

Third Party Caregivers In Independent Senior Housing

**This guide was developed by the 2003 – 2004
Life Services Network Housing Cabinet**

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A common challenge for providers of independent senior housing is how to handle tenant requests (and sometimes demands) to bring in third party caregivers. Third party caregivers may change the nature of the community add unwanted liability and additional operational headaches. On the other hand, third party caregivers provide an important support for residents with increased care needs allowing them to age in place preventing premature moves to nursing facilities. Because of the variety of issues raised by the addition of third party caregivers to a community a landlord should consider the potential consequences of such an addition as well as the safeguards that a community should have in place to limit its liability.

Defining Independent

Before examining the additional liability that third party caregivers create for independent senior communities, we should clarify the term “independent” as a modifier of senior housing. While this term is used all the time in senior housing it has three primary meanings in the industry.

- The first meaning of the term “independent” is that the tenant is independent (i.e., the tenant has no disabilities and is able to live without any support services). We’ll call this the “tenant capability meaning.”
- The second meaning is that the building only provides services associated with non-licensed, non-hands-on care communities. We’ll call this the “services provided meaning.”
- The third meaning is that the community provides a non-institutional setting that fosters independence (e.g., private rooms, a residential feel to the community). Let’s call this the “warm and fuzzy meaning” since it can apply to any setting from an apartment building to a sub-acute skilled nursing facility.

For the purposes of this analysis we are only talking about the “services provided” meaning. The use of the term “independent” in no way reflects the nature of the residents’ abilities or their need for services. The use of the term “independent” in this context indicates that the management of the community functions essentially as a landlord. While the community may provide some amenities such as transportation, housekeeping, or meals, it does not provide any hands-on care, personal care, or medical services such as medication reminders or medication administration. Therefore, we will refer to the management as “landlord” in this document.

Landlords

The good news about being a landlord of an “independent” senior housing community is that it limits the amount of liability the management is subject to for care that is delivered. Generally, liability arises from a duty that one individual has to another.

In this case the relevant inquiry is what duty does the landlord have to the tenant? Under Illinois law a landlord generally has a duty of exercising reasonable care to keep common areas in a reasonably safe condition and a landlord is liable for injuries to persons lawfully on those premises due to his failure to perform his duty. Illinois courts have further held that the landlord-tenant relationship generally does not create a duty of the landlord to protect tenants against criminal acts of third persons. A landlord generally does not have a duty to provide care to tenants or to monitor the level or quality of care being provided by third party caregivers.

While a landlord’s liability is generally limited, the liability can increase if the landlord assumes a duty. The most common example of this is that while a landlord generally does not have an obligation to remove snow and ice courts have held that “when a landlord chooses to remove snow and ice, he is charged with the duty of exercising ordinary care in the accomplishment of that task.” Thus by choosing to provide a service or to take an action, the landlord assumes the duty to exercise ordinary care while doing so. The assumption of a duty may come through a representation such as an advertisement or through a policy. For example, by advertising that a certain service is available at the community the landlord may be held liable for ensuring that the service is delivered at a certain level of quality. Likewise, by maintaining a policy that the landlord will take certain actions the landlord will be required to carry out those obligations in a responsible manner. The assumption of liability becomes particularly important in the context of third party caregivers.

The Perfect Balance

The “perfect balance” for landlords of independent senior housing communities is to be able to remove unsatisfactory third party caregivers when necessary, to have limited or no liability for their actions while facilitating their delivery of services as an important support for residents. Reaching this balance is difficult if not impossible to achieve. Landlords can increase their chances of reaching this balance by being mindful of actions that may result in the assumption of liability.

Developing Policies and Procedures

While the introduction of third party caregivers can offer a crucial support for residents they can also create operational problems. As a result, landlords may be tempted to create an exhaustive screening process and a comprehensive set of policies. As is often the case with the development of policies, what works in the conference room may not work in the real world of the community.

