

Long-Term Care Survey Alert

Survey Appeals: To Appeal Or Not To Appeal...Answer These Questions Before Rushing To Judgment

Legal experts lead you through the decision-making maze.

In the heat of the survey battle when those unfair F tags are flying, the idea of beating surveyors in an appeal may seem quite appealing indeed.

But before you start spinning the legal wheels, determine if you actually have a right of appeal in your case, no matter how unfair the deficiency. Providers can appeal deficiencies (findings of noncompliance) resulting in actual imposed remedies, says attorney **Ari Markenson** with **Epstein, Becker & Green** in New York City. But specific deficiencies, such as F221, can't be the basis for an appeal unless the **Centers for Medicare & Medicaid Services** has sanctioned the facility with an appealable remedy. Generally, you can appeal the following:

- Termination
- Loss of nurse aide training program
- Temporary management
- Directed in-service and plans of correction
- Denial of payment
- Civil monetary penalties

(See 42 CFR 488.406 for a list of remedies that can be appealed, he adds. You cannot appeal the remedy of state monitoring.) Facilities can appeal the scope and severity of a deficiency only in limited circumstances--for example, if it would change the range of CMP or if a finding of substandard care resulted in loss of nurse aide training privileges, according to Markenson.

Weigh the Cost, Benefits

Next take a look at whether the facility has a decent chance at winning an appeal--and if the appeal is worth the administrative and financial costs. For example, do you have an argument that's "supportable and sustainable?" asks Markenson. (For details of recent federal appeals where facilities prevailed because of their use of evidence-based practices, documentation and physician testimony, see the September 2005 Long-Term Care Survey Alert.)

When evaluating the cost-benefit ratio of an appeal, consider \$20,000 as the threshold where an appeal will pay off potentially, advises attorney **Joseph Bianculli** in Arlington, VA. "But some facilities have ratcheted down that amount, especially when the facility has immediate jeopardy with relatively low civil monetary penalties or civil lawsuits tied to the cited deficiencies," he says.

Editor's note: The preceding information is based, in part, on a presentation by **Ari Markenson** at the most recent **National Association of Subacute & Postacute Care** conference in Washington, DC.