

Long-Term Care Survey Alert

F-Tags: Take The Lead On Your Residents' Advance Directives Or Risk Regulatory Fallout In 2013

Watch for any conflicts between patient and family members on desired care giving and outcomes.

Are you sure your residents understand the important fundamentals of advance directives and advance care planning? If you can't answer that question with certainty, beware. This year, surveyors will be walking through your door with a fresh take on what constitutes compliance under F-tag 155 (Advance Directives).

Background: Last fall, the **Centers for Medicare and Medicaid Services** unveiled an advance copy of its revisions to its surveyor guidance for advance directives in Appendix PP of the State Operations Manual (S&C 12-47-NH). Although the regulatory language remains the same, CMS issued plenty of red ink (read: new instructions) about how surveyors are to determine nursing homes' compliance with regulation 483.10(b) (4) and (8), Rights Regarding Treatment and Advance Directives. In addition to spelling out new guidelines for compliance, CMS armed state survey agencies with 100-plus pages of surveyor training packet related to the regulation.

That renewed focus and training should prompt providers to carefully review CMS's new expectations regarding the regulations, urges **Janet Feldkamp**, a Columbus, Ohio-based attorney with the law firm **Benesch** and a former surveyor, nursing home administrator, and director of nursing.

Define Success Using New Guidance

To fare well at survey time, review the new guidance with a critical eye, with careful attention to the fine points.

"Focus on the definitions," coaches Feldkamp. The definitions frequently set the tone for the revised CMS guidance, she explains, and can give providers clues to the concerns most central on the agency's radar.

Case in point: The guidance defines "advance directives" as "a written instruction, such as a living will or durable power of attorney for health care, recognized under state law...relating the provision of health care when the individual is incapacitated." Notably, the slightly revised definition adds that state law can include "statutory [law] or [law] as recognized by the courts of the State." Further, it adds that "Some States also recognize a documented oral instruction."

That specificity supports the notion that surveyors will be casting a more critical eye on what you're doing to comply with regulations pertaining to advance directives. In addition, the guidance suggests that it might pay to familiarize yourself in broad terms with court cases involving advance directives in your state.

To refine your understanding of "advance directive" under CMS's new guidance, however, it's best to read on beyond the agency's initial and official "definition." Later in the guidance, CMS stipulates that an advance directive could be anything from a living will or durable power of attorney for health care to "a directive to the attending physician," a pre-existing medical order for "do not resuscitate," or any other "document that directs a resident's health care."

Be Proactive

To be on the safe side, work with each new resident to clarify his or her wishes. In fact, the new guidance clarifies that facility administrators, medical directors, nurse managers, and residents' personal physicians all play a critical role in ensuring residents are informed about advance care planning: "In order for a resident to exercise his or her right to make knowledgeable choices about care and treatment or to decline treatment, the primary care provider and facility staff should provide information (in a language and terminology that the resident understands) to the resident and or his/her legal representative regarding the resident's health status, treatment options, and expected outcomes," the revised

guidance reads.

Document this: The guidance goes on to declare specifically that "discussion and documentation of the resident's choices regarding future health care should take place during the development of the initial comprehensive assessment and care plan and periodically thereafter."

Furthermore, the guidance requires that facilities, "provide, at the time of a resident's admission, written information concerning the resident's rights to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives."

Beware conflicts: Try to be proactive if you perceive discord between family members and residents regarding desired care and outcomes, cautions **Joseph Bianculli**, healthcare attorney based in Arlington, Virginia.

One facility recently had to fight off an immediate jeopardy citation for purportedly not following a "no code" (do-not-resuscitate) directive. Although an advance directive stipulating a "no code" order was in place, the facility staff performed CPR when the resident went into cardiac arrest after choking on food -- responding in part to the resident's wife's urgent bedside pleas to "Save him."

Many situations are similarly complex, says Bianculli. In this case, the citation was dropped after informal dispute resolution, in part because the "no code" instructions in the advance directive were intended to be valid only in a situation in which the resident's decline left him unable to make his own medical decisions.

Communication Is Key

Among other policies and procedures, the CMS surveyor revised guidance notes that facilities must "establish mechanisms for documenting and communicating the resident's choices to the interdisciplinary care team." That need for communicating a resident's wishes to all is vital, especially when multiple players are involved.

Hospice hot spot: A hospice provider that provides care within a nursing facility should know that it is subject to F-tag 155 citations as well.

"Hospices who are providing care to patients in nursing facilities could be cited for compliance with nursing home requirements and F-tags along with a citation to the nursing home," cautions the National Hospice and Palliative Care Organization in a recent update.