

# The Appeals Process for Assisted Living – You Can Do It!

## Survey Process and Appealing Citations

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# Assisted Living Survey Guide

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- <https://www.dhs.wisconsin.gov/regulations/assisted-living/survey.htm>
- - Survey Process (10 Steps)
- - Enforcement Guidelines (harm/potential)
- - Corrections (45 days)
- - Waiver/variance guidelines

# Assisted Living – Standards of Practice Resources

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- <https://www.dhs.wisconsin.gov/regulations/assisted-living/standards.htm>
- COVID Guidance
- Dementia
- Abuse/investigating
- Falls
- Food Safety
- Infection Control
- IDD
- Legionairres
- Mental Health
- Nutrition
- Pain
- Personal Care
- Pressure Ulcers
- Restraints
- Root Cause Analysis



# Top CBRF Cites

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- ISP updates – annual/changes
- Right to receive medications
- Environment safe, clean
- Med administration documentation
- Health Monitoring
- Fire Drills
- Employees screened for communicable disease
- Preadmission and ongoing assessment



# Top RCAC Cites

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- Services
- Tenant rights
- Risk Agreements
- Annual Review



# Top AFH Cites

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- Review ISP
- Safe physical environment
- Homelike/safe environment
- Fire evac drills
- Medication – written order
- Health screen staff
- Fire extinguisher
- Training – 8 hour annual



## Types of Surveys – Ask!

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**Complaint** - Used to review complaints made against a facility. This includes violations of Wisconsin and/or HCBS rules.

**Verification**—Used to make sure a facility has addressed a violation.

**Self-Report**—Used when the Bureau of Assisted Living investigates a self-reported claim.

**Monitoring**—Used when there are concerns about the health, safety, and well-being of residents.

**Abbreviated** – no enforcement or substantiated C/Os x3 yrs, licensed x 3yrs

**Combined**

# Standard Survey Process

1. Off-site review
2. Meeting with staff in charge
3. Tour
4. Sample Selection
5. Observations
6. Interviews
7. Record review
8. Safety code review
9. Assistance (technical, standards of practice, Q/A)
10. Exit Conference\* (prelim findings/areas of concern)
11. Note: The Bureau of Assisted Living no longer requires a Plan of Correction be submitted to the bureau on a regular basis.



# Decision Making

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- **No Deficiencies**
- **Statement of Deficiency:** Used to identify incidents of noncompliance that:
  - Result in more than minimal, but not serious harm.
  - Have potential for more than minimal harm, but not serious harm.
  - Indicate a breakdown in facility systems.
- **Statement of Deficiency with Enforcement:** Used to identify incidents of noncompliance that:
  - Result in serious harm.
  - Have potential for serious harm.
  - Indicate a breakdown in facility systems that could lead to serious harm.
  - Meet the criteria identified in the Enforcement Guidelines.

## The Decision

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- Results are sent by mail or email after the exit conference.  
A courtesy copy of these results also will be sent to:
- The county.
- Waiver agencies.
- The Division of Medicaid Services.
- Disability Rights Wisconsin.
- The ombudsman.
- MCOs



# The Statement of Deficiencies (SOD)

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## **When writing a statement of deficiency, surveyors should:**

- Document if the violation has happened before (repeat violation).
- Verify that the correct regulation has been selected for the deficient practice identified.
- Describe the violation in clear terms.
- Include specific dates of the violation.
- Provide detail and sources to support findings. This includes observations, interviews, or records review.
- Describe the effects and consequences of the violation. This can include **potential** harm.
- Record facts, not opinions.
- Answer:
  - Who was involved? Was the accused person interviewed?
  - What did or did not happen? How did it happen?
  - What did staff do/not do that led to the violation?
  - When (date/time) did the violation happen?
  - Where did the violation happen?
  - What evidence is used to prove the violation?
- Identify resident and staff by identifiers. Staff are identified by title (such as Licensee A).

# Enforcement

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- Assisted living regional directors send violations to the enforcement specialists. The enforcement specialists impose sanctions and penalties. Violations referred to enforcement specialists include violations that:
  - Result in serious harm or have a potential for serious harm.
  - Show that facility processes are not working, leading to harm.
  - Increase the chances of serious mental/physical harm or death of a resident.
  - Pose a threat to the health, safety, and welfare of a resident.

