

## CMS FINALIZES NEW CONDITIONS OF PARTICIPATION FOR HOME HEALTH: PART 4

*Review of the New Home Health Conditions of Participation - Patient Rights.*

This is the fourth article in a series discussing CMS's Final Revised Home Health Conditions of Participation ("Final CoPs"). With the release of the Final CoPs, CMS is finalizing the significant changes they proposed to make to the home health CoPs in October 2014. Although these major revisions are mostly adopted as proposed, CMS has introduced a number of "clarifying changes" in the final rule that are substantive.

Since the Final CoPs impose numerous requirements, Hall Render will issue a series of articles summarizing various components. Recently, Hall Render published an [article](#) that contained a brief analysis of the Final CoPs, as well as Parts 1, 2 and 3 in the series: [CMS Finalizes New Conditions of Participation for Home Health: Part 1](#); [CMS Finalizes New Conditions of Participation for Home Health: Part 2](#); and [CMS Finalizes New Conditions of Participation for Home Health: Part 3](#).

Hall Render's New Home Health Conditions of Participation home page with summaries and links to each article in the series is located [here](#).

### PATIENT RIGHTS - SEC. 484

*Executive Summary.* The final revised Home Health CoPs adopt, with additional changes, the proposed revisions to the patient rights condition contained in CMS's proposed revisions to the home health CoPs. The Final CoPs move patient rights to 42 C.F.R. 484.50, the standards are reorganized, several old standards have been revised or expanded and new standards have been added. In many ways, this is a new CoP.

*Detailed Summary.* The patient rights CoP is divided into six separate standards: Notice of Rights; Exercise of Rights; Rights of the Patient (extensively modified); Transfer and Discharge (**new**); Investigation of Complaints (**new**); and Accessibility (**new**). Because there are so many changes in this regulation, we will be sending two articles. This article covers the standards on Notice of Rights, Exercise of Rights and Rights of the Patient. The next article will cover the standards on Transfer and Discharge, Investigation of Complaints and Accessibility.

### 484.50(A) STANDARD: NOTICE OF RIGHTS

An HHA must provide the patient and the patient's legal representative, the following information at the initial evaluation visit, before providing care to the patient: (i) written notice of the patient's rights and responsibilities and the HHA's transfer and discharge policies; (ii) contact information for the HHA administrator; and (iii) an OASIS privacy notice. The administrator does not have to receive questions, but the administrator must receive complaints. Receiving complaints is an "essential leadership function."<sup>1</sup>

Both the patient and any (legal and/or patient selected) representative "have a right to be informed of the patient's rights in a language and manner the individual understands." The written notice of rights and responsibilities "must be understandable to persons who have limited English proficiency and accessible to individuals with disabilities."<sup>2</sup>

The receipt of the written notice must be confirmed by the signature of the patient or the patient's legal representative. The Final CoPs distinguish between a legal representative, who has health care decision-making authority, and a patient-selected representative. By the completion of the second visit by a skilled professional, the patient must also be provided verbal notice in the individual's primary or preferred language and in a manner the individual understands. An interpreter may be used for this process, but the patient may not be charged. A patient-selected representative must be provided "written notice of the patient's rights and responsibilities under this rule and the HHA's transfer and discharge policies" within four business days of the initial evaluation visit.

The "patient may choose to decline the provision of the notice of rights to the patient-selected representative because the definition of the term "representative" explicitly states that the patient determines the role of the representative, to the extent possible." HHAs will need to document patient decisions in this regard in a manner that clearly shows the patient's choice and ensures HHA staff comply with the patient's decision.

## 484.50(B) STANDARD: EXERCISE OF RIGHTS

In response to concerns about variations in state laws and lack of precision, this CoP eliminates the term incompetent. It asks whether the patient "has been adjudged to lack legal capacity to make health care decisions as established by state law by a court of proper jurisdiction."<sup>3</sup> If the patient has been adjudged to lack legal capacity and the court has appointed an individual to act on the patient's behalf, the individual whom the court appointed to act on the patient's behalf may exercise the patient's rights. A patient may exercise his or her rights themselves to the extent allowed by the court's order. When caring for a patient who has been adjudged to lack legal capacity, the HHA should review a copy of the court order, both to verify the authority of the legal representative and to determine to what extent the patient may exercise their rights.

