

## MDS Alert

### Surveys: Bombshell: Expect An Automatic Penalty For Immediate Jeopardy Deficiency

**No more second chances when actual harm is involved.**

**Bad news:** The feds will now slap you with a civil money penalty (CMP) without giving you a chance to correct deficiencies any time your facility has an Immediate Jeopardy citation.

#### Anticipate Harsher Survey Punishments

On July 22, the **Centers for Medicare & Medicaid Services (CMS)** released a memo to State Survey Agencies (SAs) announcing a new mandatory imposition of federal remedies when an Immediate Jeopardy deficiency is cited. The memo, which CMS revised on July 29, also describes revisions to Chapter 7 of the State Operations Manual (SOM) and provides assessment factors for determining the seriousness of deficiencies.

The revised policies detailed in the memo are effective for all surveys completed on or after Sept. 1, 2016, according to an Aug. 2 analysis by Evvie Munley, Senior Health Policy Analyst at Washington, D.C.-based Leading Age.

**Old way:** "In the past, CMS and [SAs] have provided nursing homes with the opportunity to correct deficiencies prior to imposing federal enforcement remedies such as CMPs, temporary management, termination, directed plan of correction, state monitoring, directed in-service training, or denial of payment for all individuals," stated an Aug. 12 analysis by the law firm **Hall, Render, Killian, Heath & Lyman, P.C.**

**New way:** The memo (S&C: 16-31-NH) states that the CMS Regional Office (RO) must now immediately impose a CMP any time Immediate Jeopardy is cited. "Irrespective of a state recommendation to impose or not impose a remedy, the CMS RO must immediately impose, without permitting a facility an opportunity to correct deficiencies, one or more federal remedies based on the seriousness of the deficiencies or when actual harm or Substandard Quality of Care (SQC) is identified as outlined in §7304.1."

**Impact:** "This change in policy represents a marked expansion of the punitive enforcement process associated with survey citations," stated the **Virginia Health Care Association**.

#### SAs Won't Have a Choice Either

The memo includes an advance copy of the revisions to Chapter 7 of the SOM. The Chapter 7 revisions include a new section stating that the CMS RO or the SA "has no obligation to provide a facility an opportunity to correct its deficiencies prior to immediately imposing federal remedies.

**Red flags:** Further, the revision asserts that "federal remedies must be imposed" and SAs "shall not offer a facility an opportunity to correct cited deficiencies before federal remedies are imposed" in the following circumstances:

- Immediate Jeopardy (scope and severity levels J, K, and L) is identified on the current survey; OR
- Deficiencies of SQC that are not Immediate Jeopardy are identified on the current survey; OR
- Any G level deficiency is identified on the current survey in 42 C.F.R. §483.13, Resident Behavior and Facility Practices, §483.15, Quality of Life, or §483.25, Quality of Care; OR
- Deficiencies of actual harm or above (level G or above) on the current survey as well as having deficiencies of

actual harm on the previous standard health or Life Safety Code (LSC) survey, OR deficiencies of actual harm or above on any type of survey between the current survey and the last standard survey (these surveys must be separated by a period of compliance, meaning from different noncompliance cycles); OR

- A facility is classified as a Special Focus Facility (SFF) AND has a deficiency citation at level F or higher on its current survey.

### **Know the Risk Factors for Potential Remedies**

Now, to select the appropriate remedy (CMPs, temporary management, directed plan of correction, etc.), to apply to a facility with deficiencies, CMS and the SA will determine the seriousness of the deficiencies. To determine the seriousness, CMS and the SA must consider at least the following factors:

1. Whether a facility's deficiencies constitute
  - i. No actual harm with a potential for minimal harm;
  - ii. No actual harm with a potential for more than minimal harm, but not immediate jeopardy;
  - iii. Actual harm that is not immediate jeopardy; or
  - iv. Immediate jeopardy to resident health or safety.
2. Whether the deficiencies
  - i. Are isolated;
  - ii. Constitute a pattern; or
  - iii. Are widespread.

**Next step:** Following the initial assessment, CMS and the SA may consider other factors in choosing a remedy. These other factors may include, but are not limited to, the following:

1. The relationship of the one deficiency to other deficiencies resulting in noncompliance.
2. The facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

CMS also added Termination and Temporary Management to the possible remedies under Category 2, Munley noted. The scope and severity citations at levels A, B, and C now all indicate no remedies are required.

**Link:** To read S&C: 16-31-NH, go to [www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-31.pdf](http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-31.pdf).