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in the news

Long Term Care

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Catching Up With the Times: CMS Reforms Long-Term Care Facility Requirements

Part 2 of 4

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Following CMS publishing the biggest overhaul to federal long-term care regulations in 25 years, affected facilities must take steps to ensure they are prepared for the pending changes.

On Oct. 4, CMS published the lengthy Final Rule, which reforms the requirements for long-term care facilities participating in Medicare and Medicaid. CMS will implement the new and revised regulations in three phases, with Phase 1 regulations having an implementation date as early as Nov. 28 and Phase 3 three years later on Nov. 28, 2019.

To see a copy of the Final Rule, click here

Executive Summary of Changes to Administrative Requirements for Long Term Care Facilities (Part 1 of 2).

The proposed rule introduces a number of revisions and new sections relating to the administrative requirements in Long Term Care Facilities.

- **Arbitration Clauses - 42 C.F.R. § 483.70(n)**

  After many years of uncertainty regarding the use of Arbitration Clauses in long term care, CMS has announced through this Final Rule that it has prohibited facilities' use of pre-dispute arbitration agreements as a requirement for participation in the Medicare and Medicaid programs.

  This prohibition comes as surprise because a complete prohibition was not contemplated in the proposed rules last year. Rather, CMS advocated in the proposed rule for specific requirements and

obligations to ensure a facility fully explained the nature and implications of arbitration clauses to residents prior to execution. During the comment period, however, CMS received a large number of comments from the public, including resident advocates, members of the legal community, government officials, including 16 state's attorney generals, and organizations that conduct long term care arbitrations, who called for a complete ban on pre-dispute arbitration clauses. On the other hand, commenters for the LTC industry overwhelmingly wanted CMS to withdraw the proposed rule in its entirety. After reviewing the comments, CMS was persuaded by "significant evidence that pre-dispute arbitration agreements have a deleterious impact on the quality of care for Medicare and Medicaid patients, which clearly warrants [a] regulatory response."

Importantly, CMS made clear that the new rule does not affect already-existing arbitration clauses, but prohibits Medicare and Medicaid participating LTC facilities from using arbitration clauses in the future as a condition of participating in the federal programs. Thus, as of the effective date of the final rules, Long Term Care Providers will be in violation of participation requirements if they continue to execute any contracts, including residency contracts, with residents that contain a pre-dispute arbitration clause.

Post-dispute arbitration clauses will be permissible, however. For any post-dispute arbitration clause, the CMS is enacting the requirements from its proposed rule, and will prohibit a facility from requiring any resident to execute a post-dispute arbitration clause as a condition to remain a resident in a facility.

In the event a facility does proceed to binding arbitration with a resident, this final rule will now require facilities to retain the arbitrator's final decision for at least five (5) years, and make the decision available for inspection by CMS or its designee, including state surveyors.

Implementation Date: This rule will be implemented in Phase I on the effective date of the rule, which is Nov. 28, 2016.

Recommended Action Item: We recommend that LTC providers wishing to continue to participate in the Medicare or Medicaid programs review their resident contracts and admissions materials to ensure all pre-dispute arbitration clauses are removed as soon as possible, and certainly before Nov. 28, 2016.

- **Compliance and Ethics Plan Requirements – 42 C.F.R. § 483.85**

After considering the comments received in response to the proposed rule issued last year, CMS decided to finalize this rule regarding LTC facility compliance plans as originally proposed. Under the proposed and now final rule, CMS wants to see facilities develop and maintain a compliance and ethics program that is effective in preventing and detecting criminal, civil and administrative violations as well as effective in promoting quality of care consistent with existing regulations.

CMS has indicated its intent to implement compliance plans in LTC for many years, but has failed to issue specific guidance on what is included. The Final Rule does not give the detail providers have been looking for, but it does outline the requirement components, which include:

1. Developing and implementing established, written compliance and ethics standards, policies and

procedures for the organization to follow that are reasonably capable of reducing the likelihood of criminal, civil and administrative violations;

2. Charging specific, high-level individuals within the organization with the duty of overseeing compliance with the plan;

3. Ensuring the compliance and ethics plan includes provisions to ensure those persons overseeing the compliance and ethics plan have sufficient resources and authority to assure compliance with the standards, policies and procedures;

4. Using due care to ensure that individuals who the organization knows, or should know, have a propensity to engage in violations are not given discretionary authority on behalf of the organization;

5. Requiring the organization to communicate effectively the standards, policies and procedures in the compliance and ethics program to the organizations entire staff, including contractors and volunteers, to ensure full understanding of the expectations under the program.

6. Ensuring reasonable steps are being taken to achieve compliance with the standards, policies and procedures in the organization's program;

7. Ensuring consistent enforcement of the program through disciplinary measures where individuals fail to detect and report violations of the standards, policies and procedures of the compliance and ethics program;

8. Ensuring all reasonable steps are taken to ensure an appropriate response to any detected and reported violations to prevent further similar violations in the future; and

9. Implementing an annual review of the organization's compliance and ethics plan to determine what revisions are necessary to improve the program and implement all applicable changes in the laws or regulations on which the program is based.

