident. The ALR must provide, and have conspicuously posted, a written statement of residents' statutory rights; their right to counsel; their right to obtain the facilities' licensure; and a consumer guide with the Health Department's toll free complaint number (866-893-6772).

There is no independent measure of damages for a violation of a resident's rights as exists in a nursing home case. A common defense is that the resident refused care, such as turning and positioning, or was non-compliant. The ALRA helps to defuse this defense. If a resident refuses care or is non-compliant, the ALR must inform the resident of the consequences of such actions.

Practice Point: Advise residents of their right to file a complaint with the Health Department. The department will investigate and issue a report.

In addition, demand the Resident's Council minutes. The Resident's Council is where residents can state grievances.

Case management of the Individualized Service Plan requires oversight and coordination, as well as the ability to meet the resident's needs at the time of admission and at least every 12 months thereafter. Case management also provides referrals on an ongoing basis, coordinates services to be provided, and develops a formal mechanism between the case manager and staff to identify abrupt or progressive changes in behavior or appearance.[11]

Requirements include maintaining complete and accurate personal records for each resident, providing personal care to enable the resident to maintain good hygiene and health, carrying out activities of daily living and participation in activities. Sections 1000.12 and 1001.7(h) of Chapter X of Title 10 of the New York Codes Rules and Regulations.

Safeguards to properly manage medication require compliance with the regulations. This includes physician orders for all PRN medications, both prescription and over-the-counter, which shall identify resident behaviors or symptoms warranting the need for mediation.[12]

The operator of an enhanced assisted living facility providing services normally given by a home health care agency shall develop appropriate policies and procedures, including, but not limited to,

service-specific delivery standards consistent with the current professional standards of practice, staff supervision (reviewed and revised as necessary), and documentation of service delivery.

Additional requirements for the operator of a Special Needs ALR require vigilance of the general whereabouts of each resident. If a resident becomes absent, certain procedures must be followed and family and law enforcement must be notified. To insure proper supervision and care, all shifts must be properly staffed.

Case management records and the ISP in SNALRs shall identify resistance to care and include a care plan to address it. Food is to be offered outside of usual meal time and in a manner acceptable to special needs. The care plan should reflect functional abilities, preferences and diet. Unless contrary to orders, prescribed nutritional supplements shall be provided between meals. In addition, weather permitting, residents must be provided daily outdoor activities.

Once suit based upon a violation is filed it is necessary to proceed with all resources available to the practitioner.

Practice Points: In discovery, demand all policies and procedures of the facility, and copies of all contractual agreements between health care providers and the facility.

A claim for breach of contract under appropriate consumer protection laws should be considered as it may allow for additional damages and broader discovery.

Weigh a claim for breach of contract under appropriate consumer protection laws. This may allow for additional damages and broader discovery.

# Conclusion

Change in the long-term care industry has arrived. A clear understanding of the legal landscape is crucial. It is the role of counsel to secure the appropriate remedy, and to help prevent harm from recurring.

**Endnotes:**

1. Residents Living in Residential Care Facilities: United States, 2010, NCHS Data Brief No. 91, Centers for Disease Control and Prevention, April 2012 Residential Care Facilities: A Key Sector in the Spectrum of Long-Term Care Providers in the United States, NCHS Data Brief No. 78, Centers for Disease Control and Prevention, December 2011.

2. The Older Population: 2010, U.S. Census Bureau, November 2011.

3. A Profile of Older Americans: 2011, Administration of Aging, Department of Health and Human Services, 2011.

4. Regulatory Impact Statement, New York State Department of Health (http://www.health.ny.gov/facilities/assisted_living/adopted_regulations/docs/regulatory_impact_statement.pdf).

5. Public Health Law (PHL) Section 4651 and Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.2.

6. Public Health Law (PHL), Article 46-b, Section 4650.

7. Subdivision 25 and 28 of Section 2 of the Social Services Law.

8. Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.7.

9. Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.8.

10. Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.8.

11. Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.10.

12. Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.10.

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