

CHAPTER 14 FACILITY CLOSURES AND BANKRUPTCIES

I. Introduction

The temporary or permanent relocation or transfer of residents due to a long-term care (LTC) facility closure, emergency, or natural disaster can have a negative impact on LTC residents' quality of life and quality of care. LTC Ombudsman representatives play an important role in proactively protecting the health, safety, welfare, and rights of residents during resident evacuation or relocation.

In addition, when a long-term care facility files for bankruptcy, the Bankruptcy Court can order the appointment of a Patient Care Ombudsman (PCO) to represent the interests of facility residents. The United States Trustee is responsible for appointing the PCO, who may be the State Long-Term Care Ombudsman (SLTCO). When the Trustee appoints the SLTCO as PCO, the local Long-Term Care Ombudsman Program (LTCOP) has the responsibility of visiting the facility and reporting conditions to the SLTCO at least every 60 days or more frequently as conditions warrant.

II. Legal Citations

FEDERAL 42 Code of Federal Regulations parts 488.410 and 488.426
Title 11 United States Code section 333

STATE Health and Safety Code sections 1325, 1325.5, 1336-1336.4,
1569.44, 1569.628, and 1569.695
California Code of Regulations, title 22, sections 72519, 72551,
72553, 87212, and 87223

III. Types of Closures

Facility closures can be voluntary or involuntary. A voluntary closure for example, may be the result of an owner's decision to leave the business, or to close a facility rather than respond to cited deficiencies. An involuntary closure may result from a State licensing and certification agency determination, a federal focused enforcement action, an emergency, or a natural disaster. Closure of any licensed LTC facility significantly affects residents, family members, care providers, placement and protective agencies, licensing staff, and local Ombudsman representatives.

The California Department of Aging (CDA) through the Office of the State Long-Term Care Ombudsman (OSLTCO) has established Memoranda of Understanding (MOUs) with the Department of Public Health (DPH), Licensing and Certification Division (L&C) (Exhibit 14-A) and the Department of Social Services (DSS) Community Care Licensing Division (CCLD) (Exhibit 14-B).

Each agency follows the guidelines for facility closures specified in these agreements when residents relocate due to a Temporary Suspension Order (TSO) closure, foreclosure, emergency evacuation or natural disaster.

A. Temporary Suspension Orders (TSOs)

Both DPH L&C and DSS CCLD have authority to close LTC facilities when the licensing agency determines that residents are in imminent danger if the facility continues to operate. This closure is a Temporary Suspension Order (TSO) and requires the facility to cease operations.

1. Health Care Facilities (SNFs and ICFs)

If L&C or another State, local, or federal government enforcement agency is investigating a skilled nursing facility (SNF), distinct part (D/P) SNF, nursing facility (NF) or intermediate care facility (ICF) for fraud and/or abuse, that facility provider shall be subject to a TSO from the Medi-Cal program. Title 42 of the Code of Federal Regulations, parts 488.410 and 488.426 provide that the State must provide for safe and orderly transfer of residents who are in immediate jeopardy or whose facilities are facing closure. Health and Safety Code sections 1325-1335 describe the process of receivership to either bring the facility into compliance or assure the safe and orderly transfer of residents.

2. Community Care Facilities (RCFEs)

Upon evidence that a suspension is reasonably necessary to protect the residents of a licensed Residential Care Facility for the Elderly (RCFE), CCLD can issue a TSO against the facility. The process of suspending or revoking a license is included in Health and Safety Code sections 1569.50 through 1569.54.

Under Health and Safety Code section 1569.38, RCFEs must provide written notice to residents, their responsible parties, and the local LTCOP within 10 days of the occurrence of either of the following:

1. CDSS commences proceedings to suspend or revoke an RCFE license,
2. A criminal action that relates to the health and safety of residents is brought against the RCFE.

The RCFE must also post a notice in the facility.

When facility closure is a possible outcome of any licensing action, the policy of L&C and CCLD is to provide as much advance notice as possible to residents, relatives, and authorized representatives. Since L&C and CCLD are not placement agencies, they lack authority to relocate residents. Consequently, both agencies aim to involve appropriate placement and protective agencies (e.g., Adult Protective Services, Regional Centers, etc.) in the planning stages that precede any facility closure. In addition, as specified in MOUs between the OSLTCO and the licensing agencies, the licensing

agencies coordinate with local LTCOPs who work with the placement and protective agencies toward appropriate and safe relocation of residents.

B. Transfer Requirements

Whether facility closures are voluntary or involuntary, long-term care facilities are required to follow procedures to protect their residents from transfer trauma.

