

Long-Term Care Survey Alert

Reader Question: Is CMS F441 Glucometer Example Revision a Get Out of IJ Free Card?

Legal experts provide the good and bad news.

Question: You noted in the last issue of Long-Term Care Survey Alert that CMS revised the F441 survey guidance in Appendix PP to remove the example of failure to clean glucometers between patients as immediate jeopardy. In a survey and certification memo, CMS says the practice "may not constitute immediate jeopardy." Does CMS' change to the interpretive guidelines give facilities cited with IJ for failing to clean glucometers any recourse? Will it help a facility that currently has an IJ citation for that issue and plans to challenge it at informal dispute resolution (IDR) or an administrative law judge hearing?

Answer: "If a facility recently got cited for IJ [for failing to clean a glucometer in between patients], it certainly could use the change in the interpretive guidance for F441 at IDR or as part of its appeal," says attorney **Chris Lucas**, in Mechanicsburg, Pa. The scope and severity of the citation, however, could depend on the facts of the case. "For example, it would be different in a situation where someone took a [glucose] reading on a patient on isolation for HIV and failed to clean the glucometer before using it on the next patient."

Whatever the situation, "blood remaining on the device is a culture for airborne bacteria. Any body fluids should be cleaned from any surface," Lucas points out. As for requesting CMS to reconsider a previous IJ citation: Attorney **Joseph Bianculli** in Arlington, Va., notes that "42 CFR 498.30 provides that CMS 'on its own initiative may reopen' any determination to impose a sanction within 12 months after issuing the initial notice, whether or not an appeal has been filed." He notes that "settlements of pending appeals fall under a different regulation."

"A revised determination triggers a new appeal right," says Bianculli, who notes his firm has handled several cases in which CMS unilaterally reopened and withdrew penalties, both during appeals and otherwise. "Obviously, CMS' incentive to do so is greater if there is an appeal pending that it might lose," Bianculli continues. "But in this circumstance, where the substantive basis for a sanction has been changed ... it would be appropriate for a facility that was cited and sanctioned under the nowrescinded interpretation to request reopening."

Chicago attorney **Neville Bilimoria** says his "gut reaction is that if a facility were cited with an IJ before the change to Appendix PP was made, the facility might have a hard time overturning the IJ." A facility's chance for getting it overturned would depend on the statement of deficiencies and whether the IJ findings included other problems with infection control practices or how the facility handled the glucometer, he adds. "CMS could also say that the revised guidance wasn't in effect at that time of the survey or that the IJ was based on the entire survey." Even so, the change to "Appendix PP is a possible argument the facility could make if it received a prior IJ for failure to clean the glucometer between patients," Bilimoria adds. And if a facility gets an IJ citation for that practice in the future, it should definitely bring up the revised F441 survey guidance at IDR -- or even talk to surveyors about it during the survey or exit interview, he says.