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Director

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



ARNOLD SCHWARZENEGGER  
Governor

February 9, 2009

DOM 09-01

**TO:** District Office Managers and Supervisors  
Licensing and Certification Headquarters Managers

**SUBJECT:** Exemptions from Producing Documents or Testifying When Functioning as an Employee on Behalf of the Federal Government

This DOM addresses federal regulations, which became effective October 15, 2008. “Employees of a state agency performing survey, certification, or enforcement functions under Title XVIII of the Social Security Act (i.e. Medicare) are considered to be HHS employees for this purpose. §45 C.F.R. 2.2”. Federal employees have long been immune from having to testify in state courts concerning information they acquire in the course of performing official duties.

Being considered an employee of the federal Department of Health and Human Services will generally exempt Licensing and Certification (L&C) current and former staff from producing documents demanded under subpoena or appearing in court to testify in civil matters if the L&C employee was performing federal activities under the 1864 Agreement, such as federal surveys or federal complaint investigations. This exclusion would also apply if the L&C employee was conducting a combined federal and state investigation, such as a Skilled Nursing Facility licensing survey combined with the recertification survey or complaint survey where both federal and state enforcement tracks are used.

However, when an L&C employee conducts a state only survey or complaint investigation, then this exclusion will not apply.

When a subpoena or request to appear in court appears, a letter must be sent to the requesting party (sample letters enclosed), which states that when performing duties for a federal agency, no Department employee may provide testimony or documents which are obtained in the course of performing their duties for the government.

District Offices are advised to follow-up with the attorney 2-3 days after this letter is sent to see whether the attorney has withdrawn the subpoena. In most cases, the subpoena will be withdrawn, but in the event it is not, the Centers for Medicare and Medicaid

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Services Regional Office must be notified so their General Counsel can weigh in on the matter.

Should you have questions about the contents of this memorandum, please contact your Branch Chief.

Sincerely,

**Original Signed by Kathleen Billingsley, R.N.**

Kathleen Billingsley, R.N.  
Deputy Director  
Center for Health Care Quality

Enclosures