# Situations for Possible Enforcement

- Not meeting minimum staff training requirements.
- Failure to create a safe environment.
- Failure to promote fire safety: smoke/heat detection, evac assess, emerg drills, hot H2O temps, etc
- Abuse or neglect.
- Misappropriation of property.
- Failure to protect resident rights.
- Criminal record checks (repeat violations or serious concerns).
- Failure to provide timely treatment or physician notification causing harm to residents: PS, wt, pain, falls
- Inadequate staffing that puts resident health and safety at risk.
- Lack of supervision.
- Incorrect medication administration.
- Insufficient or improper activities.
- Lack of cleanliness or infection control, such as foodborne illness.
- Poor financial management: utility bills, unpaid staff, not enough food
- Repeat violations.



# Factors that can Affect Enforcement Actions

1. The seriousness of a violation. This includes whether the violation will, or has, caused harm.
2. Whether the licensee acted in "good faith." Good faith can include:
  1. Being aware of rules and regulations.
  2. Making honest efforts to follow rules and regulations.
  3. Making efforts to correct violations.
  4. Whether a facility self-reports a violation.
3. Any repeat violations.
4. If a facility benefits financially by committing a violation.
5. What penalties have been used for similar violations.
6. How a rule or regulation was violated. Examples include:
  1. The number of residents affected by the violation.
  2. How bad the potential outcome of the violation is.
  3. When or how long the violation occurred.
  4. Number of locations in which a violation occurred.



## Violations Not Corrected on Revisit

Failure to correct a violation could result in additional sanctions. Sanctions may include:

- Paying a forfeiture or increased forfeiture.
- Being unable to admit new residents.
- Having a plan of correction created by DHS.
- Revoking a license or having it suspended.



# Paying a Forfeiture

- Unless you file an appeal, facilities must pay forfeitures within 10 days of receipt of a Notice and Order letter. Forfeitures are payable to "DHS 639." Get 35% reduction. No "partial payments" An appeal delays the forfeiture payment but rarely will get offered 35% reduced forfeiture after the appeals process



# Actions You Can Take Prior to a Survey

- Administrative Review of the “Top 10 Cites”
- Staff survey refresher
- Review your prior SODs
- Facility walk-through – physical plant/kitchen/furnace/toxic substance storage
- Mock survey
- Document review
- Medication system review
- Review internal complaints
- Reinforce internal complaint process



# Actions to Take During a Survey

- Shadow
- Cooperate
- Copy x2
- Fix
- Answer and refer questions
- Provide additional documentation
- Investigate
- Request Exit Conference/Assistance
- Damage Control
- Document & Report surveyor “attitudes” and unprofessional behavior to your region – be specific – dates/times/what said



# “The Months of Uncertainty” and Other Issues

- Digging for additional information
- Wait and wait and.....
- Asked for QA Records
- Work on Corrections
- Request revisit – how



# You've Been Cited – Now What?

- Read, Read, Read
- Share & Compare
- Investigate
  - misunderstandings
  - misstatements
  - quotes out of context
  - wrong facts
  - incorrect staff or resident identification



# Appeal Evaluation

- Take your lumps vs “that’s wrong”
- Financial implications
- 35% Forfeiture reduction
- Credibility in your region
- “Easy Target” vs. “Retaliation”
- Importance to your facility to qualify for
  - an abbreviated survey
- SOD posting and potential consumers
- Is the clock running on a per day forfeiture?



# Appeals

A facility may appeal the imposition of a statutory sanction, revocation, or denial of licensure if allowed by law.

- **Adult family homes**

- Cannot appeal sanctions under Wis. Admin. Code § DHS 88.03(6)(g).
- Can appeal license denials, revocations, or suspensions (Wis. Stat. § 50.033(4) and Wis. Admin. Code §§ DHS 88.03(3), DHS 88.03(6)(d), and DHS 88.03(6)(e)).

- **Community-based residential facilities**

- Can appeal any sanction and penalty under Wis. Stat. § 50.03(5g).

- **Certified residential care apartment complexes**

- Can appeal any sanction and penalty under Wis. Stat. § 50.034 and Wis. Admin. Code §§ DHS 89.53(2)(c), DHS 89.53(2)(d), DHS 89.53(4)(b), DHS 89.56, and DHS 89.57.

