Long-Term Care Survey Alert

Reader Question: Does Potential Harm Open The Door To Immediate Jeopardy?

Question: Our facility got cited for immediate jeopardy for a situation that didn't involve actual harm - just the potential for an elopement risk (a door to a dementia unit that required staff to enter and exit by keying in a code failed during a survey). How can we get cited at a K level when a G-level deficiency requires "actual harm?" to have occurred?

Answer: The Code of Federal Regulations defines "immediate jeopardy" as "a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment or death to a resident," notes attorney **Ari Markenson, JD, MPH**, with **Epstein Becker & Green** in New York City.

Additionally, only one resident needs to be at risk for a surveyor to cite a deficiency at an IJ level, according to the **Centers for Medicare & Medicaid Services**. "However, the risk should not be a far-fetched theory but a real risk," Markenson adds.

For example, toxic mold found in a facility's HVAC system is one potential example of what surveyors might view as a risk-based IJ citation. "While there is no evidence of harm to a resident currently, any expert would agree that the risk to residents is serious and widespread,"says Markenson.

"There is essentially little difference in scope and severity for a lower level (D, E or F deficiency) and one at Level IV when it comes to the potential for harm," says attorney **Marie Infante** with **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo** in Washington, DC.

"In survey guidance in Appendix Q of the State Operations Manual, CMS addresses the issue of how immediate jeopardy applies to situations where the resident didn't suffer actual harm," adds Infante.

To review immediate jeopardy triggers, see Appendix Q at www.cms.hhs.gov/manuals/107_som/som107ap_q_immedjeopardy.pdf.