

**Private Caregivers in Assisted Living Communities:
Considerations to Reduce Your Community's Risk**

NCAL's Risk Management Work Group

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OVERVIEW

NCAL's Risk Management Work Group prepared this article to offer key considerations for assisted living communities when residents and their families hire private caregivers (PCGs) to provide supplemental services and support. Our members are seeing more families and residents hiring PCGs in their communities. PCGs hired by an assisted living resident's family can be important partners providing companionship and for the resident's plan of care. However, PCGs are not community employees, nor can or should they be supervised by the community management; consequently, communities must consider management and liability issues. This article highlights considerations to support assisted living communities with approaches to reduce potential liability risk. We have also posted links to sample documents, including a sample Private Caregiver Agreement, and several state requirements for PCGs (also called private duty personnel or private sitters). Please note, this is not a comprehensive list of state requirements that could be relevant, and communities are encouraged to seek assistance for legal counsel when needed.

The following article and sample policy are not intended as legal advice and should not be used as or relied upon as legal advice. It is for general informational purposes only and should not substitute for legal advice. Always seek knowledgeable counsel for advice that is tailored to the actual facts and circumstances and takes into account all relevant laws and regulations.

COMMUNITY CONSIDERATIONS

1. Identify Relevant State Regulations

It is imperative to identify any relevant state regulations regarding PCGs. Your research should include a survey of state requirements for private aides and scope of practice. Also be mindful of compliance with the Federal Fair Housing Act and Americans with Disabilities Act.¹ You can request this information from your regulatory agency, state association, and/or attorney. Once you have concluded that your state permits PCGs in communities and identified relevant requirements, create PCG written policies and procedures that incorporate federal and state requirements.

2. Determine Private Caregiver Procedures

PCG Background Checks – Policies should specify whether a background check is required for PCGs. Consider applying any such requirement uniformly to all PCGs hired by the resident or family. The policy should describe when a background check is required, who will conduct the check (e.g., the assisted living community, the company employing the PCG, or the resident or his/her family) and the scope of the review, such as whether it will review sex offender websites, CNA registry checks, health screenings, and immigration/citizenship status verification. Depending on your state's requirements, you may need to include other items as well. Always document

¹ Please note, most states have parallel fair housing and disabilities laws that will also need review prior to implementation of PCG policies.

efforts made and communications with residents and families and retain documentation and reports received during the background check process.

Reporting Requirements – In consultation with legal counsel, determine whether to specify PCG reporting procedures if an incident or concern arises. If reporting requirements are established, they should be specified in the communities' written PCG policies. Again, documentation of communications and retention of information should be standard protocol.

PCG Insurance - The community has responsibilities for the safety and well-being of its residents. While PCGs can be a benefit to the resident and the assisted living community in general, they are not employed by the organization and thus are not necessarily covered by labor and insurance policies. You should specify policies regarding: insurance; worker's compensation; injury and personal liability; whether the PCG contract requires proof of insurance; whether the community must be named as an additional insured on the PCG's liability insurance; and proof of insurance upon request. The PCG may or may not already have liability insurance from the staffing company or as a professional individual. You will want to understand state requirements regarding insurance and liability in the work force. Legal counsel should be consulted to determine a community's options for being held harmless from the actions of a PCG. Best practices suggest that proof of insurance be retained for each PCG and communities review annually to be certain that all insurance information remains current.

Training Employed Staff – Over time, a successful PCG may integrate seamlessly into a resident's daily care. As such, community employees may inadvertently consider the PCG a member of the community staff, which could result in unintended consequences. For example, community staff may inadvertently disclose a resident's HIPAA-protected information to a PCG, which may be a breach of state or federal privacy protections. To prevent these situations, annual staff trainings should incorporate reminders about the role of PCGs and appropriate boundaries, especially privacy protections. Training should seek to balance the PCG's role in the resident's community daily life and preserving all residents' rights.

Note that PCGs are not considered "staff" for purposes of satisfying state minimum staffing requirements, such as staffing ratios.

Training Private Caregivers - Orientation and training will inform the PCG about community rules and operation, and will orient them generally to the community. However, the community does not provide training on care skills or services. Furthermore, licensed staff should not oversee or document PCG services. Document in-service training for PCGs and retain training materials and attendance sheets.

