

Long-Term Care Survey Alert

Survey Appeal Provisos: CMP "Discounts" and "Independent" Appeals? Let the Buyer Beware

Weigh your options before you appeal.

Any survey deficiency linked with a civil monetary penalty (CMP) now opens a new pathway to appeal □ but don't move forward with a false sense of security. Although streamlined and "independent," the new appeals process is not necessarily designed to benefit nursing homes, experts agree.

Background: On December 2, 2011, the Centers for Medicare & Medicaid Services (CMS) released Survey and Certification Memo 12-08-NH, ushering in several important survey enforcement provisions for Medicare-certified skilled nursing facilities under the authority of the federal Affordable Care Act. A recently released Survey and Certification memo (S&C-13-57-NH, issued on August 30) further changed the playing field extending the provisions to a broader array of enforcement actions.

The new need-to-know provisions are as follows:

(1) Effective October 1, any CMP imposed on a nursing facility is subject to the escrow requirement set forth in the Affordable Care Act. That is, CMPs are subject to "timely collection and escrow." Initially, only CMPs imposed for deficiencies at an "actual harm" or "immediate jeopardy" level (G level or higher) were subject to the escrow requirement, but that requirement, in effect since January 1, 2012, has now been extended to any CMP levied against a Medicare-certified skilled nursing facility.

(2) In addition, nursing homes can now opt to appeal any CMP-linked deficiency through the relatively new process: independent informal dispute resolution (IIDR).

The provisions apply to Medicare-certified skilled nursing facilities, Medicaid-certified nursing facilities, and dually participating facilities.

Too Good to be True?

At first glance, the "opportunity" to fend off a hefty, due-immediately CMP using the IIDR route may seem to offer nursing homes a faster, more direct way to contest a CMP □ an important consideration especially given the current requirement escrow funds covering the CMP amount.

Before: Before the Affordable Care Act's escrow requirement, facilities faced with survey-related fines sometimes literally had years to ante up. That's because payment wasn't due until the often lengthy appeals process was exhausted.

After: Under the new enforcement process, facilities that opt for IIDR gain a short reprieve because the fine is not subject to escrow until the IIDR process is complete. Furthermore, facilities may be hopeful that an IIDR finding will be in their favor, even if that sentiment is likely misplaced.

Adding to the illusion that IIDR is likely to benefit facilities is the fact that states are not allowed to charge for the IIDR process; it is free. Before the IIDR pathway, nursing facilities had two ways to appeal, the original, relatively lengthy, version of informal dispute resolution (IDR) administered by the state survey agency and an even more complex and costly appeals process directly with CMS. Both are still available, though in most cases, IIDR, if elected, will preclude the IDR option.

Reality check: So what is a facility to do? Legal experts urge caution.

"CMS devised the IIDR process because it thought that the IDR process was too generous to nursing facilities," warns veteran long-term care attorney Joseph Bianculli.

In a report on the topic, *One Too Many Roads*, health care attorney Jeannie Adams of Hancock, Daniel, Johnson & Nagle, PC, in Richmond, Virginia, opines: "SNFs and their counsel that are unaware of the new appeals parameters or are unable to navigate the analysis of which process to invoke and when will be left standing behind with survey deficiencies that may be at best inaccurate and worse devastating from an operational, financial, and public relations standpoint."

Bianculli agrees. Fighting an unwarranted CMP is only one factor to consider in deciding whether to appeal an unfair survey judgment, he reminds providers.

"The CMP is often the least of a provider's worries. If you don't contest a bad survey finding, you could be opening the door to a plaintiff's lawyer and a personal injury case," says Bianculli. By appealing the CMP, you at least get discovery going, he explains. "If you are later faced with civil litigation, it can be a big plus to be able to say, 'We have this appeal going,'" he says.

The ACA factor: Also worth weighing is a related decision forced on facilities by the Affordable Care Act: Whether to secure a 35-percent reduction in an imposed CMP by waiving the right of a full appeals process.

"I have several clients who are already experiencing buyer's remorse," after taking CMS up on the offer of the penalty discount, reports Bianculli.

In addition to a potentially damaged reputation and increased liability, such survey strikes could come back to haunt you, in extreme cases even leading to decertification. Special focus facilities have to be especially vigilant, cautions Bianculli: "If you fail your last-chance survey, CMS can shut you down for a G-level citation."

Resource: For more information on this topic, see S&C: 13-23-ALL, FY2013 Sequestration Adjustments for Survey & Certification, issued April 5, 2013, and available at www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-23.pdf.

Ask The Right Questions

Factors to weigh in managing the new enforcement provisions to your advantage include the following:

1. **Is the IIDR option open to you?** States must include the offer of IIDR in all CMP imposition notices. But it is up to you to initiate the process if you feel that it is to your advantage. Facilities have a 10-day window from the imposition of a CMP to opt into the IIDR process.

2. **What do you know about your state's IIDR process?** Bianculli cautions that many states have outsourced administration of the IIDR process to quality improvement organizations or other bodies with little knowledge of long-term care. "From what we have seen so far, [IIDR] is pretty universally bad." cursory consideration of your case by a less-than-stellar panel could easily translate into a CMP that sticks and a damaging blow to your facility's reputation.

The outsourcing, especially to quality improvement organizations, isn't surprising, given CMS's motivation to create a review process "independent" of the state survey agencies, which CMS sees as having a record of deciding too frequently in facility's favor.

3. **Who is involved in the case?** If you are at all concerned that the deficiency involves a family or resident with the litigious leanings, you should steer clear of IIDR. That's because it is linked with a requirement that the state notify in writing the long term care ombudsman and any involved resident or his or her legal representative of the case. Furthermore, the ombudsman and resident or legal representative must be afforded the chance to submit a report that becomes part of the permanent record.

