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Long-Term Care Survey Alert

Survey Appeals: Don't Let Lack Of Survey Sanctions Leave You Stranded With A Serious Deficiency Or Double G

Here's how to work around a lack of appeal rights.

You've heard of no harm, no foul, right? CMS has found a variation on that theme: no penalty, no appeal - a situation that can leave a facility stuck with a serious deficiency or one it desperately wants to challenge but cannot.

The good news: There are some ways to navigate this survey quagmire. The first step is knowing what you're dealing with even though the news in that regard isn't so good.

"A facility is pretty much out of luck in cases where the **Centers for Medicare & Medicaid Services** withdraws the remedy (typically because it thinks it will lose the appeal)," notes **Joseph Bianculli**, an attorney in Arlington, VA. In his view, "CMS is using this tactic to keep deficiencies on the record ... which is 'playing dirty' and an abuse of the regulatory process."

The basics: A facility is also out of luck in terms of appealing a deficiency if the state survey agency, for whatever reason, doesn't impose a penalty in the first place. There is a list of penalties or remedies that trigger a facility's appeal rights, relays **Ari Markenson, JD, MPH**, with **Epstein Becker & Green** in New York City.

In addition to civil monetary penalties (CMPs), the sanctions include denial of payment for new admissions, termination, imposition of temporary management, a directed plan of correction and/or loss of nurse aide training. In other words, facilities cannot appeal deficiencies - only the remedy imposed.

Tip: Nursing facilities can, however, appeal the scope and severity of a deficiency if downgrading it would result in a lower level CMP, adds Markenson.

Get Out of the Double-G Dilemma

Much of the concern about the "no penalty, no appeal" issue centers on the "double G" situation where a facility gets a G in an annual survey and then a subsequent G deficiency in a successive full survey, comments **John Lessner**, attorney with **Ober/Kaler** in Baltimore.

A double G means the facility is subject to an immediate enforcement action, which can be severe. Lessner has seen facilities get hit with substantial per day civil monetary penalties or immediate denials of payment for new admissions. Yet he contends that if a facility gets a double G, then it can challenge the first G in its enforcement action appeal because the facility had no ability to appeal the first G originally. "The same is true of a termination action where surveyors at the end of a 180-day cycle identify a lower-level deficiency, so the facility gets decertified because it's still out of compliance," Lessner adds.

"When we challenge [the decertification] at hearing, we argue that we also get to challenge the nursing facility's previous deficiencies because those started the cycle toward decertification in the first place," Lessner explains.

Make the Most of IDR

Informal dispute resolution offers facilities their best bet for avoiding a scenario in which they cannot appeal a deficiency because it carries no penalty, say legal experts. Of course, by the time CMS withdraws penalties, a facility has either lost

at IDR, which is why it's appealing - or sadly, the facility long ago let the window for seeking IDR close, Bianculli notes.

Lessner typically advises facilities to request IDR to try to eliminate a deficiency that they believe is unwarranted - or at least to reduce the deficiency's scope and severity by saying the resident did not suffer actual harm (as required for a G-level deficiency).

"A facility can eliminate a deficiency through IDR," Lessner emphasizes. "That's the forum/process to address an underlying deficiency even when it does not have an enforcement action attached."

Technically, providers aren't supposed to challenge scope and severity through IDR, but they do it anyway, Lessner adds. "For example, the facility might acknowledge that it was deficient in some practice but no actual harm to the resident occurred as a result, or there was no widespread pattern of harm, etc. So in making that argument, the facility is de facto challenging scope and severity," he says. (Each state interprets the IDR process individually, and some states might take a very literal, narrow view where a facility could not challenge scope and severity by making such an argument, Lessner adds.)

Yet, when providers prevail at IDR, they usually succeed in downgrading a deficiency or lowering its scope and severity. "But in some cases, the provider may simply say the entire deficiency is unwarranted and make an argument as to why that's so, if it is the case," Lessner says.

Record Your Side of the Story

You can also set the record straight as part of the plan of correction (POC).

"When you file the plan of correction (which has to be filed on the same CMS 2567 form), include an introductory paragraph indicating that the facility doesn't agree with the imposition of the deficiencies, but it is filling the POC for regulatory compliance purposes," Lessner advises. "As part of the introductory paragraph, say the facility is filing an IDR with respect to some or all of the deficiencies (if that's the case)" and to consider the IDR letter as incorporated in the POC document by reference.

That way, if a malpractice attorney later tries to introduce the CMS 2567 and POC into evidence at hearing (or reviews it in deciding whether to bring a complaint against your facility), he can see the CMS 2567 and POC document is incomplete, Lessner advises.

Look for Expedited Appeals

Problem: Facilities can appeal loss of nurse aide training privileges even without another enforcement action. Sounds fair, but by the time the nursing facility gets a hearing, it's usually near the end of the two-year exclusion for the training.

Solution: "Facilities can ask for an expedited hearing in such cases,, which the administrative law judge may grant at his/her discretion, although it's not guaranteed," Lessner advises.

Effective Oct. 1, the Medicare Modernization Act (MMA) requires the Secretary of **Health & Human Services** to establish a process for expedited provider appeals of loss of nurse aide training privileges to the Departmental Appeals Board. The new law also requires more funding for administrative law judges, which should help alleviate the two-year backlog of appeals, says **Barbara Gay,** federal policy expert for the **American Association of Homes & Services for the Aging**.

Meanwhile, AAHSA continues to lobby Congress to allow nursing facilities to regain their nurse aide training privileges as soon as they come back into survey compliance, reports Gay.

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