

How Facilities Can Brace For DOJ Nursing Home Initiative

By **Brandon Essig, Jack Sharman and John Thompson** (March 17, 2020)

On March 3, the U.S. Department of Justice announced that it has created the National Nursing Home Initiative, a task force to investigate and prosecute instances of grossly substandard care in nursing homes nationwide.[1]

Government investigations are not new to owners and operators of nursing homes, and DOJ's pursuit of them has resulted in significant criminal and civil enforcement actions in recent years. However, past efforts by DOJ, including the announcement of an Elder Justice Initiative in 2016,[2] have tended to focus primarily on health care and financial fraud.

The DOJ's recent announcement was notable because it made clear that the focus will be on the physical well-being of elder patients potentially suffering from abuse and neglect. The department will work with state and local prosecutors and law enforcement to support the new initiative. This is a significant development for owners and operators of nursing homes.

In making the announcement, Attorney General William Barr said that the initiative was designed to bring justice to owners and operators of nursing homes "who put profits over patients, leading to instances of gross abuse and neglect."

The task force will focus on poor hygiene and nutrition, withholding pain medication, using sedation or restraints when they are not warranted and moldy or rat-infested patient rooms. Notably, the new initiative already has 30 active investigations in nine states.

Who is at risk of an investigation by the task force?

The short answer is, anyone. At the outset, the task force will doubtless be aimed at the worst-of-the-worst nursing home care providers and owners — facilities with systemic substandard care issues. However, like any government task force, it is likely that the NNHI's enforcement priorities will expand and evolve over time and could be brought to bear on essentially any operator in the industry.

We say this for two primary reasons.

First, the DOJ's announcement did not define grossly substandard care or elaborate on what investigation and prosecution tools the NNHI task force would utilize. As a result, the 94 individual U.S. Attorney's Offices throughout the country will have broad discretion to investigate what they want.

Second, the phrase "grossly substandard care" has close analogues in civil tort law, and the care deficiencies identified by the DOJ last week are frequently the subject matter of civil lawsuits against nursing homeowners and operators. Indeed, there is hardly a nursing home anywhere that has not been accused in a civil lawsuit of at least one of the categories of care cited by the DOJ.



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Historically, the DOJ has relied upon federal regulations and statutes — the False Claims Act, Health Insurance Portability and Accountability Act, Medicare/Medicaid rules, etc. — to investigate and prosecute nursing home operators and other health care providers.

None of those statutes, however, use a “grossly substandard care” analysis. Will the DOJ rely on civil, common law to identify grossly substandard care? That remains unclear. But if so, what will that mean for nursing home operators and their business partners?

No one knows the answers to these questions for sure, but we think any time a nursing home operator is involved in a civil lawsuit involving an area of NNHI focus — understaffing, insufficient hygiene infection control practices, malnourishment, restraints, over-sedation or mistreatment of patients — the facility should recognize the possibility of a subsequent or concurrent DOJ investigation.

Patients’ families, counsel, or advocacy groups familiar with the new DOJ task force could report the nursing home to their local U.S. Attorney’s Office or law enforcement in hopes of generating a parallel criminal investigation or even cashing-in as a whistleblower.

Given the frequency of claims against nursing homes in these areas of NNHI focus, and the possibility that patients reporting to the DOJ could generate further investigations, facilities should consider whether to implement an NNHI-investigation readiness plan whenever they face a lawsuit involving any of these areas.

How can a potential target prepare?

In light of the considerations we set out above, what kind of team does a responsible nursing home operator need in light of the NNHI? There are three points to keep in mind.

Parallel Proceedings

This DOJ initiative, like similar efforts in the past, will confront targets with a classic parallel proceedings scenario, one with simultaneous exposure to criminal, civil and administrative liability. For that reason, the legal team needs to be nimble and should reflect different skills. The experts and consultants who are part of the team should similarly be able to pivot to the most immediate threat in an authoritative but efficient manner.

Rapid Reaction

The NNHI is a strike force, and the target needs one as well. We suggest that nursing home operators reach out proactively to interview and assemble a team of lawyers, experts and support staff. Being prepared can be expensive but, when the enforcement hour comes, there will be no time to do so efficiently and with a high degree of confidence.

Active Advocacy

The DOJ nursing home task force is a national initiative announced with public fanfare. If one becomes a target, there will almost certainly be follow-on enforcement. The response team should be able to work with prosecutors, agents and government analysts, but the government also needs to appreciate the fact that the target is defended by a team composed of skilled and zealous advocates.

The nursing home operator that assembles an array of skills in advance positions that team

to respond rapidly, and then counts on the team's prudent but aggressive advocacy will fare best in the new enforcement environment.

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[1] <https://www.justice.gov/opa/pr/department-justice-launches-national-nursing-home-initiative>.

[2] <https://www.justice.gov/opa/pr/department-justice-launches-10-regional-elder-justice-task-forces>.