

COUNTDOWN TO PHASE 3 SKILLED NURSING COMPLIANCE PROGRAMS - COMPONENT #1 - POLICIES AND PROCEDURES

This is the first in a series of articles discussing the countdown to Phase 3 skilled nursing home compliance programs. To view other articles in this series, click [here](#).

Beginning on November 28, 2019, surveyors will use the requirements detailed 42 C.F.R. Section 483.85, the Requirements for States and Long-Term Care Facilities ("Final Regulations") by the Centers for Medicare & Medicaid Services ("CMS"), to determine whether a skilled nursing facility's ("Facility") compliance and ethics program fulfills the requirements in the Final Regulations. One of the required components of the Facility's compliance and ethics program is that the Facility create written compliance and ethics standards, policies and procedures.

BACKGROUND AND PURPOSE OF A COMPLIANCE AND ETHICS PROGRAM

The Final Regulations created a new Section 483.85 requiring Facilities to have a compliance and ethics program. This regulation arises from Section 6102 of the Affordable Care Act, which added Subsection 1128I(b) to the Social Security Act.

Section 483.85(c) sets forth the required compliance and ethics program components for all Facilities. Under those regulations, a compliance and ethics program means, with respect to a Facility, a Facility program that has been reasonably designed, implemented and enforced so that it is likely to be effective in preventing and detecting criminal, civil and administrative violations under the Affordable Care Act and in promoting quality of care; and includes, at a minimum, the required components specified in the Final Regulations.

REQUIRED COMPONENT #1 - WRITTEN STANDARDS, POLICIES AND PROCEDURES

Section 483.85(c)(1) of the Final Regulations requires that the operating organization for each Facility develop, implement, maintain and establish written compliance and ethics standards, policies and procedures to follow that are reasonably capable of reducing the prospect of criminal, civil and administrative violations under the Affordable Care Act and promote quality of care.

The Facility must prepare policies and procedures that support and implement the compliance and ethics program. These policies and procedures may include:

- Background and Exclusion Checks Policy
- Compliance Violation Reporting Policy
- Auditing and Monitoring Policy
- Non-Retaliation Policy
- Business Relationship, Referrals and Gifts Policy

THREE REQUIRED WRITTEN STANDARDS, POLICIES AND PROCEDURES

The Final Regulations require that a Facility have specific written standards, policies and procedures on the following three areas and topics:

1. Designation of an appropriate compliance contact individual to whom individuals may report suspected violations.
2. Creation of an alternate method of reporting suspected violations anonymously without fear of retribution.
3. Design of disciplinary standards that set out the consequences for committing violations for the operating organization's entire staff; individuals providing services under a contractual arrangement; and volunteers, consistent with the volunteers' expected roles.

These three topics and required components are mentioned in other required compliance and ethics program components in the Final Regulations. Facilities should prepare specific written standards, policies and procedures to address these three specific topics.

STATE OPERATIONS GUIDANCE TO SURVEYORS

CMS has not issued guidance on how surveyors will interpret and cite the compliance and ethics program requirement.

Surveyors will likely request copies of the compliance and ethics program documents, as well as copies of certain policies and procedures. The surveyors will also likely question the staff and employees about the Facility's policies and procedures to assess if the policies and procedures have been distributed and if staff know who to contact to report a suspected violation.

OIG GUIDANCE - POLICIES ON RISK AREAS

In its 2000 memo titled "Publication of the OIG Compliance Program Guidance for Nursing Facilities," the Office of Inspector General ("OIG") wrote that Facilities should prepare a comprehensive set of written policies and procedures that are in place to prevent fraud and abuse in Facility operations and to ensure the appropriate care of their residents.

OIG developed a list of potential risk areas affecting Facility providers that should be covered in the standards, policies and procedures. These risk areas include:

- Quality of care;
- Residents' rights,
- Employee screening;
- Vendor relationships;
- Billing and cost reporting; and
- Record keeping and documentation.

This list of risk areas should be viewed as a starting point for an internal review of potential vulnerabilities within the Facility. The objective of identifying the topics on this list is to create policies and procedures around each to ensure that the employees, managers and directors are aware of these risk areas and that steps are taken to minimize, to the extent possible, the types of problems identified.

OIG GUIDANCE - CODE OF CONDUCT

Many Facilities create a "Code of Conduct" that sets out the guiding intentions and goals of the organization's anti-fraud and abuse mission statement.

OIG specifically recommends that Facilities development of a corporate statement of principles that will guide the operations of the Facility. OIG identifies a "Code of Conduct" as a key and common expression of the Facility's principles. The "Code of Conduct" should function in the same fashion as a constitution, a foundational document that details the fundamental principles, values and framework for action within a Facility. The "Code of Conduct" for a Facility should articulate the Facility's expectations of employees, as well as summarize the basic legal principles under which the Facility must operate.

IMPLEMENTATION TIME FRAME

Beginning on November 28, 2019, surveyors will use requirements detailed in Section 483.85 to determine whether a Facility's compliance and ethics program fulfills the requirements in the Final Regulations.

ACTION ITEMS

Facilities should review existing policies and procedures or create new policies and procedures so the Facility is ready for survey enforcement. Facilities should have policies that at a minimum address these three topics:

1. Designation of a compliance officer or compliance coordinator;
2. Establishment of a method for staff and others to report suspected compliance violations; and
3. Creation of disciplinary standards detailing the consequences of committing a compliance violation for staff and others are required in other components in the Final Regulations.

COMPLIANCE AND ETHICS PROGRAM TOOLKIT AVAILABLE

Hall Render has developed a compliance and ethics program toolkit to assist skilled nursing facilities in achieving compliance with Section 483.85 and the Final Regulations. For more information about the toolkit, please contact Sean Fahey at (317) 977-1472 or sfahey@hallrender.com.

If you have questions about this topic or would like assistance with the phase 3 compliance and ethics program requirements, please contact:

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