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Director

State of California—Health and Human Services Agency
Department of Health Services



GRAY DAVIS
Governor

July 16, 2003

Joseph Hafkenschiel, President
California Association for Health Services at Home
723 S Street
Sacramento, CA 95814

Dear Mr. Hafkenschiel:

Thank you for your letter dated April 25, 2003 to the Department's Licensing and Certification Program (L&C) regarding the use of unlicensed assistive personnel in both licensed and unlicensed agencies providing services in patients' homes.

As you well know, L&C is responsible for licensing and certifying Home Health Agencies (HHAs) under state and federal laws and regulations. L&C consulted extensively with the Department's Office of Legal Services in researching the questions you posed and preparing appropriate responses to them. This letter will restate your original question and then provide L&C's response on a question-by-question basis.

Question 1: May an **unlicensed agency** provide a *licensed nurse* (registered nurse [RN] or licensed vocational nurse [LVN]) to render skilled services (medication set ups, diabetes testing, insulin injections, etc.) to patients in their temporary or permanent places of residence, if these services were not ordered by a physician?

Response: No. An unlicensed agency cannot provide a RN or LVN to render skilled services to patients in their temporary or permanent places of residence, whether or not the services were ordered by a physician. By providing the services of licensed nurses, an unlicensed agency is operating a home health agency, because its business activities come within the statutory definition of a home health agency in Health and Safety Code section 1727 (a). An unlicensed agency must either cease providing the services of licensed nurses or apply for, and be granted, a license to operate as a home health agency.

Question 2: May an **unlicensed agency** hire a *licensed nurse* as an independent contractor on per diem status to provide skilled services to patients in their temporary or permanent places of residence, if these services were not ordered by a physician? What about medication set ups, which should obviously be ordered by a physician?



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Licensing & Certification – Field Operations Branch
1501 Capitol Avenue, Suite 71.6054, MS 3001, P.O. Box 942732, Sacramento, CA 94234-7320
Internet Address: www.dhs.ca.gov

Response: No. An unlicensed agency may not contract with a licensed nurse to provide skilled services to patients in their homes on an independent contract basis. Regardless of how the unlicensed agency pays the licensed nurse, this business activity comes within the statutory definition of a home health agency. Additionally, the California Code of Regulations (CCR), Title 22, section 74652, subsections (a) and (b) state that entities providing or arranging for the provision of skilled nursing services (which includes employing an RN or LVN or obtaining the services of an RN or LVN who is not an employee), in order to fulfill the agencies' contractual obligations to promote the medical benefit of patients in their temporary or permanent places of residence are subject to licensure as home health agencies.

I have enclosed additional information regarding independent contractors in HHAs. This information is from CCR, Title 22, Division 1-Employment Development Department, Subdivision 1, Division 2.5, Chapter 1-4304.3 --Specific Application of Rules for Determination of Employment Status in the Home Health Care Industry.

Question 3: May a **state licensed agency** provide a *licensed nurse* to render skilled services to patients in their temporary or permanent places of residence, if these services were not ordered by a physician?

Response: Yes, at least for some services, such as nursing assessments. These services can be provided by a nurse without a physician's order. However, most skilled services are provided under a plan of treatment or plan of care established for each specific patient. A physician must review and authorize these treatment /care plans.

Question 4: May a **nurse registry** provide a *licensed nurse* to render skilled services to patients in their temporary or permanent places of residence, if these services were not ordered by a physician?

Response: No. A nurse registry may not provide a licensed nurse to render skilled services to patients in their temporary or permanent places of residence, whether or not these services are ordered by a physician, if the nurse registry is receiving payment for the services provided. The nurse registry may place a nurse to work in patients' homes without a physician's order, but the nurse (not the nurse registry) must be paid directly for the nursing services. The nurse registry receives its fee for placing the nurse, not for the services provided.

Question 5: May an **unlicensed agency** provide an *unskilled caregiver* (Certified Home Health Aide [CHHA], Certified Nurse Assistant [CAN], Personal Care Assistant, Companion, etc.) to render skilled services to patients in their temporary or permanent places of residence, if these services were not ordered by a physician?