## 484.50(C) STANDARD: RIGHTS OF THE PATIENT

Although this standard is not entirely new, it has been revised heavily and is, in some respects, an entirely different standard. Under the new standard, the patient has the right to:

1. Have his or her property and person treated with respect.<sup>4</sup>
2. Be free from verbal, mental, sexual and physical abuse, including injuries of unknown source, neglect and misappropriation of property. **This is a new standard.** The former CoP patient rights requirements did not expressly address this right. A number of commenters objected to this requirement because HHAs are already required to prevent illegal activity. CMS noted that criminal enforcement mechanisms and CoP enforcement were very different and that without this requirement, a surveyor would have no mechanism to cite an HHA for criminal acts committed by its staff. This raises the potential of a parallel enforcement track where law enforcement and surveyors reach different conclusions.
3. Make complaints to the HHA regarding treatment or care that is (or fails to be) furnished, and the lack of respect for property and/or person by anyone who is furnishing services on behalf of the HHA.<sup>5</sup>
4. Participate in, be informed about and consent or refuse care in advance of and during treatment, where appropriate, with respect to: (i) completion of **all** assessments (**new**) - CMS originally proposed this to apply to only the comprehensive assessment, but after considering comments, has revised it to apply to **all** assessments; (ii) the care to be furnished, based on the comprehensive assessment (**modified requirement**); (iii) establishing and revising the plan of care<sup>6</sup>; (iv) the disciplines that will furnish the care<sup>7</sup>; (v) the frequency of visits;<sup>8</sup> (vi) expected outcomes of care, including patient-identified goals and anticipated risks and benefits (**new**); (vii) any factors that could impact treatment effectiveness (**new**); and (viii) any changes in the care to be furnished.<sup>9</sup> **Overall, the requirements related to patient involvement in care has been highly modified.** CMS removed the proposed requirement that the patient receive a copy of the plan of care because the plan of care is a clinical document that a patient would not necessarily understand.<sup>10</sup> CMS replaced this with a requirement to provide clinical and educational information to the patient at 42 C.F.R. § 484.60(e).
5. Receive all services outlined in the plan of care (**new**).
6. Have a confidential clinical record. Access to or release of patient information and clinical records is permitted in accordance with 45 CFR parts 160 and 164. **This is a modified standard.** This change reflects the fact that confidentiality of medical records, notices and related considerations have been governed by HIPAA since 2003.
7. Be advised of expectation of payment for services from federal payers or the patient. This is a modified standard, but it is not completely new. HHAs have been required by the Social Security Act to notify patients of charges and the patient's potential liability for many years.
8. Receive proper written notice in advance of a specific service being furnished if the HHA believes that the service may be non-covered care or in advance of the HHA reducing or terminating ongoing care. **This is a new requirement.** This is a new standard but reflects current requirements related to expedited determinations.
9. Be advised of the state toll free home health telephone hotline, its contact information and its hours of operation and that its purpose is to receive complaints or questions about local HHAs.<sup>11</sup>

10. Be advised of the names, addresses and telephone numbers of the following federally funded and state-funded entities that serve the area where the patient resides: (i) Agency on Aging; (ii) Center for Independent Living; (iii) Protection and Advocacy Agency; (iv) Aging and Disability Resource Center; and (v) Quality Improvement Organization. **This is a new requirement.** The proposed CoPs did not specify the agencies to be listed. The use of specific categories in the Final CoPs reflects concerns raised by commenters.
11. Be free from any discrimination or reprisal for exercising his or her rights or for voicing grievances to the HHA or an outside entity.<sup>12</sup>
12. Be informed of the right to access auxiliary aids and language and how to access these services. **This is a new standard.** This requirement is similar to Section 1557 of the Patient Protection and Affordable Care Act.

## PRACTICAL TAKEAWAYS

HHAs must review and revise their intake policies to ensure that patients and patients' representatives are provided with the required notices in a timely fashion. HHAs will also need to be sure to track the different deadlines provided for the different notices.

HHAs must develop a process for clearly documenting, in an obvious place in the patient's chart, whether a patient lacks legal capacity and the existence of a legal representative and/or patient selected representative. If there is a legal representative, the HHA should obtain a copy of the document establishing the legal representative's authority.

HHAs should consider the provision of notices to limited English proficiency and disabled patients in light of HHA policies and procedures for 1557 compliance.

If you have any questions regarding this article, please contact:

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<sup>1</sup> See, 82 Fed. Reg. 9, January 13, 2017, 4521

<sup>2</sup> Id.

<sup>3</sup> Pre-Publication Copy, p. 75.

<sup>4</sup> This is not a new standard. This same requirement was previously set out at 42 C.F.R. § 484.10(b)(3).

<sup>5</sup> This is not a new standard. This same requirement was previously set out at 42 C.F.R. § 484.10(b)(4). But note, the language in 484.10(b)(4) regarding reprisals has been moved to a new section of the condition.

<sup>6</sup> This is not a new standard. This same requirement was previously set out at 42 C.F.R. § 484.10(c)(2).

<sup>7</sup> This is not a new standard. This same requirement was previously set out at 42 C.F.R. § 484.10(c)(1)(i).

<sup>8</sup> This is not a new standard. This same requirement was previously set out at 42 C.F.R. § 484.10(c)(1)(i).

<sup>9</sup> This is not a new standard. This same requirement was previously set out at 42 C.F.R. § 484.10(c)(1)(ii).

<sup>10</sup> Pre-Publication Copy, p. 81

<sup>11</sup> This is not a new standard. This is a modified version of the standard that was previously set out at 42 C.F.R. § 484.10(f).

<sup>12</sup> This is not a new standard. The non-discrimination/non-retaliation language was previously set forth at 42 C.F.R. § 484.10(b)(4).

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