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LIABILITY landscape

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Resident smoking rights and risks

At times, nursing homes can find themselves stuck between a rock and a hard place as they attempt to satisfy state inspectors' and insurance companies' demands for smoking safety while also respecting residents' rights. Several nursing homes have considered joining the leagues of other businesses that have banned smoking altogether on their premises, especially in light of recent tragedies involving senior living facility fires that were started by residents.

But can a nursing home force its residents to quit smoking by no longer accommodating their needs? Not according to many state regulatory agencies that advocate for residents' rights. Middle ground is often hard to find, and sometimes our best intentions are not enough to keep residents safe. Please take the time to review the circumstances surrounding the situation and make changes as appropriate in your facility.

The Situation

An elderly man was admitted to a nursing home after experiencing difficulty living alone with uncontrolled diabetes. His children were concerned not only about his health but also his safety, as they had discovered burns on his furniture from a lifetime habit of smoking. The man had no desire to quit, so his children looked for a facility that had a supervised smoking area for residents.

The nursing home's smoking policy and guidelines were vague, simply stating, "The facility is designated as nonsmoking. If a resident requests to smoke, employees must accompany the resident into the courtyard, light the cigarette, and remain with the resident until he/she is finished." The man quickly adapted to his new environment and routinely went outside to smoke accompanied by a staff member. However, one



afternoon a staff member found him outside dozing with a cigarette in his hand, which had begun to singe his eyebrows. The staff member quickly put the cigarette out and sought immediate treatment for the man, who was relatively unharmed.

Following this incident, all residents' cigarettes and matches were kept in a drawer at the nurses' station. In addition, the facility's guidelines were enforced, and staff members were more careful to accompany the man while smoking. At times, this meant that the man had to wait for staff to assist him. The man was often impatient and became anxious when asked to wait, which upset his children to the point that they complained to the state regulatory agency. In response to their complaint, state surveyors investigated the facility and cited them for "Quality of Life" issues.

About a month later, the man once again impatiently told a nurse that he wanted to smoke. The nurse was in the process of attending to another resident, so she asked him to wait until she was able to accompany him. The man continued to plead for the nurse to let him go outside to smoke in the courtyard, and he began to push on the door. All attempts by the nurse to calm him down were futile, so she reached in the drawer at the nurses' station and gave him a cigarette

with the promise that she would be back soon to light it for him outside.

When the nurse returned to the nurses' station about ten minutes later, she was surprised to find that the man was not there waiting for her. She went outside to the courtyard and found him in a panic, as his lap was on fire. Apparently, the man went outside and somehow got his cigarette lit. As he sat down on a bench, the cigarette ignited his clothing, burning him over his lap. The nurse quickly put out the flames and rushed him to the shower room to pour cold water over his burns. By that time, several other staff members arrived to assist her. While in the shower room, the nurse asked the man how he got his cigarette lit. He replied that he had "stolen a lighter."

An ambulance was summoned, and the man was immediately rushed to the hospital, where he spent the next two months in a specialized burn unit for treatment of second- and third-degree burns to 13.5% of his body—to his thighs and lower legs. After sufficient healing, the man was eventually transferred to another nursing home, where he received care for severe cognitive decline. He died of natural causes a month later.

Soon after the incident, the state survey agency returned to the facility to investigate. The surveyors cited the facility for not developing a care plan after the first burn incident when the man singed his eyebrows. The surveyors determined that although the staff would light the resident's cigarette and supervise his smoking, no care plan was initiated to alert staff members who were unfamiliar with the man of the interventions required to prevent further injury. The surveyors felt that it was not unreasonable to assume that a third party could have entered the facility, could have seen the man with his cigarette, and lit it for

him. The facility responded to the citation by training its staff to update all resident care plans in a timely manner, as needed. They also purchased smoking aprons for residents to use while smoking in the courtyard with staff supervision.

After the man's death, his children hired an attorney to sue the facility for negligence in the care of their father. They felt the facility was liable for allowing their father to have a cigarette while unsupervised. A daughter even testified that her father told her in the hospital that an unidentified aide had given him a lighter. She said her father told the staff that he had "stolen" it so he wouldn't get the aide in trouble. Their demand to settle the case was \$1.5 million. Months of deliberation followed before the case was mediated and settled for substantially less money.

Risk Management Steps

As in this facility, many nursing homes find it hard to balance a resident's desire to smoke against fire-safety precautions. Staff awareness plays a big part in the issue of resident smoking, as does the personal responsibility of residents and their families. The following are some practical risk management steps that staff can use to avoid fires and the injuries that can result from them:

1. Designate a smoking area for residents other than in their rooms. Many buildings

are smoke-free except during harsh weather conditions.

2. Have a call system to summon help in the area in case of an emergency. Keep a fire extinguisher in the smoking area, and make sure that staff members who supervise resident smoking know how to use it.

3. Routinely perform a smoking evaluation on all residents who request permission to smoke. Make sure that the assessments are completed and documented. Obtain a physician's order permitting them to smoke, as indicated.

4. Consider using devices approved by the National Fire Protection Association, such as ashtrays and smoking aprons. Make sure these are addressed in the resident's care plan.

5. Store cigarettes or other smoking products and lighters in a secure place outside of residents' rooms, where access is limited to staff only.

6. Provide staff supervision of smokers and develop a method of documenting this intervention. Talk to residents and family members about agreeing on scheduled times for smoking so that staff can plan accordingly.

7. Document your smoking policies and discuss them with residents and family members. Present the information in the form of a handout or shared-risk agreement specifying the terms, conditions, expectations, and responsibilities of each party. Obtain signatures acknowledging that

they understand and will comply with the facility's policy.

8. Determine actions to take when residents do not comply with the smoking policy.

Developing an effective resident smoking policy can be complicated. If your facility currently does not have residents who smoke, you may want to consider going smoke-free and informing prospective residents of your policy before admission to the facility. Let them know that if residents try to resume smoking at any point during their stay, you will assist them in relocating to another facility that allows smoking. Confer with your state's regulatory agency and legal counsel and review Life Safety Code requirements when developing your facility's smoking policies, and then train staff accordingly. ■

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