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CMS PRIORITIZES CERTAIN PROVIDER SURVEYS AND HALTS OTHERS IN RESPONSE TO COVID-19

Due to the strain on the entire health care system caused by the COVID-19 pandemic, the Centers for Medicare & Medicaid Services ("CMS") issued a memo on March 23, 2020, prioritizing certain surveys of long-term care facilities and halting all other surveys for three weeks. Specifically, the memorandum prioritizes surveys for (1) complaints and facilities reported incidents ("FRIs") that are triaged at the immediate jeopardy ("IJ") level; and (2) targeted infection control surveys of providers identified through collaboration with the Center for Disease Control and Prevention (the "CDC") and the HHS Assistant Secretary for Preparedness and Response ("ASPR").

BACKGROUND

Given the current national emergency declared by President Trump, the Secretary of Health and Human Services has the authority to authorize waivers or modifications of certain requirements related to the various federal health care programs under § 1135 of the Social Security Act (the "Act"). On March 23, 2020, CMS issued a memo utilizing § 1135 of the Act in order to prioritize certain oversight surveys for providers operating long-term care facilities. Specifically, the memorandum prioritizes surveys for (1) FRIs that are triaged at the IJ level; and (2) targeted infection control surveys of providers identified through collaboration with the CDC and the HHS ASPR. This prioritization of surveys will last from March 20 to April 10 (the "three-week period"). All other surveys will not be conducted during this three-week period.

PRIORITIZED SURVEYS

During the three-week period, State Survey Agency ("SSA") and federal surveyors will prioritize, and conduct surveys related to complaints and FRIs that triage at the IJ level. Specifically, if a facility has been triaged for a complaint or FRI that is at an IJ level, and a revisit survey has not verified that the IJ has been removed, survey of those facilities would proceed as normal. However, if a revisit survey determines that there is continuing noncompliance, but it is not at an IJ level, the surveyors would not conduct another revisit survey. Instead, the provider may immediately submit a plan of correction ("POC") or it may delay submission of the POC until the end of the three-week period. The option to submit or delay a POC submission until the end of the three-week period is also applicable to any non-IJ, lower-level citations against a provider.

Also, CMS noted that for Clinical Laboratory Improvement Amendments, they will prioritize IJ situations over recertification surveys, and use enforcement discretion unless an IJ situation occurs. Notwithstanding the foregoing, initial inspections will be conducted in accordance with current CMS guidance and prioritizations.

FOCUSED INFECTION CONTROL SURVEYS

According to the memo, CMS is also prioritizing a Focused Infection Control survey of facilities that the CDC and ASPR have identified as needing additional oversight. The surveys will use a streamlined review checklist to minimize the impact on provider activities during this pandemic, all the while ensuring that the provider is properly implementing actions to protect the health and safety of all individuals.

CMS also provided the Focused Infection Control survey checklist. CMS recommends that providers use this checklist to perform a voluntary self-assessment in order to ensure that they are complying with the appropriate guidance issued by both CMS and the CDC. Furthermore, CMS is encouraging individuals who voluntarily self-assess to share the results with their state or local health department health care-associated infections program.

UNAUTHORIZED SURVEYS

All onsite surveys that were started prior to the three-week period and are not related to either a Focused Infection Control Survey or an IJ level complaint or FRI are to end immediately. This includes all standard inspections for nursing homes, hospitals, home health agencies, intermediate care facilities for individuals with intellectual disabilities and hospices.

All survey revisits that are not associated with an IJ level are prohibited during the three-week period. For this reason, CMS has also suspended the enforcement of the following

- Imposition of Denial of Payment for New Admissions ("DPNA") for nursing homes, including situations where facilities that are not in

substantial compliance at three months, will be lifted to allow for new admissions during the three-week period.

- Imposition of Suspension of Payment for New Admissions ("SPNA") following the last day of the survey when termination is imposed will be lifted from Home Health Agencies ("HHAs") to allow for new admissions during this three-week period.
- For nursing homes and HHAs, per day civil money penalty ("CMP") accumulation and imposition of termination for facilities that are not in substantial compliance at six months.

If a complaint or FRI is triaged and determined to be non-IJ, the SSA who receives the complaint would enter the complaint or FRI into ASPEN Complaints/Incidents Tracking System ("ACTS") but not conduct a survey at this time. CMS announced that it will issue further guidance related to these non-IJ complaints and FRIs in the upcoming weeks.

ENFORCEMENT ACTIONS

CMS indicates they will, for the duration of the three-week period, be suspending pending enforcement actions against providers who are currently not in substantial compliance or who have not had a revisit survey to verify they are in substantial compliance. This includes any per day CMP accumulation or DPNA or SPNA that occurred prior to March 20, 2020. Additionally, CMS noted that they will not impose any new remedies to address noncompliance that occurred prior to March 20, 2020. However, this does not apply to IJ level noncompliance which is discovered due to a survey to have been ongoing during the three-week period. Lastly, CMS deferred until a "later date" the three-month mandatory DPNA and six-month mandatory termination for not being in substantial compliance.

ADDITIONAL SURVEYOR GUIDANCE

Beyond the prioritization requirements, CMS also noted two important guidance principles for surveyors. First, if a federal or SSA surveyor is unable to meet the Personal Protective Equipment expectations outlined by the latest CDC guidance to safely perform an onsite survey, CMS is instructing them to refrain from entering the provider's facilities and to attempt to obtain all of the necessary information for the survey remotely. Second, if a survey discovers that there is an active COVID-19 case during a survey of an IJ level complaint or FRI, the surveyor is to report the case and the facility to their agency, the provider's state health department and the provider's regional CMS office.

PRACTICAL TAKEAWAYS

This memo is another example of how CMS is utilizing the authority granted by § 1135 in order to alleviate some of the traditional regulatory burden faced by providers during the COVID-19 pandemic. However, providers should still aim to ensure compliance with the federal and regulatory requirements because if they are cited for an IJ-level complaint or RFI, then they can still be surveyed during this already chaotic time. Additionally, non-compliance does not ensure that there will not be future consequences, as surveyors who discover non-IJ level non-compliance are still required to report the non-compliance to ACTS. CMS has not provided guidance on what is to be done with the information reported to ACTS, but it appears to still be possible that said information could be used by CMS to institute a penalty or some other recourse after the three-week period. CMS has stated that it will provide guidance on what to do with the information reported to ACTS in the upcoming weeks.

Providers should also become acutely familiar with the Focused Infection Control Survey checklist provided at the end of CMS's memo. Providers can use this checklist to self-assess and ensure that they are complying with both the CDC and CMS's current guidance as it relates to infection control and the COVID-19 pandemic. Additionally, the checklist will provide a good baseline for what all providers should be doing to stop the spread of COVID-19 within their facilities.

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