

CMS ISSUES 18-MONTH MORATORIUM AND DELAYS ENFORCEMENT OF SOME PHASE 2 REQUIREMENTS FOR LONG-TERM CARE FACILITIES

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").

BACKGROUND

On September 28, 2016, CMS released a complete overhaul of Part 483 to Title 42 of the Code of Federal Regulations, the Requirements for States and Long-Term Care Facilities. CMS's Final Regulations cover many regulatory requirements for long-term care facilities and create new compliance obligations for providers. The Final Regulations seek to target rehospitalizations, facility-acquired infections, overall quality and resident safety.

Hall Render published an [overview](#) of Final Regulations components as well as Parts 1, 2, 3 and 4 in the series, which are located [here](#), [here](#), [here](#) and [here](#).

IMPLEMENTATION IN PHASES

The Final Regulations became effective November 28, 2016. They were to be implemented in phases with the first phase-in period completed by November 28, 2016, followed by additional phases that end on November 28, 2017 and November 28, 2019. The implementation date for Phase 2 of the revisions is November 28, 2017.

CMS ISSUES 18-MONTH MORATORIUM ON THE IMPOSITION OF CIVIL MONEY PENALTIES

On November 24, 2017, the Survey and Certification Group at CMS issued a memorandum "Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to Nursing Home Compare" ("S&C Memo") to delay enforcement of additional provisions in the regulations. CMS issued the S&C Memo to address concerns about the implementation of the new requirements and new long-term care survey process and to make specific policy and process adjustments to the enforcement system and results posted on Nursing Home Compare. The S&C Memo issues an 18-month moratorium on the imposition of civil money penalties ("CMPs"), discretionary denials of payment for new admissions ("DPNAs") and discretionary termination where the remedy is based on a deficiency finding of one of the following specified Phase 2 F-tags.

- F655 - Baseline Care Plan - Sec. 483.21(a)(1)-(a)(3)
- F740 - Behavioral Health Services - Sec. 483.40
- F741 - Sufficient/Competent Direct Care/Access Staff-Behavioral Health - Sec. 483.40(a)(1)-(a)(2)
- F758 - Psychotropic Medications related to PRN Limitations Sec. 483.45(e)(3)-(e)(5)
- F838 - Facility Assessment - Sec. 483.70(e)
- F881 - Antibiotic Stewardship Program - Sec. 483.80(a)(3)
- F865 - QAPI Program and Plan related to the development of the QAPI Plan - Sec. 483.75(a)(2)
- F926 - Smoking Policies - Sec. 483.90(i)(5)

CMS will use this 18-month moratorium period to educate surveyors and providers to ensure they understand the health and safety expectations that will be evaluated through the survey process as these Phase 2 requirements are associated with separate tags where specialized and technical assistance may be needed. CMS is not extending the moratorium to reporting reasonable suspicion of a crime due to its concerns about significant resident abuse going unreported.

The 18-month moratorium on the imposition of remedies does not change the implementation date for the Phase 2 provisions, and the S&C Memo states that state survey agencies should cite these tags as appropriate and continue to forward their findings as normal.

For surveys identifying noncompliance of both Phase 1 and the Phase 2 tags specified above, CMS will follow standard enforcement procedures related to the Phase 1 tag if the Phase 1 tag(s) necessitates the imposition of remedies. The S&C Memo provides that CMS expects that, for the Phase 2 F-Tags identified above, a Directed Plan of Correction or Directed In-Service Trainings would address the structures, policies and processes needed by the facility to demonstrate and maintain substantial compliance. For surveys identifying noncompliance of both Phase 1 and the Phase 2 tags specified above, CMS will follow standard enforcement procedures related to the Phase 1 tag if the Phase 1 tag(s) necessitates the imposition of remedies.

- **Directed Plan of Correction.** A Directed Plan of Correction (Section §488.424) is an enforcement remedy developed by CMS and the State Survey Agency requiring a facility to take action within specified time frames to correct cited non-compliance. A Directed Plan of Correction is completed when the facility has achieved substantial compliance as determined by CMS or the state based upon a revisit or after an examination of credible written evidence that can be verified by CMS without an on-site visit.
- **Directed In-Service Training.** Directed In-Service Training is an enforcement remedy that may be used when CMS or the state believes that education is likely to correct the deficiencies and help the facility achieve and sustain substantial compliance. This remedy requires the relevant staff of the facility to attend an in-service training program that will address a demonstrated knowledge deficit. After the directed in-service training has been completed, CMS or the state will assess whether substantial compliance has been achieved either through an on-site visit or by examining credible written evidence that it can be verified without an on-site visit.

TEMPORARY FREEZE OF HEALTH INSPECTION FIVE-STAR RATINGS

Most facilities will be surveyed for compliance with Phase 2 requirements using the long-term care revised survey process within one year after the November 28, 2017 Phase 2 implementation date. Due to the differing standards and process between those facilities surveyed under the new survey process compared to prior surveys, CMS will be holding constant, or “freezing,” the health inspection star rating for health inspection surveys and complaint investigations conducted on or after November 28, 2017. CMS expects this freeze to begin in early 2018 and last approximately one year.

AVAILABILITY OF SURVEY FINDINGS

In addition to freezing the health inspection star rating on its Nursing Home Compare website, CMS plans to provide summaries of a facility’s most recent survey findings, such as the total number of deficiencies cited and the highest scope and severity level cited. The survey findings for facilities under the new survey process will be published but will not be considered in the calculations for the Five-Star Quality Rating System for 12 months.

PRACTICAL TAKEAWAYS

- CMS will provide an 18-month moratorium on the imposition of certain enforcement remedies for specific Phase 2 requirements. The 18-month period will be used to educate facilities about specific new Phase 2 standards.
- After the implementation of the new long-term care survey process on November 28, 2017, CMS will freeze the current health inspection star ratings on the Nursing Home Compare.
- Survey findings of facilities surveyed under the new long-term care survey process will be published by CMS.

A copy of the S&C Memo can be found [here](#).

If you have questions or would like additional information about this topic, please contact:

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