

COUNTDOWN TO PHASE 3 SKILLED NURSING COMPLIANCE PROGRAMS - COMPONENT #4 - SCREENING PROCESS FOR POSITIONS WITH DISCRETIONARY AUTHORITY

This is another article in a series discussing the complete overhaul of Part 483 to Title 42 of the Code of Federal Regulations the Requirements for States and Long-Term Care Facilities ("Final Regulations") by the Centers for Medicare & Medicaid Services ("CMS"). To view other articles in this series, click [here](#).

Beginning on November 28, 2019, surveyors will use the requirements detailed in 42 C.F.R. Section 483.85 in the Final Regulations by 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 is that the Facility take due care not to delegate substantial discretionary authority to individuals who the operating organization knew, or should have known through the exercise of due diligence, had a propensity to engage in criminal, civil and administrative violations under the Social Security Act.

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 #4 - SCREENING PROCESS FOR POSITIONS WITH DISCRETIONARY AUTHORITY

Section 483.85(c)(4) of the Final Regulations require that a Facility take due care not to delegate substantial discretionary authority to individuals who the Facility knew, or should have known through the exercise of due diligence, and had a propensity to engage in criminal, civil and administrative violations under the Social Security Act.

The Office of Inspector General ("OIG") and CMS have identified patient abuse, patient neglect and misappropriation of property (i.e., theft) as widespread problems that cause harm to beneficiaries receiving long-term care services.

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 evidence of the due diligence efforts to gather the information about those individuals.

OIG GUIDANCE - RESOURCES

In its 2000 memo titled "Publication of the OIG Compliance Program Guidance for Nursing Facilities," OIG identifies that Facilities are required by federal, and in some cases state, law to investigate the background of certain employees. OIG wrote that Facilities should conduct a reasonable and prudent background investigation and reference check before hiring those employees who have access to patients or their possessions or who have discretionary authority to make decisions that may involve compliance with the law.

OIG 2019 REPORT ON NATIONAL BACKGROUND CHECK PROGRAM

OIG recently issued a [report](#) on the National Background Check Program ("Program") providing grants to states to develop systems to conduct background checks of state and federal criminal history records for prospective long-term-care employees. The 10 states that had concluded their participation in the Program by 2016 varied as to the degree to which they achieved implementation of Program requirements. Of the background checks that 8 of the 10 states conducted, nearly 80,000 resulted in determinations of ineligibility for prospective employees. The number of determinations of ineligibility and rates of ineligibility varied among the states (i.e., from less than 1 percent to 8 percent). None of the states reported a reduction in available workforce for long-term care facilities or providers as a result of

the Program.

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:

- Verify background/sanction checks are conducted in accordance with applicable rules and laws (e.g., employment, promotions, credentialing); and
- Monitor government sanction lists for excluded individuals/entities.

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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