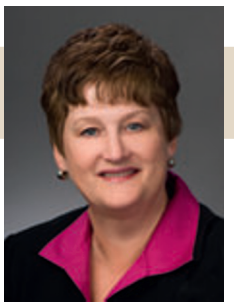
## Legal Issues



# Reducing Smoking Risks While Honoring Residents' Choices

**By Janet K. Feldkamp, JD, RN, LNHA**

Accidents and injuries can occur when residents smoke in postacute care settings. Skilled nursing and assisted living facilities increase this risk if they don't have good processes for allowing residents to exercise their right while ensuring safety for all residents.

Facilities may establish a smoke-free environment that applies to both residents and employees, if that action is taken pursuant to state laws and in consideration of resident rights. However, if a resident is admitted with the right to use tobacco, the facility must implement a safe and consistent process to allow the resident to exercise that right throughout the person's stay.

Significant injuries and deaths have occurred from smoking in postacute care and long-term care facilities. A television news story last August showed a 2011 videotape of a nursing home resident on fire at Lake Shore Healthcare and Rehabilitation. A security camera captured the man's shirt catching on fire while he was smoking on a patio outside the Chicago facility.

The resident ultimately died from the injuries, and the family has filed negligence litigation against the facility. Allegations include that the resident was not appropriately supervised during smoking and that there was a lack of appropriate response by the staff to the resident when he wheeled himself inside the facility after a lighter in his shirt pocket started the fire. Other residents attempted to put out the fire, but video shows a delay in assistance from the staff and a delay in resuscitation.

After the resident was sprayed with a fire extinguisher and was rolled back outside, the staff did not remain with him on the patio and returned several minutes later. Cardiopulmonary resuscitation was not initiated until the paramedics arrived on the scene, about 10 minutes after the fire was discovered. This video has been viewed by many on the Internet and will probably play a significant factor in the pending litigation.

### Stick to the Rules

A Virginia facility experienced the death of a resident when an ember of his cigarette started a fire in a garden area. A jury in Spotsylvania County awarded $1.45 million dollars to Joseph Roberts' family after it sued Carriage Hill Health and Rehab Center and alleged the facility was responsible for Mr. Roberts' injuries and death.

Carriage Hill had a no-smoking policy for residents on its campus but had admitted Mr. Roberts, knowing that he was a smoker and that he had violated Carriage Hill's no-smoking policy on a previous admission.

The wheelchair-bound resident was smoking unattended outside the facility when he was found on fire and lying on the ground. There were several suppositions as to how he was burned, including that the mulch at his feet caught fire first or his clothing did and that he fell out of his wheelchair. The court verdict indicated that a staff member knew the resident was leaving the building to smoke but let him go alone. Mr. Roberts's history of smoking despite

the ban, known to the facility upon his admission, was an important issue in the case.

## Supervision Is a Key

Another example of a smoking violation was reported in the Health and Human Services (HHS) Departmental Appeals Board case of Azalea Court (CR2134, May 25, 2010). The West Palm Beach, FL, facility was cited by the state's survey agency in 2008 when a resident was observed by a surveyor with a smoldering towel in his lap and a cigarette. Of note, this occurred while the man slept in his wheelchair, which was outside on a patio.

The facility was given an actual harm citation for failure to supervise the resident while smoking, even though he had a known history of unsafe smoking, including previously falling asleep with a lit cigarette in his mouth.

The facility had taken actions to supervise the resident and conducted an assessment of the resident's ability to smoke independently. Despite a number of medications that caused sedative effects and the fact that he was likely to go outside late at night to smoke, the facility determined that he was capable of being an independent smoker.

In the hearing, HHS asserted that the facility failed to provide necessary safety equipment such as fire extinguishers and smoking aprons. The facility was also cited for failure to designate an appropriate smoking area or to have smoking blankets in the areas in which the residents smoked. Also, the facility failed to reassess the resident, even though staff knew that the resident was not smoking in a safe manner. In addition, they failed to supervise the resident, despite this knowledge of previous unsafe smoking.

## Kick Bad Habits

If a facility allows residents to smoke, a number of safety practices and policies should be developed and consistently implemented. As noted in the Azalea Court case, the facility had a no-smoking policy and made it known to the resident at the time of his admission. However, staff failed to consistently reinforce the policy and stop the resident from smoking in an unsafe manner.

**Facilities that choose to allow smoking can reduce their risk by developing a practical smoking policy.**

Facilities that choose to allow smoking can reduce their risks of accidents and citations by developing a practical smoking policy that includes:

- Use of an assessment tool that takes into consideration many factors in determining whether or not a resident is safe to smoke independently.
- Triggers for reassessment, such as change of condition, certain behaviors, and time since the previous assessment.
- Attention to the appropriate clothing for residents when smoking either independently or under supervision.
- Assurance that those residents with portable oxygen are not in a smoking area.
- Education of residents, family, and staff regarding smoking policies and procedures.
- If a resident has been assessed as needing smoking supervision, a facility should consistently supervise smoking and never leave the person unattended while smoking or in possession of smoking materials and should monitor and control the smoking materials.
- Designate a smoking area or areas and make sure those areas are outdoors but with limited possibilities for strong winds and free of additional combustible materials, such as mulch or an accumulation of paper in smoking receptacles.

Staff should be trained regarding emergency response to smoking emergencies, and the facility should provide adequate amounts of appropriate safety equipment that may include:

- Smoking aprons.
- Smoking blankets for suppression.
- Appropriately placed fire extinguishers.
- Appropriate door openers to allow ease of entry to and egress from the smoking area.
- Smoking material receptacles that reduce the potential for fire.

*This column is not to be substituted for legal advice. The writer,* Janet K. Feldkamp, *practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff, LLP of Columbus, OH. You can comment on this and other columns at www.caringfortheages.com, under "Views."*