



**DATE:** June 23, 2011

**RE: Assisted Living Facilities: Asserting a Legal Defense in Response to AHCA Enforcement Action**

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Recent news reports show increased legal sanctions are being imposed by the Agency for Health Care Administration (AHCA) against operators of Assisted Living Facilities (ALFs) for alleged violations of licensure standards. The sanctions available in the AHCA enforcement arsenal are many and include imposition of a moratorium on admissions, imposition of fines and penalties, or the suspension or revocation of the ALF's license to operate. Recent developments suggest AHCA is presently engaged in an orchestrated "crackdown" on ALF operators, leading some to ask: What are my legal rights and responsibilities? What should I do if my facility becomes the subject of an AHCA investigation or enforcement action?

Chapter 429, Florida Statutes, includes the basic laws governing operations of an ALF. The rules governing licensure and operations are contained in Chapter 59A-5, Florida Administrative Code. These Rules address such areas as licensure requirements, resident care standards, staffing standards, physical plant standards, fiscal standards, and detailed Agency administrative enforcement mechanisms including inspections, survey deficiencies, and sanctions. Sections 408.811, and 429.34, Florida Statutes, provide the authority for AHCA and other state agencies to make unannounced inspections of an ALF. If faced with an inspection, an ALF operator has no legal right to refuse to allow the inspectors access to the facility. However, there is a right to require that proper identification be presented by AHCA or other agency employees. An ALF operator may also request that an Administrator or other designated representative accompany the inspectors while at the facility. It is advisable that the ALF operator immediately consult with legal counsel if an unannounced AHCA inspection is made. During an exit interview, the AHCA representatives should explain their findings, including any alleged deficiencies that were found.

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Subsequent to an inspection, AHCA will provide the ALF Administrator with a survey report that provides a detailed written explanation of the findings made during an inspection. The ALF will be given 10 days in which to present a Plan of Correction. Although seldom asserted, an ALF operator may assert a legal right to challenge a survey report and petition for a formal administrative hearing pursuant to Section 120.569 and 120.57(1), Florida Statutes, if the provider believes that there were in fact no deficiencies that should result in a Plan of Correction being submitted. However, in most instances, the results of a licensure or complaint survey can be resolved through submission and implementation of a Plan of Correction.

In the event of alleged severe deficiencies which AHCA claims threaten the health, safety or welfare of an ALF resident, AHCA can impose an immediate moratorium on admissions, or an emergency order of license suspension pursuant to Section 408.814, Florida Statutes. In order to support such emergency action, AHCA is required by Section 120.60(6), Florida Statutes, to make specific findings that document the existence of the emergency situation, and may take only such action as is required to address the emergency. Further, an ALF operator faced with an emergency moratorium, or suspension order, or any other effort to suspend or revoke a license is entitled to file a Petition for Formal Administrative Hearing to challenge the validity of AHCA's action or proposed action on the license. Hearings on license proceedings are held before an independent administrative law judge at the Division of Administrative Hearings. Such hearings are an opportunity to prove that the true facts do not support a moratorium, suspension or revocation of the ALF license.

In addition to taking direct action against an ALF operator's license, AHCA is also empowered to seek imposition of civil penalties for alleged violation of licensure rules and standards. Pursuant to Section 429.19, Florida Statutes, according to the "classification" assigned to the alleged violation, as follows:

Class I violations: present an imminent danger to clients (residents) or a substantial probability that death or serious physical or emotional harm would result. These must be corrected within 24 hours. Imposition of a fine is mandatory in an amount of \$5,000-\$10,000 per violation, even if the violation is corrected.

Class II violations: directly threaten the physical or emotional health, safety or security of clients (other than Class I). Fine in the amount of \$1,000-\$5,000 per violation, even if the violation is corrected.

Class III violations: indirectly or potentially threaten the physical or emotional health, safety or security of clients (other than Class I or Class II). Fine in the amount of \$500-\$1,000 per violation.

Class IV violations: pertain to reports, forms or documents that do not have the potential of negatively affecting clients (purely paperwork type violations). Fine in the amount of \$100-\$200 per violation.

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In order to assess a penalty against an ALF operator, AHCA is required to file an Administrative Complaint. An ALF operator has the right to demand a formal hearing to challenge the facts, and to challenge the amount or appropriateness of the fines being imposed. While it is clear that fines for Class I and Class II violations are mandatory, even when the violation is corrected, it is less clear whether a fine should be imposed when a Class III or Class IV violation is timely corrected by the ALF operator. Language in Section 408.813 (AHCA's "Core Licensure Act") suggests that no fine shall be imposed when such minor violations are corrected. However, there is some language in the statute that creates ambiguity, and the specific fine amounts for violation of ALF licensure standards are also stated in mandatory language in Chapter 429, Florida Statutes. Section 408.832, Florida Statutes, provides that when the AHCA Core Licensing Act conflicts with the specific facility governing statutes (such as the ALF statute) that the Core Licensure Act should prevail. Applying that principle, then no fines should be imposed for minor Class III and IV violations when they are timely corrected. AHCA takes a contrary view, and this legal issue will likely need to be resolved through legal challenges if an operator feels that a fine is not appropriate.

Undoubtedly the best course of action for any ALF operator is to develop and implement a strong staff education and compliance program. This can be done with assistance of a qualified health care consulting firm, or health care attorneys. An ounce of prevention in this respect will be well worth avoiding the costs of a bad survey or inspection by AHCA.

However, even with a good education and compliance program in place, AHCA may still seek to suspend or revoke a license, or impose a moratorium on admissions or levy substantial fines. The ALF Operator in such situations may assert the legal right to contest and defend against such actions by retaining qualified legal counsel and filing a Petition for Formal Administrative Hearing. Further, for small operators, Florida's Equal Access to Justice Act, Section 57.111, Florida Statutes, allows for recovery of attorneys' fees and costs in an amount of up to \$50,000 for a "prevailing small business party." Thus, an ALF operator is not without legal rights when AHCA takes action. To the contrary, ALF operators are entitled to basic due process, and can assert the right to require that the State prove its case in an administrative hearing process.