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Response: No. An unlicensed agency may not provide an unskilled caregiver to render skilled services to patients in their homes because unskilled persons cannot provide skilled services.

Question 6: May a **state licensed agency** provide an *unskilled caregiver* (CHHA, CNA, Personal Care Assistant, Companion, etc.) to render skilled services to patients in their temporary or permanent places of residence, if these services were not ordered by a physician?

Response: No. A licensed home health agency may not provide unskilled persons to render skilled services to persons in their homes since unskilled persons cannot provide skilled services.

Question 7: May a **nurse registry** provide an *unskilled caregiver* (CHHA, CNA, Personal Care Assistant, Companion, etc.) to render skilled services to patients in their temporary or permanent places of residence, if these services were not ordered by a physician?

Response: No. A nurses' registry may not provide unskilled caregivers to render skilled services to persons in their homes since unskilled persons cannot provide skilled services. Furthermore, nurses' registries can place only nurses, and then only if the nurses are paid directly for the nursing services.

We will provide all of L&C's district offices with copies of this letter for their reference and use. Thank you for your patience while we researched the answers to your questions. If you have any comments or concerns, please call me at (916) 440-7372.

Sincerely,

Mark S. Helmar, Chief
Field Operations Branch-South

cc: L&C District Administrators and Managers,
Brenda Klutz, Denise Arend, Diane Ford
Darlene Taylor, Lori McLean, Scott Vivona
Marlys Huez, Belinda Whitsett
Joyce Johnston, Joseph Conkle.

Specific Application of Rules for Determination of Employment Status in the Home Health Care Industry

Title 22 – Division 1- Employment Development Department, Subdivision 1, Division 2.5, Chapter 1-4304.3

While determination of whether a “home health care professional” is an employee or an independent contractor in the home health care industry will be made generally by the rules set forth in

Section 4304-1, above, specific application of those rules to services of a “home health care professional,” as described in paragraph (b)(3) below, in the home health care industry is set forth in this Section 4304-3.

(b) Definitions:

The “home health care industry” covers any home health agency that provides for professional health services primarily for a client at a residence.

A “home health agency” means a public agency, private organization or subdivision of such an agency or organization which is primarily engaged in providing skilled nursing and other therapeutic services on a part-time or intermittent basis to patients in a place of residence used as the patient's home under a plan of treatment as prescribed by the attending physician, which meets the requirements of Titles XVIII and XIX, P. L. 93-603(7).

A “home health care professional” is a licensed, certificated, or registered person who is engaged by any home health agency in the home health care industry to provide any of the following professional health services primarily for a client at a residence, although services are occasionally rendered at health care facilities.

A “registered nurse” means a person licensed in the State of California by the Board of Registered Nurses.

Basic Guidelines:

- 1) Written contracts and agreements. Generally, when a home health care agency and a home health care professional agree to be independent contractors, an “independent contractor agreement” is signed. When an independent contractor agreement is signed, it shall be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not be evidence of the intent of the parties to the agreement.

- 2) Home health care agency's policies. Since Title 22 of the California Administrative Code and Title 42 of the Code of Federal Regulations require the agency to ensure that treatment and care given to a client by a home health care professional are medically appropriate and actually required, it is expected that each agency will have policies which are required for the protection of clients and which must be binding upon all home health care professionals. Such policies, including the selection of treatment and/or forms required by government agencies shall not be considered evidence of an employment relationship between the agency and the home health care professional. An agency's policies relating to the manner and means of performing services that extend beyond those required by statute or government regulation or procedure shall be evidence of the exercise of a right to control the manner and means by which a home health care professional performs services.
- 3) Assignments other than licensed activities. If a home health care professional is expected by the agency to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Attendance at conferences on the multidisciplinary treatment of a particular patient or patients is not the type of activity, which indicates employment. Attendance at initial orientation conferences for the purpose of assuring the agency that a home health care professional understands how to use and fill out clinical notes and medical record forms and billing forms required by law shall not be evidence of employment.