

CMS FINALIZES NEW CONDITIONS OF PARTICIPATION FOR HOME HEALTH: PART 5

Review of the New Home Health Conditions of Participation - Patient Rights (part 2).

This is the fifth 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, 3 and 4 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**; **CMS Finalizes New Conditions of Participation for Home Health: Part 3**; and **CMS Finalizes New Conditions of Participation for Home Health: Part 4**.

Hall Render's New Home Health Conditions of Participation homepage 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, this is a follow-up article to Part 4 in our series. This article covers the standards on Transfer and Discharge, Investigation of Complaints and Accessibility. Part 4 covered the standards regarding Notice of Rights, Exercise of Rights and Rights of the Patient.

484.50(D) - TRANSFER AND DISCHARGE

The former CoPs specifically required the group of professional personnel to review the home health agencies' ("HHAs") discharge policies and procedures but did not provide any substantive content. The Final CoPs address this oversight. The Final CoPs prohibit an HHA from transferring or discharging a patient except as allowed under the CoPs. The circumstances under which a transfer or discharge may occur are: (1) the transfer or discharge is necessary for the welfare of the patient; (2) the patient or payer will no longer pay for the care; (3) the physician and HHA agree that the patient has achieved the measurable outcomes/goals stated in the plan of care; (4) the patient refuses services; (5) HHA determines, pursuant to a written policy, that the patient must be discharged for-cause; (6) the patient dies; or (7) the HHA closes. For the most part, this standard simply states the primary situation in which HHAs discharge or transfer patients. However, because discharges and transfers are now governed by these very specific requirements, HHA policies and procedures will need to reflect this standard.

A key consideration in this standard is the requirement that discharges for-cause are handled pursuant to a written policy. HHAs may well have a number of policies, anti-discrimination policies for example, that spell out situations that give rise to a for-cause discharge. HHAs will need to be sure that they pull these sources together into a single description of a for-cause discharge that is incorporated into their transfer and discharge policy and procedure.

HHAs will also need to consider the interplay between the discharge rule and other rules. For example, the new CoPs expressly recognize the patient's right to refuse care. This is not a new patient right, but the patient's refusal of certain aspects of care may not always require discharge from care. CMS stated that HHAs will need to consider discharging a patient who refuses care "if the patient's refusal of services compromises the HHA's ability to safely and effectively deliver care to the extent that the HHA can no longer meet the patient's needs."¹ HHAs' policies will need to address when a refusal becomes discharge and document the decision-making process.

HHA policies will also need to address the process for a for-cause discharge. This includes notifying the patient that a for-cause discharge is being considered, making efforts to resolve the situation, providing contact information for other HHAs and documenting the problem and the efforts to resolve the problem. Providers may already have processes that incorporate these requirements but will want to review and revise as necessary to ensure compliance. HHA policies will also need to document the communications to the patient and/or patient representative.

484.50(E) - INVESTIGATION OF COMPLAINTS

The Final CoPs require an HHA to accept a complaint from the "patient, the patient's representative (if any), and the patient's caregivers and family." This change reflects CMS's revision of terminology, including the new term *caregiver* and the term *patient's representative*. This will result in a broadening of the individuals from whom complaints may be received, although the practical impact may be relatively low.

HHAs must accept complaints including, but not limited to, complaints regarding "treatment or care that is (or fails to be) furnished, is furnished inconsistently, or is furnished inappropriately" and "mistreatment, neglect, or verbal, mental, sexual, and physical abuse, including injuries of unknown source, and/or misappropriation of patient property by anyone furnishing services on behalf of the HHA." This list of complaints is broader than in the former CoPs, which was limited only to care issues and lack of respect for the patient's property. The former CoPs also did not include the "including, but not limited to" phrase. The phrase "including, but not limited to" was added by CMS in response to comments that raised the concern that the listed issues were too narrow. HHAs should be prepared to accept a wide range of complaints.

Despite receiving numerous comments regarding investigating complaints in general as well as investigations of injuries of unknown origin, CMS declined to define how investigations should be handled. CMS concluded it was important to allow HHAs flexibility to develop their own policies and procedures. CMS did address when an injury should be classified as an injury of unknown source. Injuries should be classified as of "unknown source" when: "(1) The source of the injury was not observed by any person or the source of the injury could not be explained by the patient; **and** (2) The injury is suspicious because of the extent of the injury, or the location of the injury (for example, the injury is located in an area not generally vulnerable to trauma), or the number of injuries observed at one particular point in time, or the recurring incidence of injuries over time."²

The Final CoP reincorporates the requirement that the HHA document the existence of the complaint and the resolution of the complaint using the same language as the current regulation, which should mean current practices in this area will continue to be compliant. The Final CoP adds a requirement to the standard that the HHA take action to prevent further violations, including retaliation against the complainant, while the investigation is happening. This would include actions such as re-assigning and/or suspending staff during an investigation.

Staff who identify "incidences or circumstances of mistreatment, neglect, verbal, mental, sexual, and/or physical abuse, including injuries of unknown source, or misappropriation of patient property" are required to report the findings to the HHA. The Final CoPs do not define how this must be done but provide the flexibility for "each HHA to establish its own policies and precise chain of command for reporting incidents," which "will give [HHAs] the flexibility to meet the various levels of incidents and behavior, and to respond appropriately."³ HHAs will need to be sure their staff are aware of their obligation to report these issues and to whom they should report. HHAs will need to develop a policy and procedure defining who receives these reports, how they are handled internally and who is responsible for making reports to appropriate state agencies. HHAs will most likely already have policies in place regarding certain reports, such as those related to elder abuse and neglect, that will serve as a starting point for compliance with this requirement.

484.50(F) - ACCESSIBILITY

This new standard requires information to be "provided to patients in plain language and in a manner that is accessible and timely." This includes providing accessible websites and the auxiliary aids in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. It also requires the provision of this information to individuals with limited English proficiency through oral interpreters and written translations. Although this is a new standard, the "requirements of this rule are not intended to go beyond [the requirements of currently applicable non-discrimination and civil rights laws]."⁴ This statement is a strong indicator that HHAs' current efforts to comply with civil rights laws, PPACA § 1557 and other accessibility requirements in federal law should meet this standard.

PRACTICAL TAKEAWAYS

Review current discharge policies and procedures as well as policies and procedures related to discrimination, employee safety and related

policies to develop a for-cause discharge policy that addresses all possible for-cause discharge scenarios.

Review complaint procedures to ensure all complaints are received and recorded by the administrator and that all complaints are investigated and resolved. HHA policies should be revised as needed to ensure no complainant is the subject of retaliation.

Review policies on investigations to incorporate injuries of unknown source. Educate staff to ensure they are aware of the definition and what to do in the event such injuries are identified.

Review policies and procedures on internal reporting of abuse and neglect issues to ensure clear lines of communication. Educate staff on their obligations and to whom they should report.

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

- **Robert Markette** at (317) 977-145 or rmarkette@hallrender.com;
- **Todd Selby** at (317) 977-144 or tselby@hallrender.com;
- **Brian Jent** at (317) 977-1402 or bjent@hallrender.com;
- **Sean Fahey** at (317) 977-1472 or sfahey@hallrender.com; or

Your regular Hall Render attorney.