

CLIENT ALERT

Nursing Homes Again in the Regulatory Hot Seat: COVID-19 Spurs CMS to Increase Infection Control Survey Penalties

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Earlier this month, the federal Centers for Medicare & Medicaid Services (CMS), which oversees nursing home care and surveillance nationwide, announced that it was increasing the penalties for a single infection control deficiency found at a nursing home from between \$1,000 and \$10,000 to between \$10,000 and \$20,000. Thus, while still trying to fend off COVID-19 in their facilities, nursing homes must now focus attention on preparing for the ensuing government surveys assessing their response to the pandemic, under the prospect of enhanced civil money penalties. Notably, the results of the infection control surveys along with data reported to CMS on COVID-19 deaths are now also being posted to the federal “Nursing Home Compare” website.

This latest regulatory action comes against the backdrop of increasing scrutiny of the response of nursing homes to the presence of COVID-19 in their facilities. The risk factors for COVID-19 are in full evidence in nursing homes – older, medically compromised residents receiving care as well as living, dining, recreating, and socializing together in a congregate setting. Those elements have created what one industry leader has aptly described as the “perfect storm” for the spread of the disease, with adverse outcomes, in nursing homes across the country. Not surprisingly, as the coronavirus has ravaged the nation, more and more coronavirus cases and deaths from COVID-19 have been reported among nursing homes. According to CMS data reported as of June 1, there have been 26,000 deaths from COVID-19 in nursing homes throughout the country (~108,000 deaths overall nationwide).

However, while the public has shown much empathy for the staff caring for infected or symptomatic COVID-19 patients in hospitals, the reception offered to senior care providers, on the front lines of combating the coronavirus among the most vulnerable, has been at best mixed, with reactions to reported cases and tragic resident deaths ranging from sympathy to scorn.

Nursing Homes In CMS Cross Hairs During Coronavirus Crisis. Since March of this year, CMS has suspended its regular annual surveys and complaint investigations – with the notable exception of “immediate jeopardy” situations and enforcement of infection control regulations at nursing facilities with COVID-19 cases. Then, on June 1, CMS announced (i) that funding to States under the Coronavirus Aid, Relief and Economic Security (CARES) Act will be tied to performance on infection control surveys and (ii) that the penalties for infection control-related survey deficiencies will be dramatically increased.

To induce States to ramp up infection control surveys, any States that fail to complete such surveys for all nursing facilities within their States by July 31, 2020 will be required to submit a corrective action plan for doing so within 30 days. If, after this 30-day period, States still have not completed 100% of the surveys, CMS may reduce the funding received by the States under the CARES Act by up to 10%. Subsequent 30-day extensions could result in additional reductions of up to 5%, with the funds originally allocated for these States to be redistributed to those States that have completed 100% of these surveys.

Enhanced Survey Penalties. Under the new, enhanced penalty scheme, nursing facilities now face penalties for deficiencies amounting to substantial non-compliance (a scope and severity of “D” or above) ranging from (i) up to \$10,000 per deficiency if

there was a prior citation in the last year, and (ii) up to \$20,000 per deficiency if there were two or more citations in the prior year. Even if a facility was not cited for an infection-control deficiency in the prior year, the State survey agency must impose a directed plan of correction as a result of any infection control deficiency cited in this year's survey.

In addition, States must perform surveys, on-site, at any nursing homes that have had either: (i) a COVID-19 outbreak (defined to include confirmed cases of 10% of bed capacity or confirmed plus suspected cases of 20% of bed capacity), with those surveys to be completed by July 1, 2020; (ii) three or more new COVID-19 suspected and confirmed cases since the last "National Healthcare Safety Network" COVID-19 report, to be completed within three to five days of identification; or (iii) one confirmed resident case in a facility that was previously COVID-19 free, also completed within three to five days.

