

Long-Term Care Survey Alert

Survey Management: Getting Up to Speed on Upcoming CMP Rules Can Pay Off

Know the downsides of accepting the 50 percent discount for self-reported deficiencies.

Come Jan. 1, you will face a new slate of rules for paying and challenging survey civil monetary penalties. Here's what legal experts suggest you need to consider and do now.

Basics: Nursing facilities will have a chance to eliminate civil monetary penalties (CMPs) through a new independent informal dispute resolution process. But if the facility loses its case, it will have to pay the CMP, which the government will place in escrow pending the outcome of additional appeals, explains attorney **Jeannie Adams**, with Hancock, Daniel, Johnson & Nagle PC in Harrisburg, Pa. If the facility wins its appeal, however, it will get the CMS back with interest, she adds.

The independent IDR process, which will be separate from the state-run IDR, applies only to deficiencies with a CMP, Adams says. However, "there may be deficiencies that don't result in a CMP that the facility could challenge at the state level through the state's traditional IDR process."

Independent IDR Perk + Potential Downside

"The independent IDR process will very likely end up being run by the state, but the preamble of the rule talks about the process being run by a state agency that's not involved with licensure and certification," says attorney **Susan Turner**, with Ober/Kaler in Baltimore, Md. It remains to be seen how this will work out, she adds. But "the new rules provide an opportunity for facilities to be heard by someone who didn't originally cite them. Those individuals can provide a new, neutral eye."

Now for the downside: CMS says the independent IDR process "will be specifically requesting input from residents and residents' families who are considered to be part of the IDR," cautions Turner. And she views that as "dangerous; it's a way of letting potential plaintiffs know they may have cases."

Could this be an impetus for facilities to invest more in building positive family relationships? Turner says she thinks so. "Communication with the family is always very important, but by the time someone becomes Resident No. 1 on the CMS 2567, the person has probably been interviewed by the state, and he [or the family or responsible party] has given permission to be included. Or the resident/family may have been the one who called in the complaint." And "at that point, the horse is out of the barn."

Rule Provides Discount for Self-Reported Deficiencies

The new rules will give facilities that self-report a deficiency a chance to pay half the resulting CMP in certain cases.

How it works: "The facility would have to report what it believed to be a deficient practice to the state survey agency before the matter came to the [survey] agency's attention," says Turner. In addition, the facility would have to correct the deficient practice within 10 days, she adds.

"The 50 percent discount will eventually apply to any CMP, so long as the deficiency doesn't relate to a resident's death, an IJ citation, or a deficiency at the H or I level," says Turner. But as CMS implements the new system, it's going to start with the more serious CMPs, she notes.

The 50 percent discount "is very appealing," Turner says. But the preamble to the rule implementing the new CMPs

"makes it fairly clear that in order to take advantage of that discount, the facility has to for all intent and purposes admit that it did something wrong."

Keep in mind: A facility can currently take a 35 percent discount if it waives its right to appeal, which will also be the case when the new CMP rules take effect, Turner points out. But a facility "doesn't admit wrongdoing by waiving that right" and accepting the 35 percent discount. By contrast, "in order to get the 50 percent discount, you not only have to [agree not to] appeal -- you have to self-report a deficiency."

Turner thus advises facilities to think through the potential legal ramifications of accepting the 50 percent discount. Facilities have to "take that into account if there has been any sort of allegation on the CMS 2567 of resident harm (physical, psychological or dignity issues) due to a self-reported deficient practice. Plaintiff's attorneys are very good at taking surveys and turning them into court complaints," she points out.

Adams predicts, however, that the option for a 50 percent discount will have "limited benefit" given that it doesn't apply to IJ, an H- or I-level deficiency, or an issue involving a resident death, which are the "types of deficiencies that typically result in CMPs." She does, however, advise facilities to "examine their reporting policies and decide on an approach, if any, given the possibility of obtaining a 50 percent reduction in any future CMP."

Don't Overlook This Potential Appeals Benefit

"A lot of times facilities appeal further up the chain to delay paying a CMP and also to pursue a settlement," observes Adams. And she predicts the new CMP rules could "take some wind out of the sails" for appealing beyond the independent IDR.

Yet Adams points out that even though most facilities don't win CMS appeals -- they do sometimes "win" in terms of negotiating settlements. And she anticipates that "if a facility paid a CMP held in escrow and then settled the case, they might get some of that penalty back as part of the settlement process."

Turner believes that facilities won't appeal as often as they do now once the new rules go into effect, "which is a shame." But she hopes they will manage the survey more effectively so they end up with a more accurate CMS 2567. "That means facilities will have to spend more time preparing for the exit conference," says Turner. "One reason the exit is so important is that a lot of survey teams will give the facility a short period of time after the exit to submit additional documentation." (For quick survey management tips, see the sidebar on page 43.)