

Long-Term Care Survey Alert

Legislative Trends: Be Aware of These 2 Healthcare Reform Legislation Measures

Wannabe whistleblowers may soon be trolling your survey records for a qui tam case.

The healthcare reform bill provides a new roadmap for your survey management efforts -- one with a few twists and turns. Here's a rundown of what's coming down the pike.

1. A more give-and-take approach to survey civil monetary penalties. Currently a facility's survey fines are stayed until the facility receives a ruling in a hearing, including a federal court appeal, if the facility takes its appeal that far, according to attorney **Neville Bilimoria**, with Duane Morris LLP in Chicago.

Under the new legislation, however, the Health & Human Services Secretary is authorized to place facilities' CMPs for actual harm and immediate jeopardy level citations in escrow. This would occur after the facility completed informal dispute resolution or 90 days after the CMPs were imposed, whichever came first, according to a summary of the bill by the American Association of Homes & Services for the Aging. If a facility won its appeal, it would get its CMP back with interest. In cases where the facility lost its appeal, a portion of the CMPs could be used to pay for activities that benefit residents, including facility improvement efforts approved by the HHS Secretary.

Another provision in the new law allows CMS to discount CMPs for a self-reported deficiency by up to 50 percent when a nursing facility corrects the deficiency within 10 calendar days of the date of the CMP. (The provision doesn't apply to actual harm or IJ deficiencies.) Attorney **Joseph Bianculli** finds the CMP discount provision to be "peculiar" in that "most rational facilities promptly identify and correct errors and omissions" when they are aware of them. That's why, many, if not most serious deficiencies, "come as unwelcome surprises."

Bianculli is thus unsure how CMS will interpret and apply that provision: "It's conceivable, for example, that CMS might read it narrowly to apply only to self-reported incidents." Or CMS could apply the provision to any citation that a facility conceded and fixed quickly, he adds. The CMP escrow requirement and discount option go into effect in a year following the legislation's enactment, according to an American Health Care Association overview of the reform bill.

2. A free-for-all for qui tam lawsuits. Effective on March 23, 2010, the reform legislation "lifted the bar for qui tam relators to use public documents to bring a whistleblower lawsuit under the qui tam provisions in the False Claims Act," reports Bilimoria. Previously, the whistleblower had to be the original source of the information about the nursing home, he adds. Although the measure actually applies to all providers, Bilimoria predicts nursing homes will be hardest hit. As Bilimoria sums it up: "If surveys can be used as a basis for a qui tam lawsuit -- look out."

Proactive strategy: "It's more important than ever for facilities to challenge survey findings through IDRs and hearings," stresses Bilimoria. (For inside tips on doing IDR and appeals, check out the next Long-Term Care Survey Alert.)