Steps to Mitigate the Risk of Survey Deficiencies

With infection control surveys inevitable, and more consequential, nursing homes can prepare for, and potentially mitigate the risk of negative survey results. Some steps to consider include:

Perform the CMS Recommended Self-Assessment Tool. On May 6, 2020, [CMS issued updated guidance](#) to State survey agencies for infection control surveys during the coronavirus outbreak that included an assessment tool (COVID-19 Focused Survey for Nursing Homes) to be used by the surveyors. Notably, CMS encourages nursing facilities to voluntarily use the tool to assess the adequacy of their infection control and prevention measures. Nursing facilities can utilize the CMS self-assessment or other comparable State or trade-association tools and develop a plan for remediating any noted deficiencies.

Train Staff, and Document Training, on New Guidance. CMS as well as State survey agencies, along with the federal Centers for Disease Control (CDC), has promulgated a barrage of continually evolving guidance memoranda and directives to facilities and surveyors. The guidance materials offer a window into the government's priorities and expectations on any subsequent survey or investigation. Facilities should have a process in place for tracking, training on, and incorporating the evolving guidance into their infection control protocols, in "real time."

Secure, or Attempt and Document Efforts, to Procure Available PPE. As any new COVID-19 outbreaks occur, nursing facilities may face periodic shortages of N95 masks, face shields, gowns and other supplies needed by nursing home staff to safely treat residents infected by COVID-19 or other pathogen despite best efforts to build up inventory. Whenever a facility does experience a shortage, it will be critical to document diligent, continual efforts to secure the PPE from all available sources, through supply chain networks or on the market.

Conduct and Document Staff and Resident Testing, Etc. and Other Regular and Extraordinary Infection Control Measures. The familiar adage in health care enforcement goes, "if it is not documented, it did not happen." Every one of the steps being taken to prevent and contain the spread of the coronavirus at your facility should be documented. This is so, especially with efforts to secure mandated tests for residents and staff. What is more, any lapse in documented quality assurance meetings or implementation of the facility's infection control policies may be cited as a deficiency, notwithstanding the multiple infection control measures the facility may have improvised specifically to address the coronavirus threat.

Steps to Manage the Survey

There are also several steps that nursing facilities can consider taking once the surveyors come knocking.

Designate A Survey-Team Contact Person. A nurse manager or senior staff member can serve as the contact person during the survey to interface with the survey team and channel all of the surveyors' document or information requests.

Record the Survey Team's Activities. Where possible, document any observations or comments made by the surveyors while onsite; the discrete areas, units, rooms, and residents visited by the surveyors; and the dates and times of their daily arrival and departure from the facility; as well as any surveyor requests for, and responses to, documents and information.

Debrief Staff after Surveyor Interviews. To the extent that the surveyors speak with any staff, consider debriefing those staff members afterwards about the topics covered and more importantly on any information or documents requested by the surveyors – without interrogating the staff in a manner that could be perceived in any way as intimidating, threatening, or punitive to the staff.

Memorialize the Exit Conference. Make a contemporaneous memorandum of the mandatory exit conference conducted by the surveyors, including the specific findings shared at the conference and any references made to alleged deficiencies that would constitute "immediate jeopardy" or substandard quality of care, as removal of an immediate jeopardy must be achieved and confirmed by the surveyors within a very short window – 21 days from the exit conference – in order to avoid the sanction of program termination.

Manage Public Relations. If your facility is cited for immediate jeopardy or substandard quality of care over alleged lapses in infection control and intends to timely remediate and/or contest the findings, consider having ready a statement for the press to be able to respond to inquiries that, respectful of resident privacy, fairly expresses your facility's commitment to resident health and safety and infection control.

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In these extraordinarily uncertain times, nursing homes are still on the front lines fighting for the safety of their residents. Facilities, however, not only have to battle a lethal and highly contagious virus, they also should be preparing themselves for the arrival of surveyors now armed with substantial, enhanced penalties for any cited deficiencies. Crowell & Moring's experienced counsel can help you navigate through these difficult legal challenges.

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