

Long-Term Care Survey Alert

READER QUESTION: Do ALJ or DAB Rulings Indicate Whether IJ Citations Should Involve Actual Harm?

Question: I'm a new administrator for a nursing home and am surprised that we can get an immediate jeopardy citation for an issue that doesn't really cause harm. Are there any administrative law judge rulings or Departmental Appeals Board decisions that say that immediate jeopardy citations should involve actual harm to one or more patients? Also have ALJ or DAB rulings addressed how theoretical the potential for harm has to be in order for surveyors to cite IJ?

-- Pittsburgh reader

Answer: "Several years ago the Departmental Appeals Board issued a decision that suggested that immediate jeopardy may not be based on a 'potential for harm' deficiency," reports **Joseph Bianculli**, an attorney in private practice in Arlington, Va. Yet the Board has made "crystal clear in numerous subsequent rulings that immediate jeopardy may be based on potential for harm citations," he adds.

And "unfortunately, there are many decisions, including some upholding immediate jeopardy citations, where the asserted potential for harm is extremely remote, to the point of being speculative or hypothetical ...," Bianculli adds.

"The Board loves to hold that the asserted noncompliance is of the sort that 'could' cause harm, and that this standard is enough to impose sanctions."