

Long-Term Care Survey Alert

SURVEY MANAGEMENT: Backlogs In Complaint Investigations Can Work In Your Favor -- Here's How

Know the rules for how surveyors can punish you for past noncompliance.

Suppose your facility self reports an adverse event, or a resident's family member lodges a complaint against the facility with the state survey agency. But the agency is too swamped with complaints to process the one involving your facility for some time. And meantime, a survey team unaware of the complaint against the facility does a standard survey and finds the facility in substantial compliance.

Such a scenario can hold some positive outcomes for a facility: "If a subsequent survey shows the facility is back in 'substantial compliance,' there may be no reason for surveyors to put the facility on the 180-day survey track toward decertification," says **Howard Sollins**, attorney with **Ober/Kaler** in Baltimore. But that doesn't mean the facility can get out of a deficiency, say legal experts.

It is true that the **Centers for Medicare & Medicaid Services** did away with the specific tag for past noncompliance because it was confusing, notes **Joseph Bianculli**, a private practice attorney in Arlington, VA. "But that doesn't mean that state survey agencies aren't still citing [as deficiencies] events that occurred in the past," he cautions.

The bad news: When surveyors cite a deficiency that predates a finding of compliance, the citation can stand, says Bianculli.

The better news: Yet, it's questionable whether surveyors can impose a remedy in such scenarios--"except for maybe a 'per instance' civil monetary penalty because remedies can't be imposed where a facility is in compliance," Bianculli says. He's even seen immediate jeopardy cited under such circumstances.

But "from an evidentiary perspective," the cases usually settle, he reports. That's because CMS recognizes the surveyor will be in a predicament when the facility attorney asks him upon cross examination: "How bad could it have been if you missed it?" Bianculli points out.