For organizations that operate five or more facilities, CMS proposed, and now enacted, additional requirement that those organizations:

- Develop and implement mandatory annual training programs on the organizations compliance and ethics plan;

- Designate a high-level individual to serve as the organization's compliance officer to assume responsibility for overseeing the overall compliance and ethics plan for the organization; and
- Establish compliance liaisons at each facility or site to oversee the compliance and ethics program at the facility level.

Fortunately, CMS indicated in the Final Rule that it will be developing and issuing sub-regulatory guidance, including interpretative guidelines on how surveyors will determine compliance with these requirements before any facilities are surveyed on these new rules.

Implementation Date: This rule will be implemented in Phase III, which is Nov. 28, 2019.

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Recommended Action Item: Begin gathering your existing "compliance plan" materials to determine what more needs to be done in your organization. Set a goal for developing a compliance plan while the industry waits for the guidelines and guidance that CMS has promised. Given the fact that similar guidance has been promised in the past, and never issued, we encourage providers to begin working on their existing compliance programs to comply with the rule so the organization can then revise their program based on CMS' guidance and guidelines once it issues.

- **Training Mandates - 42 C.F.R. § 483.95**

Last year, CMS proposed to add a new Subpart B to Section 483.95 to specify specific training requirements for LTC providers. In issuing the proposed rule, CMS explained that the intent was to ensure facilities develop, implement and maintain effective training programs for all new and existing staff, contractors, and volunteers, consistent with their expected roles. Following the comment period, CMS decided to implement the proposed rule in these Final Rules. Thus, LTC facilities will be required to develop, implement and maintain formal training programs on the following topics:

1. Effective Communication Training for Direct Care Personnel. Although CMS has required specific training for direct care personnel on effective communication, CMS has not provided any further specific information to advise facilities how to provide this training or what subs topics should be emphasized. Rather, CMS has explained that they purposefully left this requirement vague to allow facilities to provide training that most appropriately meets their specific needs.

2. Residents Rights Training to familiarize staff with the requirements specified in 42 C.F.R. § 483.10 and § 483.11.

3. Abuse, Neglect and Exploitation Training to ensure staff are knowledgeable on what activities constitute abuse, neglect and exploitation, as well as the proper procedures for reporting suspected incidents.

4. Mandatory QAPI Training to outline the elements and goals of the facility's QAPI program.

5. Infection Control Training to ensure staff are effectively versed in the facility's infection control policies and procedures.

6. Compliance and Ethics Program Training to, at a minimum, explain in a practical manner the requirements of the facility employees under the compliance and ethics program. For organizations of five facilities or more, this training will be required annually.

7. Dementia Management and Abuse Training In addition to the existing rules for nurse aide training, CMS has now added additional requirements to include 12 hours of annual in-service training for all staff to include dementia management and abuse prevention.

8. In-service Training to ensure in-service training addresses areas of weakness that are identified by its administrative assessment results pursuant to Section 483.70(e).

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9. Behavioral Health Training based on the facility's administrative assessment results conducted under Section 483.70(e) to ensure facility staff are equipped to address the behavioral health related needs of the facility's residents.

Implementation Dates: Most of this final rule will be implemented in Phase III, which is Nov. 28, 2019. However, CMS will implement specific sections of this Final Rule in Phase I, on Nov. 28, 2016. They include:

- Section 483.95(c) - Abuse, neglect and exploitation training;
- Section 483.95(g)(1) – In-service training;
- Section 483.95(g)(2) - Dementia management and abuse prevention training
- Section 483.95(g)(4) – Care of the cognitively impaired; and
- Section 483.95(h) – Training of feeding assistants.

Recommended Action Item: Facilities should review their training programs that relate to the Phase I implemented topics and verify that they have developed and maintained a program that complies with the new rules. After that has been assured, facilities leadership should carefully read the rule and begin updating their training program, and developing new training programs if needed, to fully comply with all aspects of Section 483.95.

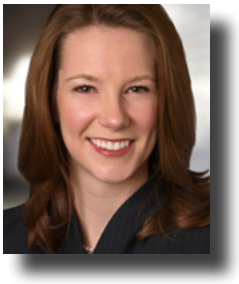
Upcoming Information To Be Aware Of

This alert is the second in a series of four communications regarding the Final Rule. The first alert can be found here. Throughout October, Polsinelli will provide detailed information about the new and revised long-term care regulations through two additional alerts and three webinars to complement the alerts.

Please join us on Oct. 19, 2016 at 12 to 1:15 p.m. CST for the first of our three webinars that will provide a more in-depth analysis of these three aspects of the Final Rule, discuss how the Final Rule will affect your facility's operations, and identify steps you should take to prepare for implementation of the Final Rule.

For More Information

For questions regarding this information, please contact one of the authors below, a member of Polsinelli's Health Care practice, or your Polsinelli attorney.



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