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DQA Memo 09-047

To: Nursing Homes

Supersedes DDES BQA 05-008
NH 24

From: Paul Peshek, Director
Bureau of Nursing Home Resident Care

Via: Otis Woods, Administrator
Division of Quality Assurance

**Changes in 2010 to WI Clean Indoor Air Act and Its Effect on
Nursing Home Smoking Policies**

Effective July 5, 2010 the Wisconsin Clean Indoor Air Act (section 101.123, Wis. Stats.) will prohibit smoking in all *inpatient health care facilities, including nursing homes*, within the state of Wisconsin. Nursing homes currently having a policy that allows smoking in designated area(s) within the facility will need to change this policy and will need to notify all residents of the change in policy. Nursing homes on or before that date will have two options: (1) to allow smoking in a designated smoking area outdoors or (2) to designate the entire campus as non-smoking.

This memo updates and replaces DDES-BQA-05-008, which was issued June 15, 2005. This memo is being sent at this time so that staff and residents can prepare for any changes that will need to be implemented by July 5, 2010.

Nursing homes will fall into one of the following four scenarios with respect to smoking:

- **Facility has a policy that currently prohibits smoking within the nursing home and on facility grounds.** The changes to the Wisconsin Clean Indoor Air Act (section 101.123(4)(a)1, Wis. Stats.) will not impact these nursing homes and no changes need be made to existing smoking policies.
- **Facility policy currently allows smoking only in a designated outdoor smoking area and the facility wishes to continue this practice.** The changes to the Wisconsin Clean Indoor Air Act will not affect these facilities and no changes need to be made to existing smoking policies. As an aside, please ensure that your designated outdoor smoking area is located in an area adjacent to the facility that is easily accessed and protected from the weather (e.g., covered, wall or fence on one side if there are winds typically from one direction, etc.). The area or areas must also protect nonsmokers from the potential hazards of second-hand smoke.

The Life Safety Code (NFPA 101, 2000 ed., 19.7.4) requires each smoking area be provided with ashtrays made of noncombustible material and safe design. Metal containers with self-closing covers into which ashtrays can be emptied must be readily available. Oxygen tanks are not allowed in the area and must be removed from residents before they are taken outside to smoke.

- **Facility policy currently allows smoking in designated areas within the facility and outside the facility and the facility wishes to continue to allow smoking outside.** Effective July 5, 2010, smoking within the nursing home is prohibited for all staff and residents. Current residents **are not grandfathered in terms of smoking inside** the building. Residents and staff may continue to smoke in designated areas outside the facility. (Considerations for outdoor smoking areas are explained above.)

Federal and state nursing home regulations require the nursing home to give oral and written notice of the change in the facility's smoking policy to the resident or legal representative in a language the resident or legal representative understands. (42 CFR 483.10(b)1 [F156]; 42 CFR 483.10(b)(11)(ii)(B) [F157]; HFS 132.31(4)(b), Wisconsin Administrative Code). The federal regulation at F156 also requires the nursing home to obtain written confirmation from each resident or legal representative acknowledging his/her receipt of the notice of a change in rules and regulations governing resident conduct and responsibilities.

- **Facility policy currently allows smoking but the facility wishes to become a nonsmoking campus.** If a nursing home changes past policy by prohibiting smoking altogether on facility grounds, this must be clearly stated in a revised admission agreement. The facility should notify the community, potential visitors, referral sources, and current residents of the change in smoking policy. Residents who are admitted on or after the effective date of the policy are subject to the restrictions of the smoking policy.

The nursing home must give oral and written notice of the change to the resident or legal representative in a language the resident or legal representative understands. (42 CFR 483.10(b)1 [F156]; 42 CFR 483.10(b)(11)(ii)(B) [F157]; HFS 132.31(4)(b), Wisconsin Administrative Code).. The federal regulation at F156 also requires the nursing home to obtain written confirmation from each resident or legal representative acknowledging his/her receipt of the notice of a change in rules and regulations governing resident conduct and responsibilities.

Current residents who smoke are considered grandfathered for outdoor smoking since they were admitted to the facility at a time when smoking was allowed on the campus. Guidance at 42 CFR 483.15 (b)(3)[F242] says, "...if a facility changes its smoking policy and prohibits smoking, it must allow current residents who smoke to continue smoking in an area that maintains the quality of life for these residents." This means that nursing homes that currently allow smoking indoors or outdoors will need to provide an outdoor smoking area for **current** residents even after it becomes a non-smoking campus.

