Long-Term Care Survey Alert

Survey Management: Know When To Draw The Line In The Sand With Surveyors

3 scenarios where you're on more solid ground than you might think in challenging F tags.

Sometimes it pays to stand your ground with surveyors -- f you have the regs and State Operations Manual in hand to back you up.

"It is important for facilities to differentiate between what surveyors do and what surveyors should do," says attorney **Christopher Lucas** in Mechanicsburg, PA.

Yet many facilities don't stand up to a surveyor due to fear of retribution, adds **Kathy Hurst, JD, RN**, a survey expert in Chino Hills, CA. "And that fear has put us in a bind as an industry," she notes.

Here are three instances in which you just might head off F tags during or after the survey by pointing out that surveyors don't have the regulatory muscle to pull off what they are trying to do.

1. Citing G-level deficiencies that did not cause actual harm to a resident. "Surveyors frequently cite level G deficiencies when they perceive a serious problem that holds the potential for harm ... even though 'actual harm' is a legal requirement for a G deficiency," notes Lucas.

How to beat it: If surveyors insist on handing out a G for potential harm, your facility can mount a challenge in two steps, Lucas advises. "First, produce a well prepared IDR and submit it to the state survey agency," he suggests. If IDR is not successful, consider a CMS-level challenge, if the situation warrants. Keep in mind that the **Centers for Medicare & Medicaid Services** "contracts with most state survey agencies to perform most survey functions ... and the agencies are required to cite violations correctly, which means in compliance with SOM standards," Lucas counsels. (For highlights see "Find Out How This Facility Bean An Unreasonable G-Levbel Deficiency".)

2. Tagging a facility for past noncompliance for "nonegregious" deficiencies that the facility has already corrected through the QA process. "There definitely appears to be more instances where surveyors are citing past noncompliance," reports **Annaliese Impink, JD**, associate general counsel of **Mariner Healthcare** in Atlanta.

Yet there's actually nothing in the regs that says CMS can impose retroactive noncompliance, she notes. Even so, the State Operations Manual creates "the creature called past noncompliance," as an avenue for surveyors to cite facilities for serious past noncompliance, including immediate jeopardy, for deficiencies corrected before the survey, Impink points out.

The SOM does say, however, that surveyors should not cite past noncompliance that has been corrected through the QA process/committee unless it's egregious, Impink adds. "So if surveyors see an instance of elopement where a resident made it across the street and they think that's egregious, then they will cite F698 for the past noncompliance and then crosswalk it to F323 or F324 or whatever the deficiency is," Impink explains.

Yet Impink is seeing surveyors in the past six months cite G- or even E-level deficiencies for past noncompliance. "And an E, by definition, is hardly egregious," she points out. The bottom line: Surveyors are doing things for which there is no basis in the regs -- and not even in the SOM.

Be proactive: "When surveyors enter the building, the administrator and DON should not be afraid to say: 'We have the SOM provision that outlines what should and should not be cited as past noncompliance and we have used our QA

program as it is supposed to be used ... here's the section [of the SOM] that talks about that,'" Impink advises. If that doesn't work, "don't be afraid to IDR after the fact if the facility gets cited for something that you ran through your QA process and corrected before the survey," Impink advises.

3. Insisting that a facility needs policies and procedures formatted a certain way or certain assessment forms to comply with regs. Surveyors sometimes don't understand that while facilities are required to follow the regs, they have latitude in how they "get there" in complying, notes Hurst. "For example, the regs don't say you have to have a form for every clinical issue," Hurst points out.

Thus, if surveyors tell Hurst a facility needs a form for fall assessments post-fall, as an example, she directs them to the same information in the physical assessment documented in the medical record.

Hurst also succeeded in educating surveyors that a facility's abuse policy has only to include the elements spelled out by the SOM - "it doesn't have to follow the exact bulleted format in the SOM," she says.

Know when to fold: You also have to know when to compromise with surveyors. For example, Hurst reports she got weary of getting low-level deficiencies based on her stance that facilities did not need to do smoking safety assessments on every resident when there were only three smokers in a building. "Some things aren't worth arguing over," she notes.