

## Long-Term Care Survey Alert

### **SURVEY MANAGEMENT: Be Prepared To Cut Off F Tags For Past Or Continuing Noncompliance**

**These strategies can head off a major survey and fiscal headache.**

If surveyors don't believe you've corrected an old problem, you could get hit with a citation for continuing noncompliance where the civil monetary penalties add up--and fast.

Attorney **Joseph Bianculli** recently heard of one case where surveyors initially told a facility that they planned to cite a medication error as past noncompliance. "The survey office then changed that to continuing noncompliance through the survey--\$176,000 worth," says Bianculli, whose law office is based in Arlington, VA.

**Your best defense:** Know the rules for managing and heading off past noncompliance citations. For one, surveyors will now be handing out the actual F tags for health deficiencies--or K-tags for life safety code violations--rather than the generic F698 for past noncompliance. That's according to a recent survey and certification memo (**S&C-06-01**) from the **Centers for Medicare & Medicaid Services** to state survey agencies.

"CMS' clarification in the survey and certification memo makes sense in terms of identifying the category of deficiency--which F698 didn't--for the facility's internal quality assurance purposes," comments **John Lessner**, an attorney with **Ober/ Kaler** in Baltimore.

Surveyors can cite past noncompliance when these three conditions exist, according to the memo:

1. The facility was out of compliance with regulatory requirements at the time a situation occurred (such as a medication error or fall);
2. The noncompliance occurred after the exit date of the last standard recertification survey and before the survey (standard, complaint, or revisit) currently being conducted; and
3. "Sufficient evidence" exists that the facility corrected the noncompliance and is in "substantial compliance at the time of the current survey for the specific regulatory requirement(s) as referenced by the specific F-tag or K-tag," according to the memo.

#### **Argue Against Continuing Noncompliance**

A typical scenario involving past noncompliance would be a citation for a single incident, such as a medication error that the facility addressed with inservice education and retesting nursing staff, as an example, says Bianculli. In such a situation, surveyors might decide to levy a per instance civil monetary penalty.

Be prepared to make your case: If surveyors say they are going to write you up for ongoing noncompliance--and you corrected the problem--be prepared to make your case before the deficiency ends up on the CMS 2567.

"Nursing facilities have an opportunity to sit down at the exit conference to explain their position," says attorney **Michael Cook** in Washington, DC. "That's the first line of defense to either show you weren't out of compliance in the past or you didn't have ongoing noncompliance," he says.

Even after the exit conference, you will likely be allowed to provide additional information to the state survey team or regional office, depending on who did the survey, Cook adds. If that doesn't work and the facility gets cited, you can go

to informal dispute resolution.

What if you get blindsided by surveyors finding what they believe to be an incident of past noncompliance, such as a resident telling them about a fall that he hadn't previously reported? "Do your fact gathering before you state your position" to the surveyors, Cook urges. "Talk to the QA team and people involved in the incident to see what happened."

### **Ramp Up Your QA Process**

"The memo and the possibility that a survey team could cite ongoing noncompliance ... underscores the importance of a vigorous QA program," says Lessner. "Surveyors often identify past noncompliance on a complaint survey," he notes. "And the incidents/outcomes that trigger complaints are usually falls and other accidents, elopements, pressure ulcers and medication errors," Lessner adds.

**Smart move:** Facilities should have a good protocol for doing incident reports as a way to track adverse events and gather pertinent facts about what occurred, says Lessner. "But take the incident reports to the next level, which is to do root-cause analysis and make changes if needed," he urges. And then monitor the issue. "All of that should be done through the quality assurance committee," says Lessner.

**Remember:** Surveyors aren't supposed to play "gotcha" by reviewing your QA proceedings.

Surveyors can't require you to turn over the records of the QA committee except to be able to show the committee met, says Cook. To play it safe, facilities can maintain two sets of QA records ... a copy of the meeting minutes and a record of when the committee met and who attended, etc., advises Cook. Then the facility can show surveyors the latter without airing their QA-related dirty laundry.