1. Skilled Nursing Facilities

- The facility must provide an appropriate team of professional staff to assist residents and families in finding alternative placement (Health & Saf. Code § 1336).
- The facility must notify the OSLTCO at least 30 days prior to any change in status of its license or operation (Health & Saf. Code § 1336.1).
- The facility is required to complete a medical and social assessment of each resident to be transferred (Health & Saf. Code § 1336.2).
- The facility must evaluate each resident's relocation needs and inform the resident or the resident's representative of alternative placements that will meet those needs (Health & Saf. Code § 1336.2).
- Under the MOU between L&C and the OSLTCO (Exhibit 14-A):
 - L&C agrees to inform and consult with the OSLTCO, who is responsible for notifying the appropriate local LTCOP whenever there is a pending closure.
 - The L&C District Office will contact the local LTCOP and provide detailed information about the closure.
 - The L&C District Office and the local LTCOP will co-facilitate meetings with residents and their families to discuss issues related to the closure.

2. RCFEs

- The facility must take all reasonable steps to transfer affected residents safely with a minimum of trauma (Health & Saf. Code § 1569.682).
- The facility is responsible for evaluating each resident and preparing a relocation plan, including recommendations for the type of placement and a list of nearby facilities that will meet the resident's needs (Health & Saf. Code § 1569.682).
- The facility must cooperate with CCL in preparing for removal of residents' medications, transferring their insurance documents,

valuables, clothing, etc. and assisting to find suitable placement and transportation (Cal. Code Regs., tit. 22, § 87223).

- Under the MOU between CCL and the OSLTCO (Exhibit 14-B):
 - CCL local licensing offices must notify the local LTCOP of pending closures that will necessitate the transfer of residents.
 - CCL will work collaboratively with the local LTCOP to share information and make plans to minimize transfer trauma.
 - Local LTCOPs will provide input into the proposed facility closure plan.

C. Emergency and Natural Disaster Closures

1. SNF Requirements (Cal. Code Regs., tit. 22, §§ 72519, 72551, 72553)

SNFs are required to prepare for potential emergencies in the following ways:

- Preparing a written external disaster and mass casualty program plan to include procedures for emergency utilities and supplies and arrangements for transporting residents to emergency housing.
- Having a copy of the plan available on the premises, reviewing it annually, and revising as necessary.
- Holding a disaster drill every six months and maintaining written reports of the drills.
- Preparing a written fire and evacuation plan and posting a map of the evacuation route throughout the facility.
- Holding fire and internal disaster drills at least quarterly.
- Maintaining written transfer agreements with other nearby health facilities in case transfer of residents is needed.

2. RCFE Requirements (Health & Saf. Code § 1569.695; Cal. Code Regs., tit. 22, §§ 87212, 87223)

RCFEs are required to prepare for potential emergencies by:

- Developing an emergency plan to include evacuation procedures, relocation sites, procedures to be self reliant for a minimum of 72 hours, processes for communicating with residents and family members, provisions for emergency power.
- Making the plan available to local emergency responders and to residents upon request.

3. LTCOP Assistance during Emergencies and Disasters

When local LTC facilities experience emergency evacuations and resident relocations because of wildfires, floods, and other natural disasters, LTCOPs become catalysts to assist others in fulfilling their responsibilities and to ensure continuity of care to LTC residents. LTCOPs can encourage LTC facilities in advance to develop disaster plans and contingencies specific to the type of disaster and the facility's location, size, resident population, and special needs.

LTCOP representatives regularly visit SNFs and RCFEs in the community and are familiar with individual residents and with the staff providing the residents' care. This regular presence in facilities gives Ombudsman representatives a unique perspective beneficial to those involved in local disaster planning and response activities. For example, the LTCOP may have knowledge about facility bed vacancies in the area, which is critical information when resident transfer to another facility is urgent. The local LTCOP shares information with local agencies and communicates with State entities such as the OSLTCO, DSS CCLD, and DPH L&C during any emergency or natural disaster affecting LTC residents.

During an emergency or disaster affecting LTC residents, the local LTCOP in the affected area shall, as warranted:

- Identify lead and support emergency preparedness and response agencies in advance in the local community so that Ombudsman disaster response efforts are coordinated with the appropriate agency.
- Contact the licensing agencies or other lead agencies to establish a procedure to notify the local LTCOP about which facilities are evacuated and where residents will be sent.
- Seek assistance from other local LTCOPs outside of the affected area per "mutual aid" agreements.
- Activate the local LTCOP disaster/emergency plan. When it is safe to do so, the local LTCOP organizes available Ombudsman representatives to do the following:
 - Conduct on-site visits to facilities in affected areas, if appropriate, and relocation sites
 - Check on the safety and well-being of the LTC residents, and address complaints residents have during and after the evacuation
 - Report findings to the OSLTCO