For these residents, the facility must make reasonable **outdoor** accommodations. This

applies to all residents who were admitted at a time when smoking was allowed, including residents who transfer from one unit to another, and those who live on a closed unit, e.g., a locked, secured or supervised unit.

For any nursing home considering becoming a non-smoking campus, we would like to reiterate the advice provided in BQC-91-007 (January 30, 1991). While "we are all keenly aware of the dangers of smoking, we also recognize that many residents have smoked for years...and depriving them of the opportunity to smoke could be counterproductive to their welfare. We encourage consideration of the residents' rights issues and accommodations for those who wish to smoke, and strongly urge that prior to implementation of total smoking restriction in your facility, the psychological and social impact upon your residents be carefully reviewed." As you weigh the pros and cons of becoming a non-smoking campus, keep in mind that facilities, on the one hand, are responsible for finding "options that most meet the physical and emotional needs of each resident" (Guidance for 42 CFR 483.15 (g)(1)[F250]). Facilities are also responsible for accommodating "an individual's needs and choices for how he/she spends time, both inside and outside the facility." (Guidance for 42 CFR 483.15(d) [F245]).

Facility smoking policies: As you consider changes to facility smoking policies, the Bureau of Nursing Home Resident Care encourages facilities to develop written policies and procedures that clearly identify:

- whether smoking is allowed on facility grounds and, if so, where it is allowed;
- what accommodations for smoking are provided; and
- the type of staff assistance that will be given with smoking.

These policies and procedures should be clearly explained orally and in writing to all new or prospective admissions. A facility policy that clearly articulates smoking restrictions will allow potential residents to determine if they can abide by the conditions of the policy when they are considering admission. An explicit policy will also help deter or settle issues that might arise concerning smoking.

As you develop your policies, please keep the following in mind: **Some individuals who are admitted to a facility that permits smoking may have or develop serious physical, mental or cognitive disabilities. These residents do not lose their right to smoke because they need monitoring and assistance by facility staff for safety.** A facility's smoking policy, however, may provide reasonable limitations and restrictions on a resident's right to receive staff assistance to smoke (time of day, weather conditions, frequency, type of assistance that will or will not be provided, including assistance with the actual act of smoking, etc). The clearer the policy, the less likely that conflicts will arise later.

In all cases involving residents who are able to smoke safely and without assistance, staff must help transport the residents to and from the smoking area if the resident needs this type of assistance. This includes transporting residents living on a secure unit to and from the designated smoking area and **monitoring their whereabouts once at the designated smoking area.** The latter becomes particularly important since some residents who are escorted outside to

smoke will be residents with histories of elopement or wandering. For residents who are not able to smoke independently, facility policy may establish reasonable limitations and restrictions concerning the amount and type of staff assistance that will be given with smoking. Staff should ensure that no resident is allowed outside to smoke with an oxygen tank, regardless of whether the tank is running or shut off.

Smoking cessation programs: Nursing homes are responsible for providing assistance to residents who wish to quit smoking. F250 [42 CFR 483.15(g)] requires nursing homes to "provide medically-related social services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." Guidance at this regulation indicates that "Medically-related social services" means services provided by the facility's staff to assist residents in maintaining or improving their ability to manage their everyday physical, mental, and psychosocial needs." Smoking cessation products are part of the drug benefits available through a Medicare Part D Prescription Drug Plan. If payment is denied by Medicare, a claim for certain products can be submitted to Wisconsin Medicaid and BadgerCare Plus. Wisconsin Medicaid and BadgerCare Plus cover a small number of over-the-counter patches and nicotine chewing gum. They require a diagnosis restriction for smoking cessation when the drug claim is submitted to Medicaid.

Surveyors will determine whether a facility is honoring the right of residents to make choices about aspects of their lives in the facility that are significant to them in regard to smoking by evaluating how the facility's smoking policies are being implemented.

If you have questions, please contact your Regional Field Operations Director (RFOD) at the location and phone number below.

Southern Regional Office - Pat Virnig, Interim RFOD (608) 266-8886

Southeastern Regional Office - Jean Rucker, RFOD (414) 227-4563

Northeastern Regional Office – Dolores Zwiers, Interim RFOD (920) 983-3185

Northern Regional Office - Jessica Radtke, Interim RFOD (715) 365-2801

Western Regional Office - Kathy Lyons, Interim RFOD (715) 836-3030