3. Create Private Caregiver Agreement

Another useful tool is a Private Caregiver Agreement between your community, family/resident, and the PCG. This agreement should include HIPAA compliance, confidentiality, and specific services the PCG will perform in addition to the duties

established by the community policies and procedures. This agreement should clearly convey the status of the PCG at the community. In particular, the assisted living community does not: employ or independently contract with the PCG; offer benefits to the PCG; direct, manage or supervise the PCG; or have responsibility for coverage in absences. Additionally, the agreement should specify circumstances under which the caregiver will be asked to leave the community temporarily or permanently and conditions for termination of the agreement by the community.

NCAL's website has a Private Caregiver Agreement sample used in other communities. We recommend legal counsel and an insurance specialist assist you in creating your policies, procedures, and Private Caregiver Agreement.

4. Create and Distribute Private Caregiver Policies & Procedures

Assisted living communities should have written policies and procedures specifically applicable to PCGs. A copy of the policies should be provided to the PCG in advance of the PCG providing services. If the PCG violates a policy or procedure, the community must follow through on enforcement. Communities who are on notice that PCGs are providing services can reduce risk and liability if there is a negative outcome through enforcement of the policies. Working with legal counsel to proactively create policies and procedures and enforcement processes, and sharing them with all relevant parties, will help to mitigate liability.

Written policies can include topics such as, but not limited to:

- Training and Orientation Requirements for PCGs
- Community Rules and Regulations
 - Signing In/Out of the Community Policy
 - Use of name tags
 - Appropriate clothing
 - Smoking prohibitions or limitations
 - Allowed (or disallowed) marijuana use as relevant to your state
 - Parking
- PCG Limitations
 - Use of common areas - staff dining rooms, lounges, laundry facilities
 - "Roaming" of community
- Circumstances under which the caregiver will be asked to leave the community temporarily or permanently (for example, suspected or actual abuse, theft, etc.)
- Fire Safety and Emergency Training
 - Calls to 911
 - When to call for staff assistance
- PCG Absentee Policy (e.g., that the community is not responsible for finding coverage during an absence)
- Person Centered Care Plan
- Background Checks
 - Process for verifying the caregiver's qualifications to perform duties
- Communication

- PCG and Community Communication, including reporting requirements as applicable
- Resident/Family and Community Communication
- HIPAA, Privacy Rights and Duty in the Event of Breach
- Social Media

5. Discuss Expectations and Terms With the Resident/Family

Initial and continued communication with residents and families regarding a PCG is vital in reducing potential gaps in the continuity of care, and will assist in reducing prospective liability and grievances. Include a copy of the community's PCG policies in resident disclosures at the time of admission. Planning meetings between the family/resident and the community related to the PCG should cover, at a minimum:

- Understanding and setting realistic expectations for the community and resident/family
- Scope of service
- Payment
- Supervision
- Potential and real risks

6. Integrate Person Centered Care Plan

In addition to the policies, procedures, and Private Caregiver Agreement, we recommend discussing the Person Centered Care Plan established by your community and the responsibilities of the PCG with the resident and family, and documenting the conversation. The Person Centered Care Plan for the resident should be updated to include the involvement of the PCG and to note specifically what the PCG can and cannot do. For example, if the family agrees to allow the PCG to assist the resident with bathing or toileting, the community should require the PCG to be trained and certified as needed by an outside entity. Policies should reflect scope of practice laws so that all staff and PCGs are working within their scope and compliant with applicable requirements.

CONCLUSION

PCGs may be involved with your residents and families and become part of the assisted living community. While comfort and reassurance for the resident and family may enhance the life experiences for the resident, communities want to be properly prepared. Before a PCG provides care in your community, consider the steps and processes described in this article. Identifying and managing potential risk can help reduce liability for unexpected and unplanned outcomes that involve the PCG. Adherence to community standards and policies are particularly critical issues that can be managed through purposeful community decision-making and best practices. Consult with legal advisors and insurance specialists for assistance with policies and procedures and compliance with state and federal regulations and laws. Multi-state operators may need to create policies and sets of procedures for each state. PCGs can

improve the quality of care and life of our residents and their families and bring comfort and needed care. Adopting a proactive risk management approach to PCGs in the community will reduce the risk of conflicts and unmet expectations. The issues and processes discussed in this article are a good start to support the PCG and our community members in a safe and appropriate manner.