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CMS Brings Back Surveys, Enforcement for All Providers, Suppliers

By Nina Youngstrom

Surveys of compliance with the Medicare conditions of participation are coming back for all types of providers and suppliers, although there will be deference to the infection risks of COVID-19, according to an Aug. 17 CMS memo.^[1] Enforcement actions that had been put on hold because of the public health emergency (PHE) also will start to be resolved with a mix of on-site and desk reviews.

CMS had suspended nonemergency surveys in a March 4 memo^[2] so facilities could focus on the coronavirus. State surveyors have limited their survey activities to serious health and safety threats and for months stuck largely to immediate jeopardy and complaint-driven reviews. In particular, “the summer focus for state surveyors was on nursing homes, because there were so many outbreaks with patients dying,” said Mary Ellen Palowitch, former EMTALA technical lead in the CMS Quality, Safety & Oversight Group who is now with Dentons US LLP in Washington, D.C. CMS said^[3] Aug. 14 it had fined 3,400 nursing homes more than \$15 million during the public health emergency (PHE) for noncompliance with infection control requirements and failure to report COVID-19 data.

Now CMS has announced it’s time to restore oversight as much as possible. “In addition to ongoing focused infection control surveys, States are encouraged to resume normal survey activities, while also addressing the backlog of surveys that were postponed,” CMS said in the memo, which was written by David Wright, director of the Quality, Safety & Oversight Group in the Center for Clinical Standards and Quality. “While CMS recognizes that resumption of surveys will depend on State reopening plans, staffing, and resources, CMS is requesting that states work with their respective CMS locations to discuss plans and proposed timeframes for completion of required surveys postponed due to the COVID-19 PHE.”

This didn’t come as a surprise to Palowitch. “If you’re moving to more elective procedures and the positivity rate is not as high, it makes sense to go back to normal survey work,” she said.

State surveyors evaluate all “non-deemed” facilities, including nursing homes, as well as “deemed” facilities for licensure issues and complaints. This includes alleged violations of the Emergency Medical Treatment and Labor Act. Accrediting bodies evaluate deemed facilities, including hospitals and home health agencies. They also have the go-ahead to get back to business. “Accrediting organizations with Medicare-approved programs may resume normal activity based on State reopening criteria. Any variations from the approved reaccreditation survey process must receive CMS approval prior to implementation,” CMS said in the memo.

“These memos are addressed to the state survey agencies, but they’re released publicly, and all health care facilities should read them,” Palowitch said.

The memo explained that when a state enters phase three of reopening or earlier, it should return to normal survey activity while prioritizing its backlog of surveys accordingly:

1. “Revisit surveys for past non-compliance that do not otherwise qualify for a desk review;
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2. “Complaint surveys triaged as non-IJ [non-immediate jeopardy] level or higher that have not been completed;
3. “Special Purpose Renal Dialysis Facilities (SPRDFs);
4. “Initial surveys of new providers;
5. “Past-due recertification surveys with a statutorily required survey interval; and
6. “Past-due recertification surveys without a statutorily required survey interval.”

Surveys Won’t Include Waived Requirements

Regardless of whether the surveyor is investigating a complaint or revalidating for Medicare participation, surveyors (from the state or accreditation organization) will check all areas of compliance, Palowitch said. They will, however, continue to focus on infection control. “The easiest thing to do is go through your normal mock surveys or [Quality Assurance and Performance Improvement] projects, the way things were done before COVID-19 hit,” she said.

Keep in mind that surveyors won’t evaluate compliance with requirements that have been waived under Sec. 1135 of the Social Security Act,^[4] Palowitch said. For example, during the PHE, some hospital discharge planning requirements have been waived. Hospitals temporarily don’t have to give patients quality data about skilled nursing facilities, home health agencies and other post-acute care providers.

The memo sets out a four-part process for moving ahead with enforcement, which was stopped when nonemergency surveys were suspended, except for unremoved immediate jeopardy deficiencies:

CMS intends to resolve those enforcement cases that were suspended and provide guidance for closing them out, going forward from the issuance of this memorandum. This process involves four components:

1. Expanding the Desk Review policy for Plans of Corrections (POCs);
2. Processing enforcement cases that were started BEFORE March 23, 2020;
3. Processing enforcement cases that were started ON March 23, 2020, THROUGH May 31, 2020; and
4. Processing enforcement cases that were started ON OR AFTER June 1, 2020.

Contact Palowitch at maryellen.palowitch@dentons.com.

¹ CMS, “Enforcement Cases Held during the Prioritization Period and Revised Survey Prioritization,” memorandum, August 17, 2020, <https://go.cms.gov/31f1Kwn>.

² CMS, “Suspension of Survey Activities,” memorandum, March 4, 2020, <https://go.cms.gov/2VL1nHq>.

³ CMS, “Trump Administration Has Issued More Than \$15 Million in Fines to Nursing Homes During COVID-19 Pandemic,” news release, August 14, 2020, <https://go.cms.gov/32cDwSr>.

⁴ 42 U.S.C. 1320b-5.

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