

CMS Announces New COVID-19 Surveys and Enforcement

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Healthcare Alert

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On June 1, 2020, the Centers for Medicare & Medicaid Services (CMS) announced it will link state CARES Act funding to its requirement that states must perform COVID-19-related infection control surveys of every licensed nursing home. CMS also announced enhanced enforcement for infection control within Medicare-participating skilled nursing facilities (SNFs), as well as a new focus for its contracted training partners.

Focused Infection Control Surveys

The CARES Act provided \$80 million in funding to the CMS for survey and inspection work related to COVID-19, but in a guidance memorandum to state survey agency directors, CMS announced it will reduce funding to states which have not completed all required focused infection control surveys by August 31, 2020. Specifically, states that have not completed 100% of the focused infection surveys by July 31, 2020 will have to submit a corrective action plan for completion of all surveys within 30 days. Thereafter, the CARES Act allocation of funds for non-compliant states may be reduced by 10%, with an additional 5% reduction if the state does not complete 100% of the required surveys by the end of September, 2020. The held-back funds will be redistributed to the compliant states.

Enhanced Enforcement for Infection Control

CMS is expanding enforcement of what, in pre-COVID-19 times, may have been deemed "low-level infection control violations" such as improper hand-washing or lack of use of personal protective equipment. To motivate sustained, long-term compliance at facilities, CMS may require states – not just facilities – to develop comprehensive Directed Plans of Correction and to perform a detailed Root Cause Analysis for infection control deficiencies. The level of CMS enforcement will depend on the Level (Level D and worse) and frequency of the facility's non-compliance. CMS enforcement will involve specific deadlines for compliance, as well as the risk of non-payment by CMS, and civil monetary penalties.

Other COVID-19 Survey Activities

CMS is now requiring that within 30 days, all states must perform on-site surveys of skilled nursing facilities that fall within any of three categories:

1. Facilities with cumulative confirmed cases of 10% or more of their bed capacity;
2. facilities with cumulative confirmed, plus suspected cases of 20% or more of their bed capacity; or
3. facilities with 10 or more COVID-19-related deaths.

CMS requires states to perform on-site surveys within 3 to 5 days of any facility:

- that identifies three (3) or more new COVID-19 suspected and confirmed cases since the facility's most recent weekly report to the National Health Safety Network or

- that identifies its first resident case of COVID-19.

States that do not perform these surveys risk losing up to 5% of their CARES Act allocation annually.

Non-COVID-19 Surveys

CMS has previously issued recommendations, but not requirements, for state and local governments with respect to their oversight of how skilled nursing facilities ease back to what will be the "new normal." In its June 1, 2020 guidance memorandum, CMS authorizes states to expand beyond the current, limited survey prioritization (which includes Immediate Jeopardy, Focused Infection Control and Initial Certification surveys). Specifically, CMS authorizes that states in the third of its three recommended phases of nursing home re-opening may resume many of the wide range of surveys and investigations which were permitted prior to COVID-19.

Increased Use of QIOs

CMS will provide technical assistance through Quality Improvement Organizations (QIOs) – 12 contracted organizations around the country, each composed of health quality experts and clinicians experienced in helping healthcare providers improving quality. CMS will turn to QIOs to provide education and training to all Medicare-enrolled SNFs. QIOs will have a particular focus on direct assistance to roughly 6,000 small rural nursing homes. QIOs will also have a renewed mission to assist 3,000 low-performing nursing homes with histories of infection control difficulties.

Conclusion

It is often difficult for staff within a skilled nursing facility to embrace new governmental requirements, but in the midst of a pandemic that preys on seniors, everyone will want to take all federally mandated measures to prevent transmission of COVID-19.

If you have any questions please contact Bill Kennedy (kennedyw@whiteandwilliams.com; 215.864.6816) or another member of the Healthcare Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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