

CMS Directs Increased Nursing Facility Survey Activity and Penalties Related to COVID-19 and Infectious Control

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07.22.2020

As the COVID-19 pandemic began this spring, the Centers for Medicare and Medicaid Services (CMS) called on all health care providers to activate infection control practices to help limit the spread of the virus. See March 4, 2020 CMS mInconnects Special Edition at <https://www.cms.gov/outreach-and-education/outreachffsprovpartprogprovider-partnership-email-archive/2020-03-04>. At the same time, CMS announced that nursing facility surveys would be focused exclusively on issues related to infection control, as well as other serious health and safety threats, such as allegations of abuse. The shift in survey priorities was seen as a way to allow inspectors to focus on addressing the spread of COVID-19. See March 4, 2020 letter to State Survey Agency Directors QSO-20-12-All at <https://www.cms.gov/files/document/qso-20-12-all.pdf>.

Calling nursing homes “ground zero for COVID-19,” CMS recently announced enhanced enforcement related to COVID-19 in nursing facilities. As a result, the stakes are higher than ever for nursing facilities, medical directors, and clinicians with respect to infectious disease control. See June 1, 2020 letter to State Survey Agency Directors QSO-20-12-All at <https://www.cms.gov/files/document/qso-20-31-all.pdf>.

The June 1, 2020 CMS letter imposes new, elevated survey requirements for state survey agencies related to infection control and COVID-19 outbreaks in nursing facilities, enhanced penalties for noncompliance with infection control requirements, and a refocused approach for CMS Quality Improvement Organizations providing COVID-19-related education and training to nursing facilities.

Enhanced Survey Activities

The CMS Memorandum requires that state survey agencies implement increased survey activities related to COVID-19. Specifically, it requires state survey agencies to implement the following COVID-19 survey activities:

- Perform on-site surveys within 30 days of June 1, 2020 on nursing facilities that have had a previous COVID-19 outbreak as defined in the CMS letter.
- Perform on-site surveys within 3 to 5 days of identification for any nursing facility with 3 or more confirmed or suspected new COVID-19 cases since the last National Healthcare Safety Network COVID-19 Report or 1 confirmed COVID-19 case in a facility that had previously not had any COVID-19 cases.
- Starting in Fiscal Year 2021, perform annual Focused Infection Control surveys of 20% the state's nursing facilities.

States that fail to perform the survey activities in a timely and complete manner face possible forfeiture of up to 5% of their CARES Act Allocation, annually.

Expanded Enforcement and Directed Plans of Correction Related to Infection Control Deficiencies

In addition to the enhanced survey activities, CMS is expanding enforcement related to infection control deficiencies within nursing facilities “[d]ue to the heightened threat to resident health and safety for even low-level, isolated infection control citations (such as proper hand-washing and use of personal protective equipment (PPE)” CMS is also providing Directed Plans of Correction, which include a Root Cause Analysis, in order to facilitate long-lasting systemic change. See June 1, 2020 letter to State Survey Agency Directors QSO-20-12-All at <https://www.cms.gov/files/document/qso-20-31-all.pdf>.

Substantial non-compliance, at tag level D or above, with any deficiency associated with Infection Control requirements will face the following enforcement remedies:

- Non-compliance for an Infection Control deficiency when none have been cited in the last year (or on the last standard survey):
 - Nursing homes cited for current non-compliance that is not widespread (Level D & E) -- Directed Plan of Correction
 - Nursing homes cited for current non-compliance with infection control requirements that is widespread (Level F) -- *Directed Plan of Correction, Discretionary Denial of Payment for New Admissions with 45 days to demonstrate compliance with Infection Control deficiencies.*
- Non-compliance for Infection Control Deficiencies cited once in the last year (or last standard survey)
 - Nursing Homes cited for current non-compliance with infection control requirements that is not widespread (Level D & E) -- *Directed Plan of Correction, Discretionary Denial of Payment for New Admissions with 45 days to demonstrate compliance with Infection Control deficiencies, Per Instance Civil Monetary Penalty (CMP) up to \$5000 (at State/CMS discretion)*
 - Nursing Homes cited for current non-compliance with infection control requirements that is widespread (Level F) -- *Directed Plan of Correction, Discretionary Denial of Payment for New Admissions with 45 days to demonstrate compliance with Infection Control deficiencies, \$10,000 Per Instance CMP*

- Non-compliance that has been cited for Infection Control Deficiencies twice or more in the last two years (or twice since second to last standard survey)
 - Nursing homes cited for current non-compliance with Infection Control requirements that is not widespread (Level D & E) -- *Directed Plan of Correction, Discretionary Denial of Payment for New Admissions, 30 days to demonstrate compliance with Infection Control deficiencies, \$15,000 Per Instance CMP (or per day CMP may be imposed, as long as the total amount exceeds \$15,000)*
 - Nursing homes cited for current non-compliance with Infection Control requirements that is widespread (Level F) -- *Directed Plan of Correction, Discretionary Denial of Payment for New Admissions, 30 days to demonstrate compliance with Infection Control deficiencies, \$20,000 Per Instance CMP (or per day CMP may be imposed, as long as the total amount exceeds \$20,000)*
- Nursing Homes cited for current non-compliance with Infection Control Deficiencies at the Harm Level (Level G, H, I), regardless of past history -- *Directed Plan of Correction, Discretionary Denial of Payment for New Admissions with 30 days to demonstrate compliance with Infection Control deficiencies.* Enforcement imposed by CMS Location per current policy, but CMP imposed at highest amount option within the appropriate (non-Immediate Jeopardy) range in the CMP analytic tool.
- Nursing Homes cited for current non-compliance with Infection Control Deficiencies at the Immediate Jeopardy Level (Level J, K, L) regardless of past history -- In addition to the mandatory remedies of Temporary Manager or Termination, *imposition of Directed Plan of Correction, Discretionary Denial of Payment for New Admissions, 15 days to demonstrate compliance with Infection Control deficiencies.* Enforcement imposed by CMS Location per current policy, but CMP imposed at highest amount option within the appropriate (IJ) range in the CMP analytic tool.

June 1, 2020 letter to State Survey Agency Directors QSO-20-12-All at <https://www.cms.gov/files/document/qso-20-31-all.pdf>.

As a result, any nursing facility with new or meaningfully increased COVID-19 cases can expect imminent survey activity and more severe penalties in the event of survey deficiencies for infection control. The key going forward is good preparation and a systematic approach to infection control to not only help keep the nursing facility's residents and staff safe from infectious disease but stave off increased risk of surveys and penalties.

If you have any questions or would like more information, please contact Alice Harris at 803.253.8284 or AHarris@nexsenpruet.com, Chandler Martin at 803.540.2161 or CMartin@nexsenpruet.com, or your regular Nexsen Pruet attorney.