Facilities receive instructions for appealing sanctions and penalties. These are included in a Notice and Order letter that accompany a Statement of Deficiency.



# The Assisted Living Appeals Process

- ❑ Careful review of the SOD cover letter
- ❑ AFHs: license denials, suspensions, revocations only
- ❑ Appeal letter to Division of Hearings and Appeals **Strictly Comply**
- ❑ Confirmation of receipt of appeal letter – assignment of an ALJ
- ❑ Notice of appearance
- ❑ Notice of and pre-hearing conference
- ❑ Negotiating with the Office of Legal Counsel
- ❑ Stipulation and dismissal
- ❑ Hearing



# Review of the DHS Cover Letter to the SOD

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- Date of Letter
- Cites correlate with SOD
- Enforcement Actions
- Forfeiture
- 45 correction period
- Appeal procedure - **postmark date\***
- Notice of Revisit and \$200 fee
- Letter signer and Parties cc'd on the letter



# The Appeal Letter

- Do NOT blow the 10 calendar day appeal deadline! Your appeal WILL be DISMISSED
  - Receipt day is Day 0. Holiday and w/e advance due date to next bus day
- Send Certified Mail Return Receipt Requested – CBRF Appeal, Div of Hearings and Appeals
- Date the letter
- Ensure a Postmark (filing date is day of postmark)
- Identify Your facility name, address, license # and the SOD #
- Identify contact person for the facility
- Identify date of the DHS letter and date facility received the DHS letter
- Identify what you are appealing – be specific – what gets “set aside”
- Include “Facility does not agree with DHS determination and believes the items cited and <add here> are unreasonable and unwarranted and should be withdrawn”
- Identify who future communications and correspondence should go to (name, address, phone and email)
- If desired “Facility waives the 30-day requirement for hearing”
- Carbon Copies
- Enclosure – include the DHS Cover letter to the SOD



# Wait for Confirmations

## Letter from Division of Hearings and Appeals

- Usually via email
- Assignment of Admin Law Judge
- Acknowledgment of Receipt of Appeal
- Assignment of Case Number ML-XX-XXXX

## Letter from DHS

- Notice of Appearance of Attorney from the DHS Office of Legal Counsel ("OLC")



# “Off to the Races”

- Possible communication from the ALJ for Pre-hearing or to ask about 30 day requirement for hearing
- The “Case Conference” – not mandatory but desired
  - 50.053 Case conference. The department may hold a case conference with the parties to any contested action under this subchapter to resolve any or all issues prior to formal hearing. Unless any party to the contested case objects, the department may delay the commencement of the formal hearing in order to hold the case conference.
  - Prepare as if going to hearing: arguments, written submission, cull arguments/appeal, review reg,
  - Schedule to give your self time to prepare; actually prepare
  - Figure out a spokesperson, efficient use of time – 1 hr allowed, prepare for questions
  - Case Conference – Zoom, BAL Director, DHS Attorney, case presentation, the ask
- The “Wait”
- Negotiation
- Settlement or Hearing



# The Stipulated Settlement Agreement

- Generally prepared by DHS
- Formalities
- Ensure “This Agreement is not to be construed as an admission of liability by the Facility or Petitioner as to the facts or legal conclusions or both as set forth in the SOD.”
- Careful review
- Sign
- Submit to ALJ
- Case Dismissal
- COMPLY with it – call DHS to carpet if they don’t comply



# Hearing in front of the ALJ

- Can do a “hearing on briefs”
- Conference with ALJ – unable to settle
- Scheduling conference with ALJ
  - Hearing date - Zoom
  - Witness and exhibit list exchanges 2 weeks before hearing
- Settlement possibility remains up through hearing date
- Hearing day
  - Opening statement optional
  - DHS goes 1<sup>st</sup> to prove citations – usually the surveyors
  - Cross Exam
  - End of DHS case – Move to Dismiss – DHS did not prove case
  - Your case
    - Your witnesses and exhibits – DHS cross Exam, your rehab
    - Your case concludes
    - Closing statements optional
    - Usually, 30 days to receive written decision from ALJ
    - Request for Rehearing (20 days) or Appeal to Circuit Court (30 days)





## Questions?

**THANK YOU!**

*This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.*