Remember, if a community affirmatively represents that it is going to take an action it creates a duty to responsibly do so. Screening of third party caregivers is an excellent example of how a policy can create a duty. If a landlord decides it will screen all third party caregivers it will then have a responsibility to do so for every third party caregiver. The failure to do such a screening could result in a claim that the landlord was negligent¹. Therefore, if you wish to implement a screening process only do so if you are willing to take the responsibility seriously and to conduct the screening for all third party caregivers. The reason is that if a landlord screens 99 out of 100 third party caregivers it will be the 100th third party caregiver that commits the crime in the community and the landlord may be subject to liability for failing to have properly screened him/her.

Screening Recommendations

This is not to say that landlords should never screen third party caregivers, but that they should only if they are willing to take the responsibility very seriously. If a community decides to implement a screening policy, the following is a list of suggested measures:

- Verify² that the third party caregiver or the agency employing the caregiver has the proper insurance coverage including:
 - Personal Liability
 - Medical professional liability, if providing medical services
 - Automobile liability, if TPCG's automobile will be used
- Require proof of worker's compensation insurance from the caregiver³ or the agency employing the caregiver.
- Check the third party caregiver's references.
- Conduct a criminal background check. This can be done through the Illinois State Police or a variety of private security agencies.
- Check whether the individual has ever been determined to have committed abuse by checking the Illinois Certified Nurse Aide Registry⁴.

¹ The Alaska Supreme Court recently found that a patient could proceed with a claim against a hospital for negligently credentialing a surgeon who allegedly injured the patient during surgery. The court stated that the hospital owed an independent duty to its patients to use reasonable care when credentialing to insure that physicians granted hospital privileges were competent. The plaintiff in the case alleged that the hospital was negligent in renewing the surgeon's credentials because the surgeon had disclosed that his medical privileges had been suspended at another hospital.

² Appropriate verification would be a certificate of insurance.

³ Many independent caregivers will not carry workers compensation insurance.

⁴ This is a valuable check even if the person is not currently a certified nurse aide.

- Check whether the individual has been excluded from participating in a federal program such as the Medicare and Medicaid Programs. The following two sites should be checked <http://epls.arnet.gov> & <http://oig.hhs.gov/fraud/exclusions.html>. If the caregiver is employed by an agency, the employing agency should verify that it has screened all of its employees for possible exclusion.
- Require a written statement from a physician based on an exam within the last six (6) months that the third party caregiver is in reasonably good health and does not appear to be at risk of transmitting communicable diseases.
- Require proof of a non-reactive Mantoux test or negative chest X-ray as to tuberculosis from the TPCG.
- If the third party caregiver will be driving, the tenant may want to request a copy of a current driver's license and appropriate automobile insurance.

Alternative to Screening by Landlord

As an alternative to screening all third party caregivers, a preferable approach is to recommend that tenants screen third party caregivers. A draft policy is attached as Exhibit 1. To complement this policy, it is also recommend that your lease:

- Specifically state that the community has the right to request (but does not require) evidence of proper licensing, training, insurance, lack of criminal record, etc...
- Specifically state that the community is not responsible for screening the third party caregiver and that the tenant will indemnify the community for the actions of the caregiver.
- Make it the tenant's responsibility to notify the community that a third party caregiver has been engaged and to provide the landlord with the third party caregiver's contact information.

A related consideration is ensuring that the third party caregiver complies with the community's policies. Again, this is best addressed by making the tenant responsible for the caregiver's compliance through the lease. The lease should also indicate that the failure of a third party caregiver to comply with a community policy would be grounds for terminating the lease.

Policies for Third Party Caregivers

What areas should a landlord consider regarding the conduct of third party caregivers? It is suggested policies regarding the following issues be developed:

1. Honoring the rights of other tenants and staff.
2. Safety procedures for entering the building - Sign in and out at the security/reception desk at the beginning and end of each shift. Limiting entrance to the building to one location.
3. Require third party caregivers to wear an identification badge while on the premises of the community.
4. Drug or alcohol use.
5. Smoking.
6. Telephone usage.
7. Solicitation of contributions, donation, tips, gifts or employment from other residents.
8. Weapons.

