



LONG-TERM CARE FACILITIES FINAL RULE IMPLEMENTATION AND NEW SURVEY PROCESS

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October 18, 2017

The Centers for Medicare & Medicaid Services (CMS) published a comprehensive 185-page final rule in October 2016, revising and adding numerous requirements for participation applicable to long-term care (LTC) facilities participating in Medicare and Medicaid. The final rule results in the most significant overhaul to LTC regulation in decades and is intended to improve resident safety, quality of life, and overall care delivery. These changes, many of which include qualitative and subjective standards, will be implemented in the three phases described below. CMS estimates that it will cost each facility \$55,388 annually to comply with the new requirements of participation, excluding costs (in the form of penalties, attorney fees, etc.) for a facility's failure to comply with the requirements.

Phase I – Currently in Effect

Phase I went into effect on November 28, 2016, and included changes deemed “minor” by CMS. Two notable Phase I provisions deal with (i) the expansion of “abuse” definition and creation of a “right” of residents to be “free from neglect ... [and] exploitation,” and (ii) facility obligations to train staff on the expanded abuse definition. Abuse expressly extends to actions “facilitated or enabled through the use of technology,” such as photographs or audio/video recordings (think: cell phones, social media), which could demean or humiliate a resident or residents. Each facility has an obligation to provide training on its abuse prohibition policy to all staff who provide care and services to residents; however, this in-service education does not relieve the facility from enforcing staff compliance with the policies as written. Instead, the facility's enforcement should encourage staff to report allegations of abuse without fear of incrimination or intimidation. It is important to note, too, that the resident's right is not limited to abuse and exploitation at the hands of facility staff, it also extends to actions of other residents and of facility visitors.

Phase 2 – Effective November 2017

Phase 2 will go into effect November 28, 2017, and includes a new survey process and requirements that CMS determined would take additional time to develop. These participation requirements include behavioral health obligations, comprehensive person-centered care planning, pharmacy services/psychotropic medication review, development of a Quality Assurance and Performance Improvement (QAPI) plan (which must be submitted to the state survey agency), implementation of physical environment/smoking policies, and demonstration of sufficient and competent staffing.

CMS has indicated that it will temporarily restrict enforcement remedies (e.g., civil monetary penalties (CMPs), denial of payment, termination, etc.) for certain Phase 2 requirements, yet to be identified, opting instead for facility education and corrective action. But a delay in enforcement remedies does not mean that a facility will not be held accountable for the Phase 2 requirements starting in November; the facility will still be cited for failure to comply and that noncompliance will be published in the survey report.

In conjunction with Phase 2, CMS will implement a new resident-centered survey process that it describes as the “best of both worlds,” combining the traditional and computer-based survey processes. New F-Tags will be used in connection with the new process, but CMS published an F-Tag crosswalk to assist facilities in converting old tags to new tags. The new process eliminates formal facility tours, but it includes mandatory observation areas for team members and resident interviews. The exit procedure remains largely unchanged.

Sample size for the survey will depend on facility size (up to 35 residents), with a portion of the sample identified prior to the survey team’s arrival (based on factors like repeat deficiencies, resident complaints, and reported incidents) and the remainder identified through observation and interviews. Each facility will be required to produce certain information to the survey team within one hour following its arrival.

Phase 3 – Effective November 2019

Phase 3 will take effect November 28, 2019, and includes full implementation of requirements from prior phases, including the QAPI plan, and additionally mandates each facility’s adoption and implementation of a compliance and ethics program.

STEPS TO TAKE

- **Review All Policies and Procedures to Confirm Compliance with Phase 1**
 - Review abuse prevention and reporting policies and other Phase 1 requirements to confirm internal practices are consistent with written documents.
 - Perform staff in-service training on abuse prevention and reporting policies.
- **Finalize Policies, Procedures, and Plans Required by Phase 2 and Evaluate Preparedness for Survey Process**
 - Finalize written policies and plans required by Phase 2 and conduct staff in-service training.
 - Review and become familiar with the revised State Operations Manual and Interpretive Guidelines.
 - Review the LTC Survey Entrance Conference and Provider Matrix and LTC Survey Pathways materials published by CMS on August 28, 2017, which materials will be used by surveyors when evaluating compliance.
- **Engage Counsel to Evaluate Your Phase 1 and Phase 2 Documents and Practices**
 - Having counsel review your policies, procedures, and practices helps minimize your risk of costly deficiencies and resident claims.
 - GableGotwals has a team of experienced healthcare lawyers who are ready to assist.

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