

Long-Term Care Survey Alert

Abuse Reporting: Beware Federal Stance On Abuse Reporting Requirements

CMS clarification ignites new survey worries ... here's how to navigate the uncertainty.

To report or not to report abuse allegations is a quandary that recently became more clear - and also more fraught with survey danger.

The **Centers for Medicare & Medicaid Services** says nursing facilities must immediately report "alleged violations" of abuse, mistreatment, neglect, including injuries of unknown source, and misappropriation of residents' property to the facility administrator and to state officials in accordance with state law. The phrase "in accordance with state law" refers only to which state officials will receive the report of allegations, which must go to the state survey agency in all cases, CMS says.

Reporting allegations "immediately" means as soon as possible but ought not exceed 24 hours after discovery of the incident (in the absence of a shorter state-mandated timeframe for reporting).

The agency issued the directions in a memo to state survey agencies (S&C 05-09), effective Jan. 15, 2005.

Federal Regs Supercede States'

"The memo could be read as saying that federal laws, as interpreted by the memo, establish abuse reporting requirements in all states," says attorney **Martha Meng**, partner with the law firm of **Murtha Cullina LLP** in New Haven, CT. And Meng says that interpretation flies in the face of what most everyone in the industry believed it to be.

"Many health care attorneys seem to think that CMS is taking a very expansive position and one that is not consistent with state reporting rules as we thought we understood them," agrees **Joanne Lax**, attorney with **Dykema Gossett** in Bloom-field Hills, MI.

Currently, some states do require facilities to report every allegation of abuse, but others define reportable allegations more narrowly. "In Tennessee, for example, state reporting guidelines don't include allegations that the facility investigates and finds to lack merit," says **Chris Puri**, legal counsel for the **Tennessee Health Care Association**.

In fact, some legal experts question whether CMS had the authority to make the interpretive change via a memo to state survey agencies. But CMS apparently takes a different view: "The information in CMS memo is really nothing more than clarification for regulations that have been in place for at least a decade," a CMS official tells **Eli**. "We know that some states are already requiring nursing facilities to report all allegations of abuse," adds the official. CMS issued the clarification, in fact, in response to some "pointed questions" from states about the issue, the official notes.

The bone of contention has to do with the meaning of the phrase "in accordance with state law," which many believed applied to a provider's obligation to report allegations of abuse. But the phrase "in accordance with state law" has been in the regulation since its inception even though some states are reading it differently than the intent, says the CMS official.

"And if you look back at the preamble and the intent of the regulation, the phrase is really addressing situations where a state had some regulations about where to send allegations in addition to the state survey agency," the official adds.

"But the federal requirement says the allegation has to be sent to survey agencies regardless of what state law says, for example," continues the CMS official. "Federal requirements supercede state ones when the former are more stringent."

Tougher Survey Landscape?

The memo appears to essentially raise every allegation of abuse to the level of being a survey issue, observes Puri.

For example, facilities still have five working days to report results of their investigation to the state survey agency, but would have to report the allegation within 24 hours, according to the memo. And because the facility is initially reporting an allegation, there could be no significant investigation beforehand. Even so, the report would get the ball rolling in terms of getting the allegation into the ASPEN Complaints/Incidents Tracking System (ACTS) as a complaint against the facility.

The reported allegation could also trigger a complaint survey in some states. Survey agencies can talk with a facility about an abuse allegation and then decide whether to conduct a complaint survey, the CMS official says.

Read the memo at <http://www.cms.hhs.gov/medicaid/survey-cert/sc0509.pdf>

Use Forensic Wound Identification Principles

The memo does contain some helpful language that clarifies facilities' obligation to report only injuries of unknown origin that the resident can't explain or that are suspicious, says Puri.

The question is whether surveyors will question a facility's judgment that a bruise wasn't suspicious. Thus, facilities should develop best practice assessment and investigation protocols for injuries that residents can't explain, Puri advises.

"When dealing with injuries of unknown origin, facilities may find it helpful to have policies and procedures that incorporate assessment based on basic wound forensic principles," agrees Lax.

In addition, facilities should use standardized, accurate terminology to describe injuries of unknown source, Lax advises. "For example, make sure not to use the term 'skin tear' indiscriminately," she adds.

For a rundown of wound terminology surveyors may use, view the archived Oct. 31, 2003 CMS surveyor training Webcast, "Forensic Wound Identification and Documentation," at cms.internetstreaming.com.

The Webcast differentiates, for example, between bruises and ecchymoses and discusses "patterned injuries" that mirror the object that caused them.

Tips: As part of daily skin assessment, look for and document every little bruise or scratch in a nursing note, so there's a paper trail, advises **Daniel Sheridan, RN, PhD**, a forensic nurse specialist with **Johns Hopkins School of Nursing**. "And always investigate bruises in different stages of healing in total care patients." (For more forensic wound identification tips, see the December 2004 Long-Term Care Survey Alert.)

Address Conflicts Between Federal, State Requirements

By virtue of the fact that states had different interpretations as to what were reportable allegations and what "immediately" meant for reporting (which CMS now defines as within 24 hours), the **American Health Care Association** thinks the memo may lead to changes, says spokesperson **Janet Myder**, director of regulatory systems for the trade group.

"Thus, whether it's a new policy or a new interpretation of regulations or firmer enforcement, it's still going to be a change in some states," predicts Myder.

To deal with potential inconsistencies between the federal and state reporting requirements, facilities should work with their state and national trade associations and state survey agencies to get clarification about how CMS' policy clarification/revisions will play out in their state. AHCA will be looking into how any changes will affect nursing facilities. "Whether CMS is also looking into that, we don't know at this point," says Myder.