

CMS REVISES GUIDANCE ON IMMEDIATE JEOPARDY AND CREATES NEW SURVEYOR TOOLS - ACTIONS NEEDED TO PREVENT AND DEFEND SKILLED NURSING IMMEDIATE JEOPARDY CITATIONS

On March 5, 2019, the Center for Clinical Standards and Quality/Survey & Certification Group released a **memorandum** titled "Revisions to Appendix Q, Guidance on Immediate Jeopardy" ("Memorandum"). The Memorandum's revisions create a "Core Appendix Q" that will be used by surveyors of all provider and supplier types in determining when to cite immediate jeopardy.

The Centers for Medicare & Medicaid Services ("CMS") announced the release of the Memorandum in a **blog post** stating that the Memorandum's guidance directly addresses violations of health and safety regulations that cause serious harm or death to a patient and require immediate action to prevent further serious harm as many stakeholders have voiced concerns that the guidance needs to be clearer and more consistent to identify serious quality concerns across states.

DETAILED ANALYSIS

Immediate jeopardy is a situation in which a recipient of care has suffered or is likely to suffer serious injury, harm, impairment or death as a result of a provider's noncompliance with one or more health and safety requirements. Immediate jeopardy represents the most severe and egregious threat to the health and safety of recipients, as well as carries the most serious sanctions for providers.

Appendix Q of the State Operations Manual provides guidance to surveyors for citing immediate jeopardy. The current version of Appendix Q was created in 2004. The Memorandum's update is designed to clarify and increase consistency for identifying immediate jeopardy. These revisions apply to all provider and supplier types. The revisions also include subparts that focus on specific concerns with nursing homes.

NEW CORE APPENDIX Q

The Memorandum announces the creation of a "Core Appendix Q" that will be used by surveyors of all provider and supplier types including health, emergency preparedness and life safety code surveys. The Memorandum sets out three key components that are essential for surveyors to use in determining the presence of an immediate jeopardy:

- **Noncompliance.** An entity has failed to meet one or more federal health, safety and/or quality regulations.
- **Serious Adverse Outcome or Likely Serious Adverse Outcome.** As a result of the identified noncompliance, serious injury, serious harm, serious impairment or death has occurred, is occurring or is likely to occur to one or more identified recipients at risk.
- **Need for Immediate Action.** The noncompliance creates a need for immediate corrective action by the provider/supplier to prevent serious injury, serious harm, serious impairment or death from occurring or recurring.

CMS also created subparts to Appendix Q that focus on immediate jeopardy concerns occurring in nursing homes since there are specific policies related to immediate jeopardy for those provider types.

REVISIONS TO APPENDIX Q

The Core Appendix Q revisions to Appendix Q include:

- **Standard Now "Likelihood" Instead of "Potential."**

Core Appendix Q directs that to cite immediate jeopardy in situations where recipients have not already suffered serious injury, harm, impairment or death, the nature and/or extent of the identified noncompliance creates a likelihood (reasonable expectation) that such harm will occur if not corrected, not simply the potential for that level of harm to occur. "Likelihood" is defined as "the nature and/or extent of the identified noncompliance creates a reasonable expectation that an adverse outcome resulting in serious injury, harm, impairment or death will occur if not corrected."

Appendix Q previously directed that a potential for serious harm might constitute immediate jeopardy.

■ **Culpability Requirement Has Been Removed.**

The regulatory definitions of immediate jeopardy do not require a finding of culpability. The Core Appendix Q provides that the culpability requirement has been removed and has been replaced with the key component of noncompliance, since the definitions of immediate jeopardy require noncompliance to be the cause of the serious injury, harm, impairment or death, or the likelihood thereof. Appendix Q previously made culpability a required component to cite immediate jeopardy.

■ **Psychosocial Harm Now Includes a "Reasonable Person" Approach.**

Core Appendix Q instructs surveyors to consider whether noncompliance has caused or made likely serious mental or psychosocial harm to recipients. In situations where the psychosocial outcome to the recipient may be difficult to determine or incongruent with what would be expected, CMS instructs surveyors to use the "reasonable person" concept to make that determination. The "reasonable person" approach considers how a reasonable person in the recipient's position would be impacted by the noncompliance (i.e. consider if a reasonable person in a similar situation could be expected to experience a serious psychosocial adverse outcome as a result of the same noncompliance).

CMS provided the following statement: "For example, a recipient who was sexually abused by a staff member may not have significant physical outcomes, but may suffer a greater psychosocial outcome. In this case, the seriousness of the noncompliance would be based on the psychosocial outcome to the recipient. Psychosocial outcomes (e.g., changes in mood and/or behavior) may result from an entity's noncompliance with any requirement. The surveyor's investigation should attempt to determine if a recipient's change in mood and/or behavior is a significant factor of the noncompliance, or part of the recipient's baseline, or disease process."

■ **No Automatic Immediate Jeopardy Citations.**

Core Appendix Q directs that each immediate jeopardy citation must be decided independently and there are no automatic immediate jeopardy citations.

NEW TOOLS - IMMEDIATE JEOPARDY TEMPLATE

CMS established a notification process for surveyors to follow when immediate jeopardy is identified.

This process ensures that providers are notified as soon as possible of an immediate jeopardy finding. This process is intended to increase transparency and improve timeliness and clarity of communication to providers.

PRACTICAL TAKEAWAYS

- Skilled nursing facilities should expect that state survey agencies will pay increased attention to immediate jeopardy violations.
- Skilled nursing facilities need to become familiar with new approaches brought by the revisions to Appendix Q, so they can properly prevent these events, as well as competently remedy and defend these citations.
- Skilled nursing facilities need to train staff on these new standards.

Should you have any questions about this or how to address and defend an immediate jeopardy citation, please contact:

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