- Notify the OSLTCO regarding the following issues:
 - What are the local needs, and what assistance does the local LTCOP need from the State Office and California Department of Aging (CDA)?
 - What is the LTCOP involvement in specific evacuations and what information is available on facility actions taken? For example, how well are facilities handling evacuations, notifying families of evacuations, sending medications and medical charts with residents, having enough staff available to care for residents, etc.?
 - What is the quality of care that residents are receiving at the evacuation sites/alternate facilities?
 - What are the types of complaints residents have during and after the evacuations?
 - Are there known incidents of suspected transfer trauma affecting residents during and after the disaster/evacuation?

For additional information and checklists developed by AoA and the Center for Medicare and Medicaid Services for Ombudsman use during an emergency or disaster, see <http://www.ltcombudsman.org/issues/emergency-preparedness#Checklists>

IV. Facilities in Bankruptcy and the Appointment of a Patient Care Ombudsman

The Bankruptcy Abuse and Consumer Protection Act (BACPA) of 2005 provides for the appointment of a Patient Care Ombudsman (PCO) for bankruptcy cases when companies or individuals involved operate long-term care facilities. If the U.S. Trustee requests that the SLTCO act as PCO, the SLTCO will contact the appropriate local LTCOP to see whether that program would be willing to participate. If so, the SLTCO will accept the appointment. When the U.S. Trustee appoints the SLTCO as the PCO, the OSLTCO requires, at a minimum, monthly visits to facilities that are in bankruptcy. The local LTCOP reports to the SLTCO on conditions at each facility named in the bankruptcy filing at least every 60 days until the court dismisses the case.

The SLTCO reviews and compiles the report for filing with the bankruptcy court. Under special circumstances, or when conditions change to the extent that they affect the care of residents, the SLTCO may file additional interim reports. The local LTCOP uses the bankruptcy report outline below for its 60-day reports to the SLTCO. According to the BACPA, the LTCOP may seek reimbursement for actual expenses incurred while fulfilling the role of PCO.

60-Day Bankruptcy Report - *Name of Entity in Bankruptcy*

1. Facility Name and City
2. Current Occupancy
 - On first report, establish the licensed capacity and current occupancy
 - On first report, note the history of occupancy for the building.
 - In subsequent reports, note any change from the previous report
 - Note any significant change in resident mix, such as the admission of different client groups, younger residents, etc.
3. Staffing Levels
 - List total number of RNs, LVNs, CNAs, caregivers, and social workers. Note any increases or decreases. The Administrator usually offers this information, but it will require monitoring and confirming through observation and direct-care staff reports.
 - Identify shortages, by shift if possible. If a direct patient care vacancy exists, note how long the position has been vacant and if the facility is actively recruiting to fill it.
 - Note other vacancies in areas such as food service, housekeeping, administration, or maintenance if the vacancy affects care.
4. Contact with Medical Director (if applicable)
 - List physician name and dates of any contact.
 - Note any issues, concerns, or observations made by the physician.
 - Ask the physician about payment for services—is the physician owed any money from the corporation?
 - Have supplies been readily available?
 - Is documentation in medical charts, by the physician's account, accurate and thorough?
 - Is the physician aware of any recent regulatory findings (if applicable)?
Visitation and Resident/Family Contact
 - Indicate the frequency of visits by either volunteer or staff Ombudsman representatives. If the Ombudsman representative makes weekly visits, so indicate. If the Ombudsman representative makes less than weekly visits, list the actual dates of visits.
 - Note total resident and total family contacts during the period and list any concerns or observations made by each group.
 - List any pertinent collateral information received from others in this section as well, such as information received from therapists or contractors who may have been in the facility during the local Ombudsman representative's visit.
5. Supplies and Services
 - Identify any concerns involving vendors, utilities, or external support factors that may affect resident care.

- Include any problems reported involving payroll or indications of cash flow problems.
- The best sources for this information are facility staff who orders supplies: food services manager, nursing, maintenance supervisor, and business office.
- Resident accounts of problems in these areas are the strongest evidence.

6. Regulatory Issues

List any actions taken by either Licensing and Certification or Community Care Licensing since the last report, and any pending or outstanding deficiencies from any period that have not been resolved.

7. Ombudsman Issues

List any complaints or concerns addressed by the Ombudsman program during this period (There may be some duplication of information in #6). What actions have been taken to resolve the concerns and any pending issues that require follow-up?

8. Miscellaneous

Convey important information that is not captured in any other section, such as the initiation of a significant culture change initiative, the start of a major renovation project, etc.