9. Theft.
10. Abuse – including verbal abuse.
11. Address the third party caregiver's right to stay overnight or live in the community.
12. Address when the third party caregiver is permitted to be in the common area of the community (i.e. only when the tenant is present).
13. Dress code.
14. Require third party caregivers to review and acknowledge that he/she understand the emergency procedures as stated in the Tenant handbook.
15. Limit or prohibiting the use of on-site laundry facilities.
16. Food & dining services: Whether the caregiver can dine or sit with the tenant in the dining room⁵. The issue of payment for the meal should be established and written into policy.
17. Common areas and other special use rooms: Whether there will there be a charge for a caregiver attending activities.
18. Transportation: Whether to charge the tenant when the personal care giver accompanies the tenant on the facility bus.
19. Parking: Where are caregivers allowed to park.
20. Key use policy – What keys can the caregiver have (common areas, mail box, unit). Establish that the tenant may be responsible for the cost of re-keying locks if the caregiver does not return a key. No TPCG should have the Tenant's key on a permanent basis. Prohibit the making of duplicate keys.
21. Caregiver visitors: i.e. prohibiting the caregiver from having visitors at any time on the grounds, other than for transportation purposes. This includes meal time and break time. If someone is providing the caregiver with transportation, he or she should be advised to wait in his/her car.

These policies should be included in you tenant handbook as well as printed as a separate set of policies given to third party care givers. We also recommend that you have the third party caregiver acknowledge in writing that they have received the policies and agree to abide by them.

⁵ Due to the limitations of the Fair Housing Act and the ADA it would be difficult to prohibit a caregiver from the dining room or to limit the amount of assistance the care giver could provide. The same concern would apply to a limitation preventing the caregiver from accompanying the tenant in common areas or during transportation.

EXHIBIT 1

THIRD PARTY CAREGIVER GUIDE

A third party caregiver (hereafter “TPCG”) is any person with whom the Tenant (or someone on the Tenant’s behalf) contracts to provide services for the Tenant. The TPCG’s contract for services may be as an employee, an independent contractor, or through an agency. Examples of TPCGs may include: registered nurses (RNs), licensed vocational nurses (LVNs), certified nurse assistants (CNAs), sitters, companions, secretaries, personal aides, assistants and housekeepers.

Because _____ (the “Community”) is an independent senior housing community, it does not provide hands on care or personal care services. Therefore, any care services are the sole responsibility of the tenant. While the Community retains the right to bar any TPCG from entering the Community it is under no obligation to screen any TPCG or to monitor the TPCG delivery of services or care.. Please note that the lease outlines the tenant’s responsibilities regarding TPCGs and additional rules regarding the conduct of TPCGs are set forth in the tenant handbook as well as in the “Third Party Care Giver Code of Conduct” (the “Code”). The tenant is responsible for ensuring that any TPCG he/she works with complies with the Code.

This Guide should be read carefully. Each tenant and TPCG must comply with the policies and procedures now existing or later amended by the Community. Should the Tenant have any questions about the policies and procedures, the Code, or the information set forth in this Guide, please contact _____.

For the protection, safety & security of the tenant, management strongly recommends the following measures be taken when securing the services of a TPCG:

- Verify that the third party care giver or the agency employing the caregiver has the proper insurance coverage including:
 - Personal Liability
 - Medical professional liability, if providing medical services
 - Automobile liability, if TPCG’s automobile will be used

This can be verified through a certificate of insurance.

- Require proof of worker’s compensation insurance from the care giver or the agency employing the TPCG.
- Check the TPCG’s references.
- Conduct a criminal background check. This can be done through the Illinois State Police or a variety of private security agencies.

- Check whether the individual has ever been determined to have committed abuse by checking the Illinois Certified Nurse Aide Registry.
- Check whether the individual has been excluded from participating in a federal program such as the Medicare and Medicaid Programs. The following two sites should be checked <http://epls.arnet.gov> & <http://oig.hhs.gov/fraud/exclusions.html>. If the care giver is employed by an agency, the employing agency should verify that it has screened all of its employees for possible exclusion.
- Require a written statement from a physician based on an exam within the last six (6) months that the TPCG is in reasonably good health and does not appear to be at risk of transmitting communicable diseases.
- Require proof of a non-reactive Mantoux test or negative chest X-ray as to tuberculosis from the TPCG.
- If the TPCG will be driving, the tenant may want to request a copy of a current driver's license and appropriate automobile insurance.

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