



EASE CONFLICT WITH SHARED RISK AGREEMENTS

A Shared Risk Agreement is an agreement between a health care provider and a resident or surrogate decision-maker, in which the resident assumes certain risks in exchange for the provider's accommodation of a preference of the resident or surrogate decision-maker acting on behalf of the resident. The surrogate decision-maker can be an agent, attorney-in-fact, or guardian of the resident legally authorized to make long-term care decisions.

The risks in question usually involve issues that are not routine or easily resolved through care planning. Often they are matters that run contrary to the provider's risk management policies or practices, for instance using a cane for ambulatory support instead of a wider-based walker, or choosing a food that is contrary to the prescribed diet. The agreement enables the resident to take full responsibility for any consequences that may occur as a result of the choice that he or she has made. However, if a federal or state regulation or a local ordinance prohibits the provider from accommodating the resident's preference, a Shared Risk Agreement should not be drafted.

Shared Risk Agreements are a relatively new phenomenon in the long term care industry. Although promoted by the assisted living industry and cited in state regulations for assisted living and guidance on Medicaid waiver programs for home and community based care, Shared Risk Agreements have rarely been tested in court. Nevertheless, providers can increase the likelihood that their drafted agreements will help reduce their risks of litigation by following these steps.

- ***Identify the cause for concern.*** Clearly state the resident's preference with respect to the issue under consideration. Also state the provider's perspective, including any policies, practices and professional recommendations that conflict with the resident's preference.
- ***Identify the probable consequences of the resident's choice.***
- ***Identify alternative actions that might be acceptable to the provider.***
- ***Acknowledge that the resident or surrogate decision-maker understands the risks and the alternatives.*** Clearly state that they had ample opportunity to review and discuss the Shared Risk Agreement with legal counsel, medical professionals, and any other person they chose to consult with prior to signing the agreement.
- ***Make clear the agreement between the resident or surrogate decision-maker and provider.*** Specify the terms, conditions, expectations and responsibilities of each party

- **Discuss the liability waiver.** State the resident or surrogate decision-maker's release of any claim against the provider for injuries that the resident may suffer from as a direct result of provider actions in compliance with the agreement and all applicable health and safety laws and regulations, including any applicable regulatory waivers.
- **Identify a sunset provision and interim review process.** The sunset provision should specify when the contract will terminate automatically. A logical date to use is the timeframe for reviewing care plans under state regulation. This automatic termination will cause the provider and resident or surrogate decision-maker to periodically review the contract in light of any changes in circumstances; at which time they may decide to modify and renew it.

Finally, seek legal counsel to assist you in the development of this agreement.

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You are encouraged to consult with your own attorney or other expert consultants for a professional opinion specific to your situation.



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